Submission: CLA Civil Liberties Australia Inc.

To: The Chair and Members
Legal and Constitutional Affairs Legislation Committee
The Senate
Parliament of Australia
CANBERRA ACT 2000

By email: legcon@aph.gov.au Attention: Sophie Dunstone

Dear Chair and Committee Members,

Inquiry into the Migration Amendment (Protecting Babies Born in Australia) Bill 2014 [the amendment bill]

Civil Liberties Australia is a not-for-profit association which reviews proposed legislation to help make it better, as well as monitoring the activities of parliaments, departments, agencies and forces to ensure they match the high standards that Australian has traditionally enjoyed and continues to aspire to.

We work to keep Australia the free and open society it has traditionally been, where you can be yourself without undue interference from 'authority'. Our civil liberties are all about balancing rights and responsibilities, and ensuring a 'fair go' for all Australians.

Civil Liberties Australia thanks the Committee for the opportunity to make the following submissions.

CLA's understanding of the amendment bill

Under the *Migration Act* 1958 any '*unauthorised maritime arrival*' may be sent for regional processing outside Australia under the scheme in Part 2 Division 8, sub-division B of the Act [*the regional processing scheme*]. Section 5AA(1) defines who is an unauthorised maritime arrival. In summary it is anyone who arrives by sea under certain conditions. Section 5AA(2) then goes on to say a person who arrives by air is not someone who arrives by sea. The Greens amendment amends s5AA(2) to say a person born in Australia is also someone who does not arrive by sea.

The apparent effect of that amendment is that a child newly born in Australia to parents who have arrived by boat (in the language of Immigration authorities, illegal maritime arrivals or IMAs) cannot be dealt with under the regional processing scheme. The amendment does not deal in any other way with the status of such a child. The thrust of the measure is to keep the child in Australia for processing under the Migration Act.

CLA's view

For the following reasons CLA supports the measure.

Removing the child from Australia under the current regime would endanger his or her health and wellbeing

Australia's approach to this area of public policy should be governed by the principle that the interests of the child are paramount. All other contrary considerations are either of a considerably lower order or of no proper application at all.

In other contexts the principle represents a social norm, is well understood and accepted and its extension to the case of children born in Australia, to IMAs, should not need the support of lengthy advocacy. It echoes statutory recognition

of the paramount interests of the child in Australian Family Law[1]. It would also be in keeping with community concern for the protection of children at the heart of, for example, the *Royal Commission into Institutional Responses to Child Sexual Abuse* and the *Northern Territory Emergency Response[2].*

It is also reasonably clear the detention environments on Manus Island, Christmas Island and Nauru are wholly unsuitable for the health and well being of children, especially the very young.

The dangerous conditions on Manus Island were recently the subject of an inquiry by the Legal and Constitutional Affairs References Committee and submissions and evidence by CLA[3]. They are certainly inimical to the health and well being of children, especially young children.

That children's health and wellbeing are at risk on Christmas Island and Nauru is also well documented. An independent medical experts' report from February 2014[4], on the parlous health conditions for children on Nauru, has been accepted into evidence by the Australian Human Rights Commission in its *National Inquiry into Children in Immigration Detention 2014.* The AHRC inquiry will also use as evidence a letter of concern documenting widespread medical failings in detention, written in November 2013 and signed by 15 doctors operating on Christmas Island. On 24 July Professor Gillian Triggs, president of the Commission, reported on her visit to Christmas Island, the cramped conditions there, that virtually all of the 174 children detained there were sick, there had been 128 incidences of self harm amongst the children and, though teachers would be provided at her request 'in a couple of weeks' the children had not had access to education[5].

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[1] Section 60 of the *Family Law Act* 1975 provides '*In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration*'.

[2] Commonly called the Intervention, the measure was and continues to be controversial including for the suspension of certain human rights that accompanied it. Never the less its principal underlying motivation was the concern to protect children from sexual abuse and violence.

[3] *Inquiry into the incident at the Manus Island Detention Centre from 16 February to 18 February 2014*. CLA submission dated 18 April 2014. Evidence given by CLA on 13 June 2014.

[4] *Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Arrangements Nauru Site Visit Report* 16-19 February 2014

[5] ABC News report 24 July 2014.

Witness testimony given to the AHRC inquiry has included the following[6]:

1. By psychiatrist Dr Peter Young, former director of mental health services at International Health and Medical Services (IHMS), that adults and children suffered mental health problems caused by their detention. Dr Young also testified departmental officers had asked IHMS to withdraw a report about those mental health problems.
2. By Dr Grant Ferguson and Dr John Paul Sanggaran, who both worked on Christmas Island, that doctors' clinical decisions were altered and downgraded, that children with complex medical problems cannot be adequately treated on the island and that detainees' glasses, hearing aids and medication were taken from them when they arrived. For example a three-year-old girl's epilepsy medication was taken from her, causing her to have seizures. The girl was eventually transferred to the mainland.

On 30 July 2014 the Australian Churches Refugee Taskforce published its report with respect to unaccompanied children in immigration detention, called *Protecting the Lonely Children*. At page 9 the report describes the detention of children on Nauru and Manus Island as state sanctioned child abuse.

The conditions on Manus Island, Christmas Island and Nauru are manifestly unhealthy for children, as indeed they are for adults. Therefore the only reasonable prospect for children of IMAs to receive adequate medical care and education and to grow up in a generally healthy environment is that they remain in Australia for processing and not be endangered by removal to Manus Island, Christmas Island or Nauru.

The recent case of Baby Ferouz[7] underscores the point that mainland Australia is the best place to provide health care for the very young. Baby Ferouz was born in Brisbane's Mater hospital in about October 2013 after his mother, a diabetic, was transferred from Nauru for the birth. Mother and baby were then transferred to Darwin's immigration detention centre after unsuccessful litigation to prevent their move. The Department argued in support of its case that Baby Ferouz and his mother should be moved to accommodate other Nauru

[6] See Rebecca Barrett, ABC News report dated 31 July 2014
[7] Guardian story dated 4 April 2014. See also Maurice and Blackburn Lawyers website.

inmates who needed to come to Brisbane for treatment. In its settlement with the applicants the Department agreed Baby Ferouz and his mother would not be removed to Nauru while Baby Ferouz continued to suffer from a respiratory illness.

The same case illustrates both the wilful blindness of the Minster for Immigration and his Department to the welfare of children in their custody and control and the failure of Australian courts to develop jurisprudence recognising any rights of children and duties of the Minister to them outside the context of the rights and duties in the Act[8]. In other words, there is a gap in Australia's treatment of and regard for children of IMAs – the Minister does not take his guardianship role seriously and courts will not supervise it. That needs to be addressed by statute. The amendment being considered by the Committee, though limited and narrow, goes some way to addressing the problem by keeping children in Australia and so CLA supports it.

Removing the child from Australia would effectively deny his or her right to apply for Australian citizenship

Children born to asylum seekers who arrive by boat can reflect one of two circumstances: a) a child is born to parents who are stateless; b) a child is born to parents who are citizens of another country. In both circumstances CLA Australia supports the Migration Amendment Bill.

a) A child born to stateless asylum seekers

A child is stateless if born to parents who themselves are stateless. The Convention on the Reduction of Statelessness[9], which came into effect in 1975, is an international attempt to reduce the incidence of statelessness. Australia

[8] Though it does not create rights and duties to be preferred to the Minister's powers under the Act, the *Immigration (Guardianship of Children) Act* 1946 constitutes the Minster guardian of unaccompanied non-citizen children. Also s4AA makes the detention of minors a last resort and according to s10 a child born in the migration zone is taken to have entered Australia. Yet courts have consistently declined to give substance to those enactments – about this see Mary Crock and Mary Anne Kenny, *Rethinking the Guardianship of Refugee Children after the Malaysia Solution*, Sydney Law Review 2012 Volume 34 at pp437 to 465.

[9] http://www.unhcr.org/3bbb286d8.html retrieved 4 August 2014.

acceded to this convention in 1973. In accordance with this convention, Australia enacted section 21(8) of the Australian Citizenship Act 2007, which ensures 'that no-one born in Australia remain stateless'. Section 21(8) requires the Minister for Immigration and Border Protection to approve an application for citizenship if the Minister is satisfied that the child

- was born in Australia;
- is not a national or citizen of any country;
- has never been a national or citizen of any country;
- is not entitled to acquire the nationality or citizenship of a foreign country.[10]

An example of a child born into this circumstance is Baby Ferouz [11] who was born in Australia to parents who are Rohingya, an ethnic group not recognized in Myanmar and not entitled to citizenship of that country. Consequently they are stateless as is their baby. As Baby Ferouz was born in Brisbane, given a Queensland birth certificate, and appears to meet the criteria of Section 21(8), he should be entitled to apply for Australian citizenship.

In addition to satisfying the Australian Citizenship Act, the 1961 Convention on the Reduction of Statelessness is clear on how children born stateless should be treated legally. In Article 1 it states that 'A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.'[12]

In summary, for children who are born in Australia and are stateless by virtue of their parents' statelessness, both the Convention on the Reduction of Statelessness to which Australia acceded and Section 21(8) of the Australian Citizenship Act 2007 clearly give those children the right for conferral of Australian citizenship. Section 21(8) does not appear to give the Minister for Immigration and Border Protection discretion in this matter.

[10] http://www.theglobalmail.org/feature/the-law-and-the-little-boy/773/ retrieved 4 August 2014.
[11] http://www.mauriceblackburn.com.au/legal-services/general-law/social-justice/asylum-seeker-rights/ retrieved 4 August 2014.
[12] http://www.unhcr.org/3bbb286d8.html retrieved 4 August 2014,

The previous section has focused on the legal acts and conventions relevant to children born to stateless asylum seekers. The next section concerns children born to asylum seekers who are not stateless.

b) A child born to asylum seekers who are not stateless

A child born in Australia to parents seeking asylum who have arrived by boat should have the ability to apply for Australian citizenship under international human rights covenants and conventions. These include the Refugee Conventions, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

Currently there are over 1000 children in detention, both on shore and offshore, despite condemnation by multiple organizations. The recent report by the Australian Churches Refugee Task Force, Protecting the Lonely Children, referred to the current policy of guardianship and treatment of unaccompanied children as 'convoluted, inequitable, grievously lacking in transparency and accountability and it is a system which can be cruel.'[13]. The National Inquiry into Children in Immigration Detention 2014 has seen and heard evidence that causes grave concern for the mental and physical health of children and new mothers on Christmas Island. The United Nations High Commissioner for Refugees has called on the government to stop sending children and families to Manus Island and Nauru after visits during October 2013. Its report states that Nauru is 'particularly inappropriate', thus no child, either unaccompanied or with a family, should be transferred there. [14]

A sound and enlightened means of keeping children born in Australia out of immigration detention centres is to give them the right to apply for Australian citizenship. Currently, when a child is born in immigration detention, a *Registration of Birth* form is submitted by immigration officials to the Births, Deaths and Marriages office in the relevant state or territory. The form allows

[13] http://www.australianchurchesrefugeetaskforce.com.au retrieved 4 August 2014.
[14] http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf retrieved 4 August 2014.

the parents to request a birth certificate for the child. It does not seem feasible for parents who have fled from their country, often at risk of torture, trauma or death from the government, to obtain a birth certificate from that country. As over 90% of asylum seekers who arrived by boat and were processed during 2011-2012 were determined to be refugees[15] it would be not only sensible but morally and ethically responsible to allow children born here to apply for an Australian birth certificate. What is the alternative, that the child is stateless?

Given that the likelihood of being granted the nationality of the country from which their parents are fleeing is exceedingly low, children born in Australia to non-stateless parents should be given the opportunity to apply for Australian citizenship. International human rights documents to which Australia is a signatory are clear on the rights of children to a nationality. The Convention on the Rights of the Child (CRC)[16] states that:

> 'Children have the right to a legally registered name and nationality. Children also have the right to know their parents and, as far as possible, to be cared for by them.'

One of the fundamental principles of the CRC is that 'laws and actions affecting children should put their best interests first and benefit them in the best possible way.' Giving children born in Australia to asylum seekers the opportunity for Australian citizenship supports this principle.

Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) are unambiguous about the right to a nationality.

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[15] Department of Immigration and Citizenship (DIAC), 'Asylum Statistics-Australia: Quarterly tables-
March Quarter 2013, ,' available from,
http://www.immi.gov.au/media/publications/statistics/asylum/_files/asylum-stats-march-quarter-2013.pdf retrieved 4 August 2014.

[16] https://www.unicef.org.au/Discover/What-we-do/Convention-on-the-Rights-of-the-Child/childfriendlycrc.aspx retrieved 7 August 2014

Section 15 of the Universal Declaration of Human Rights declares 'Everyone has the right to a nationality'.[17] Section 24 of the ICCPR states that, 'Every child has the right to acquire a nationality'.[18]

It is clearly in the best interests of children born in Australia to asylum seekers to be given the opportunity to apply for Australian citizenship. This is the case whether their parents are stateless or citizens of the country from which they are escaping. In these circumstances, where obtaining another nationality is either impossible or highly unlikely, upholding the human rights of children is paramount. The Migration Amendment (Protecting Babies Born in Australia) Bill 2014 by the Greens supports the rights of children articulated in international human rights covenants and conventions to which Australia is a signatory.

Other points

Lastly, none of the usual rhetoric has any application to the Australian born children of IMAs.

They have not arrived in Australia. They were born here.

They have not jumped any queue. There is no sense in which keeping them in Australia for processing would be unfair to anyone else. They are very young children who are not responsible for their circumstances. No adverse motivation of any kind can be ascribed to them.

No national interest or consideration of fairness applies to deny them care in Australia. The emptiness of this particular argument is demonstrated by the recent case of a 15 years old Ethiopian stowaway[19]. The boy's case had been the vehicle for a successful High Court challenge to a cap on refugee visas. The Minster at first advised he would deny the boy permanent residence on '*strict national interest grounds'.* According to the Minster it was in the national interest that asylum seekers not arrive here by boat. He subsequently relented and the boy is now an Australian permanent resident.

[17] http://www.un.org/en/documents/udhr/index.shtml#a15 retrieved 7 August 2014.
[18] http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html retrieved 7 August 2014.
[19] 7 News story 22 July 2014

Perhaps the most egregious justification for sending Australian born children overseas is that it '*saves lives*' by deterring families from attempting the dangerous ocean voyage to Australia. That reasoning requires us to prefer the imagined interests of a hypothetical family considering coming to Australia, over the interests of an actual Australian born child and then send that child to a squalid overseas camp, were he or she will likely become sick and will not have proper care and education. That is a false dilemma and the right moral choice is clear – it is to care for the Australian born child.

The other answer to this last argument is that Australia's outrageously harsh treatment of refugees has not deterred desperate people from getting on boats to come here. There have been numerous recent reports of boats being turned or their passengers being '*towed back*' in life rafts by the Australian Navy. Since *Operation Sovereign Borders* commenced on 18 September 2013, 23 boats carrying 1263 have *arrived*[20]. The Australian Government has also recently handed over 41 Sri Lankans to the Sri Lankan Navy to an uncertain fate. And it notoriously held 157 Tamils including a 3 years old girl on a Customs ship in an undisclosed location while it defended its conduct in High Court litigation[21].

CLA's wider concerns about refugee children

It is fair to say that successive Australian Governments have largely disregarded the special interests of refugee children. Whether they are Australian born children of IMAs, unaccompanied minors or children coming with their families to seek asylum in Australia, they have been subjected to the same unconscionably harsh measures and the same cruelty as the adults. Australia has now reached the point where it holds around 1000 children in immigration detention including 37 children on board the customs ship referred to earlier. The figures to do with the numbers of children, the unhealthy conditions in which they are held and some have been held since birth, the incidences of self-

[20] See ABC News' log of boat arrivals and other asylum seeker incidents, the source for which is official federal Government figures.
[21] Numerous local and international media source including Sydney Morning Herald 23 July 2014

harm and the denial of adequate health care and education shock the human conscience[22].

Australia continues to behave this way seemingly in defiance of its obligations under international treaties.

In the case of unaccompanied minors the Minister ignores his role as their guardian under the *Immigration (Guardianship of Children) Act* 1946 and courts will not attach any principles or substance to it. More generally Australian courts have not developed any high legal principles that might be a brake on the worst excesses provided for in the Migration Act.

Indeed it is quite clear refugee policy in Australia, particularly as it applies to IMAs and their children, is completely captive to crude domestic politics and no longer represents a genuine commitment to the 1951 Refugee Convention.

In the case of children, the Parliament should eschew the politics and enshrine in statute a principle that in all Ministerial and Departmental decision making in this area, the interests of the child are paramount. That principle should also be a source of rights and duties enforceable by and on behalf of affected children in Australian courts. In the current unyielding political environment nothing short of that measure can ensure refugee children will be properly cared for.

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[22] Sources for these figures are *Key Statistics from the Human Rights Commission national Inquiry into Children in Immigration Detention 2014* and numerous media sources including *The Guardian* story 23 July 2014.