Chapter 2

Key Issues

2.1 The committee received six submissions and one piece of correspondence. All of these were received prior to the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, so they address the law as it stood at the time that the Bill was introduced.

2.2 All submissions supported the Bill (though some recommended further changes).[1] The one piece of correspondence, which was received from the then-Secretary of the Department of Immigration and Border Protection, implicitly opposed the Bill.

2.3 All evidence presented to the committee raised issues with the state of affairs as it stood at the time, the changes proposed in the Bill, or both. This chapter will examine these issues.

Issues with the current state of affairs

2.4 As explained in chapter 1, the state of affairs at the time of the Bill's introduction was that a child born in Australia's migration zone who was not an Australian citizen (or an excluded maritime arrival) and who did not have a current visa was an 'unauthorised maritime arrival'. He or she was unable to apply for a visa and was required to be taken 'as soon as reasonably practicable' to a regional processing country. Legislation introduced and passed since that time has strengthened this conclusion and has also made such children 'transitory persons'.

2.5 Submissions received by the committee raised five types of concern with the arrangements as they stood at the time of the Bill's introduction, namely that:

(a) they appear to be the unintended consequence of a number of amendments made to the Act at different times;

(b) they subject children to unacceptable conditions in regional processing centres that will harm their health and wellbeing;

(c) they violate international human rights law;

(d) they deny stateless children born in Australia of their right to Australian citizenship under the *Australian Citizenship Act 2007*; and

(e) they risk subjecting non-stateless children to statelessness.

2.6 This section will deal with each concern in turn.

---

1 Australian Human Rights Commission, *Submission 1*, p. 1; Civil Liberties Australia, *Submission 2*, p. 2; UnitingJustice Australia, *Submission 3*, p. 1; Refugee Council of Australia, *Submission 4*, p. 1; Associate Professor Michelle Foster, Scientia Professor Jane McAdam and Davina Wadley, *Submission 5*, p. 2; Refugee Advice and Casework Service, *Submission 6*, p. 1.

Unintended consequences

2.7 The submission of the Australian Human Rights Commission noted that, as things stood at the time of the Bill's introduction, the Act appeared to have required the detention and taking to a regional processing country of a child born to non-citizen parents without any visa, regardless of how the parents came to be in Australia.[2] That is, this conclusion was not limited to the children of parents who were themselves unauthorised maritime arrivals. The Commission gave the example of a woman who arrived in Australia by air, overstayed her visa and then gave birth to a non-citizen child. On the Commission's interpretation of the provisions as they stood at the time, 'the child will be deemed to have "entered Australia by sea" and be liable to be detained and then taken to a regional processing country', even though neither of the child's parents are so liable.[3]

2.8 The Commission suggested that this result is an unintended consequence of insufficient consideration being given to the interaction between section 5AA and section 10 when the former was inserted into the Act in 2013.[4] In particular, the Commission highlighted that (a) the Report of the Expert Panel on Asylum Seekers, which was the impetus for the 2013 amendments, made no reference to changing the status of people born in Australia, and (b) that nowhere in the Explanatory Memorandum to the Bill that inserted section 5AA was it mentioned that the intention of that section was to deem non-citizens born in Australia to have entered by sea.[5] In fact, the breadth of section 5AA was explained in the Explanatory Memorandum as being 'intended to cover all possible situations where a person can enter Australia by sea' (aside from certain, non-relevant exceptions).[6] The Refugee Council of Australia also considered that this state of affairs was an 'anomaly' and an unintended consequence of the 2013 amendments.[7]

2.9 Since the passage into law of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, it can no longer be said that the law as it applies to unlawful non-citizen children born in Australia is an unintended consequence. Schedule 6 of that Act deliberately makes such children 'unauthorised maritime arrivals' and 'transitory persons'. As the Australian Human Rights Commission submitted to the committee in relation to that legislation, however, it does not 'address the anomaly that babies born in Australia to unlawful

2 *Submission 1*, p. 2.

3 *Submission 1*, p. 2.

4 *Submission 1*, p. 2.

5 *Submission 1*, pp 2-3.

6 Explanatory Memorandum to the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, para. 53.

7 *Submission 4*, p. 2.

non-citizens who arrived in Australia by air would be liable to be detained and then taken to a regional processing country'.[8]

Conditions in regional processing centres

2.10 A number of submissions expressed concern about requiring children born in Australia to be sent to regional processing countries on the basis that the conditions in regional processing centres are detrimental to the health and wellbeing of children. Civil Liberties Australia, for example, argued that the detention centres on Christmas Island, Manus Island and Nauru are 'wholly unsuitable' for children.[9] The submission pointed to a range of inquiries, reports and other evidence in support of that proposition,[10] including the allegation of the Australian Churches Refugee Taskforce that the detention of children on Nauru and Manus Island is 'state sanctioned child abuse'.[11]

2.11 UnitingJustice referred to 'the devastating effects of detention on the health and wellbeing of children',[12] whilst the Refugee Advice and Casework Service expressed concern about 'the long term toll that an extended period of restrictive detention is currently having on this generation of child asylum seekers' health and emotional wellbeing' because:

> currently neither Nauru nor Manus have the resources and facilities available to properly discharge our obligations to:
>
> - provide protection and assistance towards children seeking asylum;
> - provide recovery and social reintegration for children who have suffered trauma;
> - provide detention which is not arbitrary and as a measure of last resort for the shortest appropriate period of time;
> - treat children with respect and humanity, in a manner that takes into account their age and developmental needs; and
> - enable family reunification.[13]

2.12 The submission of the Refugee Council of Australia supported the passage of the Bill on the grounds that it is 'a means of exempting children who were born in

8 Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]*, p. 37.

9 *Submission 2*, p. 2-3.

10 *Submission 2*, pp 3-5.

11 *Submission 2*, p. 4.

12 *Submission 3*, p. 2.

13 Refugee Advice and Casework Service, *Submission 6*, pp 4-9.

Australia from the punitive policy regime targeting asylum seekers who arrive by boat'.[14]

International human rights law

2.13 Submissions raised concerns that the state of affairs that existed at the time of the Bill's introduction did not comply with international human rights law.[15] The submission of Associate Professor Foster, Scientia Professor McAdam and Ms Wadley expressed the view that:

> In light of the overwhelming evidence detailing children's vulnerability to the impacts of detention, Australia's policy of detaining children is very likely to be in breach of a number of our obligations under international law, including:
>
> - article 3(2) of the [Convention of the Rights of the Child] (in all actions concerning children …. the best interests of the child shall be a primary consideration);
> - article 22 of the [Convention of the Rights of the Child] (right of child asylum seekers to receive appropriate protection and humanitarian assistance);
> - article 24 of the [Convention of the Rights of the Child] (right to highest attainable standard of health);
> - article 28 of the [Convention of the Rights of the Child] (right to education);
> - article 37 of the [Convention of the Rights of the Child] (right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment; no arbitrary deprivation of liberty);
> - article 2 of the [International Covenant on Civil and Political Rights] (right to an effective remedy);
> - article 7 of the [International Covenant on Civil and Political Rights] (freedom from torture or to cruel, inhuman, or degrading treatment or punishment);
> - article 9 of the [International Covenant on Civil and Political Rights] (freedom from arbitrary detention);
> - article 10(1) of the [International Covenant on Civil and Political Rights] (if deprived of their liberty, the right to be treated with humanity and with respect for the inherent dignity of the human person);
> - article 16 of [Convention against Torture] (freedom from cruel, inhuman, or degrading treatment or punishment); and

14 Refugee Council of Australia, *Submission 4*, p. 1.

15 *Submission* 1, p. 3; *Submission 2*, pp 7-9; *Submission 3*, pp 1-2; *Submission 4*, p. 2; *Submission 5*, p. 6; *Submission 6*, pp 4, 5-6

- article 15 of the [Convention on the Rights of People with Disabilities] (freedom from torture or cruel, inhuman, or degrading treatment or punishment).[16]

2.14 The Foster et al submission also argued that transferring children born in Australia to regional processing countries may interfere with their right to the immediate registration of their birth, as guaranteed in the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.[17]

2.15 Furthermore, the submission of the Australian Human Rights Commission noted that, in the case of children who are deemed to be unauthorised maritime arrivals but whose parents are not, the current state of affairs would appear to violate a child's right not to be separated from their parents, as provided for in article 9 of the Convention on the Rights of the Child.

2.16 A number of submissions expressed the view that—in contrast to the situation that prevailed at the time of the Bill's introduction—the Bill is consistent with international human rights law.[18] The submission of the Australian Human Rights Commission, for example, considered that the Bill is consistent with article 37(b) of the Convention on the Rights of the Child,[19] which prohibits the unlawful or arbitrary deprivation of a child's liberty. The Commission also considered the Bill to be consistent with the right protected by article 22 of the Convention on the Rights of the Child, namely the right of children who are refugees or who are seeking refugee status to receive appropriate protection and humanitarian assistance.[20]

Denying stateless children their right to Australian citizenship

2.17 The Convention on the Reduction of Statelessness, to which Australia is a party, requires Australia to 'grant its nationality to a person born in its territory who would otherwise be stateless'. This obligation is given effect to in subsection 21(8) of the *Australian Citizenship Act 2007*, which provides that a person is eligible for Australian citizenship if they were born in Australia and if they are not and have never been the national or citizen of any country, nor entitled to acquire the nationality or citizenship of any country.

2.18 Civil Liberties Australia argued that removing a stateless child that was born in Australia to a regional processing country would effectively deny them the right in Australian law to apply for Australian citizenship.[21] The Refugee Council of Australia considered it to be 'completely unacceptable to subject a child who has a legitimate

16 *Submission 5*, p. 6.

17 *Submission 5*, pp 6-9.

18 *Submission 1*, p. 3; *Submission 5*, p. 2.

19 *Submission 1*, p. 3.

20 *Submission 1*, pp 3-4.

21 *Submission 2*, pp 5-7.

claim to Australian citizenship to policies which would be unlawful if applied to any other Australian child'.[22]

2.19 Drawing on concerns (outlined above) that births may not be appropriately registered, the Foster et al submission argued that, if the births of children born to stateless persons are not registered, the children will have difficulty proving that they were born in Australia and thereby establishing their right to Australian citizenship under subsection 21(8).[23] This may lead to a denial of the right to a grant of Australian citizenship for individuals who would otherwise be stateless. The children would also be denied their right to acquire a nationality, as contained in article 24(3) of the International Covenant on Civil and Political Rights and article 7(1) of the Convention on the Rights of the Child.

2.20 According to Foster et al, the passage of the Bill would give the children in question better access to birth registration and reduce their chances of remaining stateless.[24]

2.21 Similar concerns were raised during the committee's inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.[25] In response, the committee recommended that the Department of Immigration and Border Protection ensures that the birth registration process is completed before any child born in Australia is removed to a regional processing country.[26]

Subjecting non-stateless children to statelessness

2.22 In the case of children born to parents who are *not* stateless, the Foster et al submission argued that the absence of registration may make it difficult for the children to prove a link to their parents and their parents' nationality, thereby rendering them at risk of statelessness.[27] This would also be a denial of the right to acquire a nationality. Again, the passage of the Bill would give the children in question better access to birth registration and reduce their chances of becoming stateless in the first place.[28] These concerns were also addressed by the committee's recommendation in relation to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 that the Department

22 *Submission 4*, p. 2.

23 *Submission 5*, p. 9.

24 *Submission 5*, p. 10.

25 Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]*, pp 36-37.

26 Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]*, p. 40.

27 *Submission 5*, pp 9-10.

28 *Submission 5*, p. 10.

of Immigration and Border Protection ensures that the birth registration process is completed before any child born in Australia is removed to a regional processing country.[29]

Issues in relation to the Bill

2.23 The key issue raised in relation to the Bill in the submissions and the correspondence was the impact that it would have on family unity.

2.24 The committee received correspondence from Mr Martin Bowles, the then Secretary of the Department of Immigration and Border Protection. Mr Bowles explained that 'the inclusion of the children of [unauthorised maritime arrivals] who are born in the migration zone within the definition of [unauthorised maritime arrival] [is] used to implement the Government's offshore processing and offshore resettlement policies'. He went on to explain that:

> If this Bill were to be enacted, it would result in [unauthorised maritime arrivals] being subject to offshore processing whose children are exempt from offshore processing, requiring inconsistent treatment of members of the same family unit and therefore separation of the family unit.
>
> In summary, this Bill directly contradicts current Government policy.[30]

2.25 Conversely to this, the Australian Human Rights Commission and the Refugee Advice and Casework Service argued that the state of affairs that existed at the time of the Bill's introduction could also lead to the separation of the family unit, either:

(a) because a child is born to parents who arrived in Australia by plane but do not have a current visa (meaning that the child is subject to offshore detention but the parents are not);[31] or

(b) because the '"no exceptions" approach to Ministerial discretion' separates family members who arrive in Australia at different times.[32]

2.26 The Foster et al submission raised a concern that the Bill may lead to children having a different legal status—and different protection entitlements—to their parents.[33] If the parents were unauthorised maritime arrivals, for example, the Bill would have the result that the child would be able to apply for a protection visa but the parents would not (unless the minister exercised his discretion under section 198AD of the Act to allow them to apply for a protection visa). The Bill could, therefore,

---

29 Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]*, p. 40.

30 Mr Martin Bowles, Letter to the Committee Secretary, 31 August 2014.

31 *Submission 1*, p. 4

32 Refugee Advice and Casework Service, *Submission 6*, p. 4.

33 *Submission 5*, pp 10-11.

encourage the separation of children from parents and thereby breach a number of human rights obligations.

2.27 The Australian Human Rights Commission and the Refugee Council of Australia raised similar concerns.[34] They suggested that further legislative change may be required to ensure that the child's parents (and possibly other members of their family) were not taken to a regional processing country.[35] Alternatively, the Commission suggested that the minister could make a determination under section 198AE of the Act that the parents were not required to be taken to a regional processing country.[36]

2.28 Finally, the Foster et al submission also noted with concern that, even if the Bill were passed, the newborn child would still be subject to onshore detention under section 189 of the Act (unless the parents were stateless or the minister were to grant a bridging visa under section 73 of the Act).[37]

Committee comment

2.29 As noted in chapter 1, the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 has rendered this Bill largely redundant. If passed in its present form, it would not affect the change that its proponent seeks. For that reason, and for the reasons that the committee gave for recommending that the Legacy Caseload Bill be passed, the committee recommends that this Bill not be passed.

Recommendation 1

2.30 The committee recommends that the Bill not be passed.

Senator the Hon Ian Macdonald
Chair

34 *Submission 1*, p. 4.

35 *Submission 1*, p. 4; *Submission 4*, p. 2.

36 *Submission 1*, p. 4.

37 *Submission 5*, p. 11.