RACS REFUGEE ADVICE & CASEWORK SERVICE

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Canberra ACT 2600

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To the Committee

The Migration Amendment (Protecting Babies Born in Australia) Bill 2014

Submission by the Refugee Advice & Casework Service (Aust) Inc.

The Refugee Advice & Casework Service (**RACS**) is a community legal centre that provides free legal advice and assistance to people seeking refugee status in Australia. It is a specialised refugee legal centre and has been assisting asylum-seekers on a not-for-profit basis since 1988.

RACS would like to make comments in relation to a number of proposals contained in the *Migration Amendment (Protecting Babies Born in Australia) Bill* 2014 (the **Bill**) that are relevant to our service, and particularly as they affect asylum seekers in Australia. In summary we support the changes proposed in the Bill.

A summary of our comments and position is also attached.

The Bill proposes to amend the *Migration Act 1958* "The Act" to ensure that a child that is born in Australia is not classified to have entered Australia by sea and is therefore not an unauthorised maritime arrival subject to transfer to Australia's offshore detention centres.

The current law

Asylum seekers who arrive to Australia by boat with no visa are generally unable to make a valid application for any visa, including for a protection visa, without the Minister for Immigration's personal approval.

This is generally due to the bar which exists in s46A of the Act, and additionally due to the bar in s91K of the Act where a person has previously held a temporary safe haven visa (class UJ subclass 449) pursuant to s 37A of the Act and released from detention in the process of a person being granted a Bridging E (Class WE subclass 050) visa, granted to the asylum seeker by the Minister exercising his power under s 195A of the Act.

Section 46A Visa applications by unauthorised maritime arrivals

46A (1) An application for a visa is not a valid application if it is made by an unauthorised maritime arrival who:

(a) is in Australia; and

(b) is an unlawful non-citizen.

(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an unauthorised maritime arrival, determine that subsection (1) does not apply to an application by the unauthorised maritime arrival for a visa of a class specified in the determination.

Additionally

Asylum seekers coming by boat have been defined as unauthorised maritime arrivals under Section 5AA since 1 June 2013 under Act No. 35 of 2013. Prior to 1 June 2013, such people were defined in the act under section 5 as offshore entry people.

Section 5AA Meaning of *unauthorised maritime arrival*

[inserted by Act No. 35 of 2013 with effect on and from 01/06/2013]

(1) For the purposes of this Act, a person is an ***unauthorised maritime arrival*** if:

(a) the person entered Australia by sea:

(i) at an excised offshore place at any time after the excision time for that place; or

(ii) at any other place at any time on or after the commencement of this section; and

(b) the person became an unlawful non-citizen because of that entry; and

(c) the person is not an excluded maritime arrival.

Under the current section 5AA(2) a baby born in detention arguably enters the migration zone "except on an aircraft" and is therefore an unauthorised maritime arrival in that they entered Australia by sea and became an unlawful non-citizen because of that entry.

(2) A person ***entered Australia by sea*** if:

(a) the person entered the migration zone except on an aircraft that landed in the migration zone; or

(b) the person entered the migration zone as a result of being found on a ship detained under section 245F (as in force before the commencement of section 69 of the Maritime Powers Act 2013) and being dealt with under paragraph 245F(9)(a) (as in force before that commencement); or

(ba) the person entered the migration zone as a result of being on a vessel detained under section 69 of the Maritime Powers Act 2013 and being dealt with under paragraph 72(4)(a) of that Act; or

(c) the person entered the migration zone after being rescued at sea.

But on the other hand, there is some degree of ambiguity in the current law, in that the legislation, regulations and policy do not make specific reference to babies born in detention. In deed most of the "intentions" referred to in the current policy as extracted below do not refer specifically to being born:

> *Entered the migration zone except on an aircraft: PAMS 3*
>
> ***3.2 'Entered the migration zone except on an aircraft'***
>
> *Section 5AA(2)(a) is intended to cover persons who arrived in Australia by sea and entered the migration zone, other than by an aircraft and whether on a ship or otherwise. This is intended to cover persons who make their way to Australia by sea without being rescued or intercepted and who enter the migration zone.*
>
> *(Note: A person cannot become an IMA unless they also are an unlawful non-citizen because of their entry into the migration zone. A person cannot be an unlawful non-citizen unless they are in the migration zone and do not hold a visa that is in effect.)*
>
> *Section 5AA(2)(a) is intended to cover all possible situations in which a person can enter Australia by sea, apart from those described in s5AA(2)(b) or s5AA(2)(c):*
>
> *s5AA is worded so as not to allow the complexity of the interaction of the s5(1) definition of the **migration zone** and the variations of the geography of the Australian coastline to provide a means of argument for a person to be excluded from the operation of s5AA(2)(a).*
>
> *To negate any argument that, by stepping onto a pier or a similar structure, or onto land above the mean low water mark, a person has not entered Australia by sea anywhere in the migration zone (whether at an excised offshore place or not), the only way that a person will not come within this definition is to enter the migration zone on an aircraft that landed in the migration zone.*

In view of this ambiguity, RACS has assisted a number of parents to complete applications for protection visas for babies born in detention to be given to their case managers. There

currently does not seem to be a consistent response from the Department in that we are unaware of any letters determining that these applications have been assessed as invalid.

In support of the changes proposed in the Bill

In RACS' view, there are a number of significant reasons in support of clarity that babies born in the migration zone are not unauthorised maritime arrivals.

A child's lengthy and arbitrary detention, and transfer to either Nauru or Manus Island Papua New Guinea are both a current consequences of a decision that a baby is an unauthorised boat arrival under the removal and transfer powers contained in Part 2 Division 8 of the Act.

We believe that a baby's detention in Nauru or Manus Island is likely to be arbitrary and to constitute a violation of several rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10, and 21 of the *Universal Declaration of Human Rights* and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II);

We are highly concerned about continued detention of babies and children currently.

We are particularly concerned that child asylum seekers should not be held in restrictive detention for a lengthy period, given their age, and health and developmental needs.

RACS is very concerned that child asylum seekers' health, education and welfare needs could not be adequately managed offshore. We are also concerned about whether these needs are currently being met on Christmas Island. We are worried 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.

We are also particularly concerned that parents of babies born in our migration zone are told they face imminent transfer from Australia to Nauru.

We note that Nauru does not appear to be in a position to properly process refugee status determination claims currently, and as such, a transfer to Nauru represents prolonged administrative custody without the possibility of an administrative decision, or any review or remedy.

We note that currently the application of a "no exceptions" approach to Ministerial discretion can see family members such as siblings and parents separated from one another where the date of one family member's arrival means that they must remain separated with some of the family in community detention in Australia, and others in detention in Australia at risk of transfer off-shore.

Many of RACS' clients in detention have volunteered suffering mental anguish as a current health complaint. Some have made suicide threats or made statements suggestive of self harm and suicidal ideations. Some of made suicide attempts including some which have been successful. Some have reported specific kinds of previous harm suffered prior to coming to Australia which would make their continued detention particular undesirable.

Some have family members in Australia with whom it would be clearly appropriate for them to be with in community detention, rather than being separated from those family members.

Many of RACS' current clients are in contact with other asylum seekers who have already been transferred offshore. The news they are hearing from those who have already been transferred is causing them great distress in relation to their impending transfer.

We submit that 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.

The arbitrary nature of infant and child asylum seekers' detention currently at Christmas Island

In relation to detention conditions in Australia, we note that Australia has already been found to violate art 7 on the basis of the "combination of the arbitrary character of the authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention … cumulatively inflicting serious psychological harm".[1]

The arbitrary nature of a baby born in Australia's migration zone's proposed detention in Nauru

We note that after the UNHCR undertook a visit to the Republic of Nauru from 7 to 9 October 2013, one of their key findings was that the current arrangements constituted arbitrary and mandatory detention under international law:

> In assessing the transfer arrangements in their totality, including the legal framework, operational approaches and the harsh physical conditions at the RPC, UNHCR was disappointed to observe that the current policies, conditions and operational approaches at the RPC do not comply with international standards and in particular:
>
> a) constitute arbitrary and mandatory detention under international law;
>
> b) despite a sound legal framework, do not provide a fair, efficient and expeditious system for assessing refugee claims;
>
> c) do not provide safe and humane conditions of treatment in detention; and

[1] *MMM et al v Australia* [2013] UN Doc CCPR/C/108/D/2136/2012 [10.7]; *FKAG v Australia* [2013] UN Doc CCPR/C/108/D/2094/2011 [9.8].

d) do not provide for adequate and timely solutions for refugees.

In relation to the legal and physical conditions of detention they noted:

> The current Nauru policy and practice of detaining all asylum-seekers at the closed RPC, on a mandatory and open-ended basis, without an individualized assessment as to the necessity, reasonableness and proportionality of the purpose of such detention amounts to arbitrary detention that is inconsistent with international law.
> The legal framework and physical conditions for the detention and treatment of asylum-seekers remain below international standards and, overall, do not provide for a safe, fair and humane standard of treatment for asylum-seekers transferred under the bilateral arrangements to the RPC.
> Cumulatively, the conditions for asylum-seekers at the RPC, the slowness of RSD processing, the lack of clarity regarding RSD processes and the approximate timeframes for durable solutions for refugees create a deterrent effect that is punitive in nature for those affected.

The lack of resources and facilities available in Nauru to respond to the particular health and welfare needs of infant and child asylum seekers

We note the significant doubts cast by the UNHCR's recent report into Nauru in relation to the resources and facilities available in Nauru to receive infants and children, and to respond to their particular health, welfare and special needs. A full copy of this report is attached. The UNHCR noted that:

> "Overall, the harsh and unsuitable environment at the closed RPC is particularly inappropriate for the care and support of child asylum-seekers. UNHCR is also concerned that children do not have access to adequate educational and recreational facilities.
>
> In light of the overall shortcomings in the arrangements, highlighted in this and earlier reports, UNHCR is of the view that no child, whether an unaccompanied child or within a family group, should be transferred from Australia to Nauru."

While Save the Children have been contracted to provide services, we note that even they are of the view that:

> "Our view has always been that community-based accommodation in Australia is a better option for children seeking asylum. We have been consistent in calling on the Australian Government for children not to be sent to offshore or onshore processing centres, and we will continue to do so. This position has not changed.
>
> **What is Save the Children's position on sending children to Nauru?**

> We do not want to see children sent to Nauru, and we are extremely concerned about the impact of offshore processing on the health and well-being of asylum seekers, particularly children."

UNHCR after their recent visit noted that:

> UNHCR met with a number of the child asylum-seekers at RPC3 during the family group sessions. The children provided UNHCR with a number of drawings which expressed their distress at being detained in Nauru as a result of events and decisions outside their control.
>
> Asylum-seekers expressed particular concerns about:
>
> a) the unnecessary and arbitrary detention of children;
>
> b) the deteriorating mental health of children in the RPC, which was impacting on their ability to engage in educational activities;
>
> c) the trauma caused to the children by being in detention;
>
> d) the health and hygiene issues associated with the RPC, including skin and other infections, and lice infestations;
>
> e) inadequacy of educational facilities;
>
> f) the lack of suitable playing areas for children; and
>
> g) lack of access to human rights institutions and lawyers.
>
> UNHCR notes that educational and child welfare services were provided by Save the Children Australia to the best of their abilities, within the obvious constraints of space and detention policies. However, parents of the children advised that the children had not been going to school. A room had been set up for educational purposes, but it was too hot for the children to remain in it for any length of time. Outings to local schools had taken place, and negotiations were under way to secure access at the local schools for the asylum-seeker children.
>
> While the children's rights to education, to rest and leisure, to engage in play and recreational activities are actively promoted at the Centre, UNHCR is deeply concerned by the transfer of children to a closed detention facility with no time limit for when freedom of movement may be achieved. An overall ethic of care – and not of enforcement – is the appropriate response for all interactions with asylum-seeking children.

The requisite standards required in detention centres and while children are contained in detention are simply not able to be met in Nauru and the duty of care towards these young people would simply be breached if the proposed transfer goes ahead.

Again, to quote the UNHCR:

> Children have been transferred without an assessment of their best interests and without adequate services in place to ensure their mental and physical well-being.
>
> At the time of UNHCR's visit, children were in closed detention, in difficult conditions, without access to adequate educational and recreational facilities, and with a lack of a durable solution within a reasonable timeframe.
>
> On the basis of the harsh conditions at the RPC, UNHCR's view is that the current facilities and arrangements in place are inappropriate for the support and protection of children. Any transfer of UASCs would be highly inappropriate.

Concerns about access to appropriate health treatment

The UNHCR noted after their visit that asylum-seekers also raised a number of concerns with UNHCR, including:

> a) lack of adequate medical facilities, including for heart conditions, dental issues and, in one case, to address a metal plate embedded in one person's leg;
>
> b) hygiene issues – many complained of skin conditions and other infections, including parasites and lice;
>
> c) lack of a gynaecologist for the women;
>
> d) lack of access to x-rays and other medical equipment; and
>
> e) limited access to medication.

Concerns about the irreparable damage to infant and child asylum seekers' mental health

The UNHCR observed that, according to medical and security staff, the sense of injustice, along with hot and crowded detention conditions, a sense of isolation and abandonment, and a lack of information and clarity about their processing and future prospects, has led to "widespread depression" (page 20).

They noted that this was particularly the case for those asylum seekers who had been transferred from Nauru back to Australia (which can sometimes occur for medical treatment given the facilities in Nauru are inadequate). They noted that this transfer, and the lack of reasons provided for it to asylum seekers exacerbated a sense of injustice.

They noted significant concerns for mental health, especially in regard to the children held in Nauru (page 20).

We note at page 21 the UNHCR found that:

> The morale of asylum seekers is extremely low as a result of uncertainty over and delays in processing and their futures, combined within the mandatory detention framework currently prevailing.

We note that the CCPR has consistently found violations of arts 9(1) and 9(4) in relation to Australia's system of mandatory detention. However, factors such as the length of detention and the reasons for detention have been regarded as relevant in determining art 9(1)

violations, and most previous Australian cases involved more than 2 years of detention. On the other hand, maximum time limits generally indicate a consensus around a maximum of 6 months (this is also the time limit set by the European Union), so any time beyond this is prima facie likely to be arbitrary.

We note that Art 24 imports 'the best interests of the child' test in CROC, and international law clearly states that children should not be held in detention at all, and if so only as a last resort and for the shortest possible time (see below).

In relation to detention conditions in Australia, Australia has been found to violate art 7 on the basis of the "combination of the arbitrary character of the authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention … cumulatively inflicting serious psychological harm".[2] On the other hand, the Committee in the past has considered Australia's evidence as to educational, recreational and cultural programmes within detention systems for children as negating violations of arts 7 or 10 on these grounds.

In relation to detention in Nauru:

- UNHCR has publicly stated that physical conditions, in combination with the arbitrary detention in Nauru, may amount to cruel, inhuman or degrading treatment[3]
- Nauru currently does not have a functioning judicial system and there is evidence that judges to be appointed will not be independent,[4]
- Given the physical condition of Nauru and the lack of third countries willing to resettle, it is unclear where any recognised refugees will be allowed to resettle.

In our submission Australia retains continuing responsibility for the actions of Nauru, because the asylum-seekers remain under the 'effective control' of Australia. The arrangement is wholly funded by Australia and for the benefit of Australia.

In the event that infant and child asylum seekers are transferred offshore, they face:

- Arbitrary and indefinite detention as the UNHCR report indicates that asylum seekers are currently detained in Nauru for extended periods in conditions that are unfit for purpose and do not meet international standards (Art 9).
- Interference with the family in a manner contrary to the right to family life, (in relation to our client who remains separated from his brother); and
- The prospect of irreparable and significant psychological and physical harm.

Thank you for considering this submission. We would be happy to expand on these submissions in person should the committee be minded to invite us to an oral hearing.

[2] *MMM et al v Australia* [2013] UN Doc CCPR/C/108/D/2136/2012 [10.7]; *FKAG v Australia* [2013] UN Doc CCPR/C/108/D/2094/2011 [9.8].
[3] UN High Commissioner for Refugees (UNHCR), 'UNHCR Monitoring Visit to the Republic of Nauru 7 to 9 October 2013' (26 November 2013) 16.
[4] Jane Lee, 'Nauru Chief Justice Quits, Citing Rule of Law Breach' *The Age* (Melbourne, Vic., Australia), 13 March 2014 <http://search.proquest.com/docview/1506460900?accountid=12763>.

Yours sincerely,

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:

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Summary of RACS' position:

Babies born in the Australian migration zone should not be classified an unauthorised maritime arrival and should not be subject to transfer to Australia's offshore detention centres.

RACS opposes the indefinite mandatory detention of children and we oppose offshore detention and resettlement of infants and children in PNG or Nauru. We oppose the use of remote locations of detention for families and children for any length of time. Transferring infants and children offshore is cruel and unnecessarily punitive. Research on the topic is unequivocal in showing that lengthy periods of detention have severely deleterious effects for infants and children.

Infants and children should be afforded their basic rights: freedom, healthcare, education and play.

Australia should not be responsible in abusing and damaging children seeking our protection.

Our current treatment of infant and child asylum seekers who have come by boat is likely to be in violation of the following rights of the ICCPR:

- Art 2(3) – absence of an effective remedy (if other rights are found to be violated)
- Art 7 – cruel, inhuman or degrading treatment or punishment
- Art 9 – arbitrary deprivation of liberty, also possibly security of person
- Art 10 – those deprived of liberty not being treated with humanity and with respect for inherent dignity of human person
- Art 17 – arbitrary interference with family
- Art 23 – protection of family
- Art 24 – children's right to such measures of protection as are required by status as a minor, or on the part of family, society and State.

Possible future claims which this generation of infant and child asylum seekers could make against Australia would include that their detention in Australia is:

- an arbitrary deprivation of liberty (art 9(1)), in conjunction with art 24;
- not subject to review by a court (art 9(4); and
- amounts to cruel, inhuman or degrading treatment or punishment (art 7) and/or art 10, because of the conditions of detention (art 10).

Infant and child asylum seekers could additionally have claims in that their transfer to Nauru:

- would amount to cruel, inhuman or degrading treatment or punishment (art 7) and/or would violate the detentions of condition required under art 10;
- is a continuing arbitrary deprivation of liberty (art 9(1)), without access to review by a court (art 9(4)), for which Australia remains responsible;
- would constitute an arbitrary interference with family (art 17 in conjunction with art 23) through the separation of detainees from those on the mainland; and
- would violate the States' obligations under art 24 towards children.