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29 August 2014

Dear Committee Secretary,

**Submission to the Senate Legal and Constitutional Affairs Legislation Committee  
Migration Amendment (Protecting Babies Born in Australia) Bill 2014 (Cth)**

We welcome the opportunity to provide a submission to the Committee's Inquiry into the Migration Amendment (Protecting Babies Born in Australia) Bill 2014 (Cth). Our submission focuses on both the human rights protections provided by the Bill, and the human rights implications that potentially arise from the Bill.

We recommend that the Bill be passed, since it provides a number of human rights protections for asylum-seeker children who are born in Australia.

1. It will end the transfer to offshore detention centres of children born in Australia to asylum seekers who are "unauthorised maritime arrivals".
2. It will enable such children to seek protection in Australia.
3. By remaining in Australia, such children will have better access to immediate birth registration and, following birth registration, will have access to the right to acquire their parent's nationality by descent, or the grant of Australian nationality (if they are stateless).

However, as detailed below, we are concerned that the passage of this Bill will not address other pressing issues faced by asylum-seeker children who are born in Australia, and may inadvertently create further issues for such children.

If we can provide further information, please do not hesitate to contact us.

Yours sincerely,

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## **1. Introduction**

On 18 June 2014, Senator Hanson-Young introduced the Migration Amendment (Protecting Babies Born in Australia) Bill 2014 (Cth) (“the Bill”) into the Senate. The Bill seeks 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 offshore detention centres”.<sup>1</sup>

On 14 October 2014, the matter of *Plaintiff B9/2014 by His Mother as Litigation Guardian v Minister for Immigration* is listed for hearing in the Federal Circuit Court at Brisbane. This matter has been subject to much media attention.<sup>2</sup> The hearing on 14 October 2014 will consider whether a child born in Australia to an “unauthorised maritime arrival” is also to be classified as an “unauthorised maritime arrival”, by interpreting the intended scope and application of section 5AA and section 10 of the *Migration Act 1958* (Cth) (“Migration Act”).

Our recommendation is that this Bill be passed, since it provides a number of human rights protections for asylum-seeker children who are born in Australia. However, we are concerned that passage of this Bill will not address other pressing issues faced by asylum-seeker children who are born in Australia, and may inadvertently create further issues for such children.

This submission focuses on both the human rights protections provided by the Bill, and the human rights implications that potentially arise from the Bill.

## **2. Background**

### **2.1. Excision of places from Australia’s migration zone and “unauthorised maritime arrivals”**

On 26 September 2001, the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) amended the Migration Act, so that areas designated as “excised offshore places” were excised from the migration zone. The excised areas included certain parts of Australian territory where asylum seekers were most likely to land.<sup>3</sup> Unauthorised boat arrivals who arrived at excised places – “offshore entry persons” – were excluded from making an application for a protection visa in Australia and were subject to transfer to offshore detention centres<sup>4</sup> on Nauru and Manus Island (Papua New Guinea) for the processing of their asylum claims. Some asylum seekers were processed on Australia’s excised offshore territory of Christmas Island. Persons who were found to be owed protection were eventually resettled either in Australia or in a third country.<sup>5</sup>

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<sup>1</sup> Explanatory Memorandum, Migration Amendment (Protecting Babies Born in Australia) Bill 2014 (Cth), 2.

<sup>2</sup> “Asylum-seeker fight for baby’s refugee status goes to federal court”, *The Guardian*, 6 June 2014 <http://www.theguardian.com/world/2014/jun/16/asylum-seeker-babys-fight-for-refugee-status-goes-to-federal-court>.

<sup>3</sup> Castan Centre for Human Rights Law, Submission No 17 to the Senate Legal Affairs and Constitutional Committee, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth), December 2012, 2 <http://www.law.monash.edu.au/castancentre/policywork/mig-amendment-bill-sub.pdf>.

<sup>4</sup> Also referred to by the Department of Immigration and Border Protection as Offshore Processing Centres, Offshore Processing Facilities, and Regional Offshore Processing Centres.

<sup>5</sup> Janet Phillips and Harriet Spinks, ‘Immigration detention in Australia’, (Background Note, Parliamentary Library, Parliament of Australia, 2013), 10 [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/Detention](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Detention).

This policy of offshore processing became known as the “Pacific Solution”.

On 8 February 2008, the “Pacific Solution” formally ended under the Rudd Government. However, the abovementioned excision of Australian territory remained, and unauthorised boat arrivals continued to be processed at Christmas Island. In 2012, the Gillard Government reintroduced a policy of transferring asylum seekers to offshore detention centres in Nauru and Papua New Guinea.<sup>6</sup>

On 20 May 2013, the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) was passed. This Act allowed for the excision of the Australian mainland from the migration zone. The Act also removed the definition of “offshore entry person” from section 5(1) of the Migration Act and inserted a new definition of “unauthorised maritime arrival” in section 5AA.

This statutory change eliminated the distinction between asylum seekers who arrived by boat at an excised offshore place and those who reached the Australian mainland.<sup>7</sup> Thus, since 20 May 2013, all asylum seekers who reach the Australian mainland by boat without authorisation have the same status under domestic law as those who arrive at an “excised offshore place”, unless they are an excluded class or otherwise exempted (see section 5AA(3) Migration Act).<sup>8</sup>

Pursuant to section 46A of the Migration Act, “unauthorised maritime arrivals” are barred from making a valid application for a visa for Australia, including a protection visa,<sup>9</sup> and must be transferred to a regional processing country<sup>10</sup> as soon as reasonably practicable.<sup>11</sup> However, the Minister for Immigration and Border Protection (“the Minister”) retains a non-compellable discretion to determine that these restrictions do not apply to an “unauthorised maritime arrival”.<sup>12</sup>

As at July 2014, there were 3702 people (including 712 children) in onshore detention centres in Australia (excluding community detention), 1146 people (including 183 children) detained in offshore detention centres in Nauru, and 1127 people detained in offshore detention centres in Papua New Guinea (asylum-seeker children are not detained in Papua New Guinea).<sup>13</sup>

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<sup>6</sup> Ibid, 11.

<sup>7</sup> Law Council of Australia, Submission No 13 to the Senate Legal Affairs and Constitutional Committee, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth), December 2012, 3 <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2679%20-%20Migration%20Amendment%20%28Unauthorised%20Maritime%20Arrivals%20and%20Other%20Measures%29%20Bill%202012.pdf>.

<sup>8</sup> Australian Human Rights Commission, Submission No 20 to the Senate Legal Affairs and Constitutional Committee, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth), December 2012, 4 [https://www.humanrights.gov.au/sites/default/files/20121217\\_migration\\_amendment.pdf](https://www.humanrights.gov.au/sites/default/files/20121217_migration_amendment.pdf).

<sup>9</sup> This undermines the normative protection of the Refugee Convention - Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, read in conjunction with the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

<sup>10</sup> Under section 198AB of the Migration Act, the Minister can designate a country as a regional processing country if “the Minister thinks that it is in the national interest to designate the country to be a regional processing country”. Currently, Nauru and Papua New Guinea are designated regional processing countries under section 198AB of the Migration Act.

<sup>11</sup> Migration Act, s 198AD.

<sup>12</sup> Migration Act, ss 46A(2), 198AE.

<sup>13</sup> Department of Immigration and Border Protection, Immigration Detention and Community Statistics Summary, 31 July 2014, 3 <https://www.immi.gov.au/managing-australias-borders/detention/pdf/immigration-detention-statistics-july2014.pdf>. Community detention is not available to asylum seekers detained in offshore detention centres in regional processing countries.

## 2.2. Australia's international legal obligations

The Migration Amendment (Protecting Babies Born in Australia) Bill 2014 (Cth) is relevant to the rights and freedoms expressed in the following international legal instruments to which Australia is a party:

- *1951 Convention relating to the Status of Refugees* (“1951 Refugee Convention”, read in conjunction with the *1967 Protocol relating to the Status of Refugees*)
- *1954 Convention relating to the Status of Stateless Persons* (“1954 Statelessness Convention”)
- *1961 Convention on the Reduction of Statelessness* (“1961 Statelessness Convention”)
- *1966 International Covenant on Civil and Political Rights* (“ICCPR”)
- *1966 International Covenant on Economic, Social and Cultural Rights* (“ICESCR”)
- *1967 Protocol relating to the Status of Refugees* (“1967 Protocol”)
- *1979 Convention on the Elimination of All Forms of Discrimination against Women* (“CEDAW”)
- *1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“CAT”)
- *1989 Convention on the Rights of the Child* (“CRC”)
- *2006 Convention on the Rights of Persons with Disabilities* (“CRPD”)

As a starting point, Australia cannot relieve itself of its international obligations – whether by excising territory from its migration zone or by sending asylum seekers to other countries for processing.<sup>14</sup> Australia is responsible for the actions of its officials both within and outside of Australian territory, including within the territory of other sovereign States, such as Nauru and Papua New Guinea.

Additionally, liability for breaches of international law can be both joint and several. This means that human rights violations in regional processing countries (including *refoulement*) will remain attributable to Australia, as well as to the regional processing country. Even if a State does not have effective control over a situation in another State's territory, it cannot avoid its own international law obligations by transferring asylum seekers to a third country and it may remain liable for the consequences of its action of such transfer.<sup>15</sup>

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<sup>14</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 27, 29. See for example, *Amuur v France* (1996) 22 EHRR 533; Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Oxford University Press, Oxford, 1983), 135–37, 159–66; *MSS v Belgium and Greece* (App No 30696/09, European Court of Human Rights, Grand Chamber, 21 January 2011); *NS v Secretary of State for the Home Department, Joined Cases C-411/10 and C-493/10* (Court of Justice of the European Union, Grand Chamber, 21 December 2011).

<sup>15</sup> Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> ed, Oxford University Press, Oxford, 2007), 408–11; United Nations Human Rights Committee, “General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13 <http://www.refworld.org/docid/478b26ae2.html>.

The 1951 Refugee Convention, the 1954 Statelessness Convention, and the 1961 Statelessness Convention are not listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). Accordingly, there is no obligation under that Act to include an analysis of how a Bill engages Australia's obligations under these treaties in the statement of compatibility.

However, the full human rights impact of the present Bill cannot be considered without a consideration of these treaties. Further, the 1951 Refugee Convention and the 1961 Statelessness Convention have been (partially) implemented by provisions in the Migration Act and the *Australian Citizenship Act 2007* (Cth) ("Citizenship Act"), respectively.

### **3. Human rights protections provided by the Bill**

As mentioned above, the Bill seeks to ensure that children who are born in Australia to asylum seekers are not classified to have "entered Australia by sea" and are therefore not "unauthorised maritime arrivals" subject to transfer to offshore detention centres in regional processing countries.

The Bill, if passed, would also allow such children to apply for protection in Australia, as they would no longer be barred from doing so under section 46A of the Migration Act.<sup>16</sup>

Currently, children born in Australia to asylum seekers are classified as "unauthorised maritime arrivals" if:

1. An "unauthorised maritime arrival" is pregnant on arrival in Australia and gives birth in Australia before being transferred to an offshore detention centre in a regional processing country under section 198AD of the Migration Act; or
2. An "unauthorised maritime arrival", who is detained in an offshore detention centre in a regional processing country, is pregnant and is transferred temporarily to Australia for the birth of the child.<sup>17</sup>

In both circumstances, soon after the child's birth, the mother and newborn child are transferred to an offshore detention centre in a regional processing country.<sup>18</sup>

Below is a summary of the potential human rights violations arising from the transfer of children to offshore detention centres in regional processing countries, with respect to the impact of detention on children, the right to immediate birth registration, the right to acquire a nationality, and the right to a grant of nationality if the child is stateless.

#### **3.1. Impact of detention on children**

If children are detained, it should only be as a matter of last resort<sup>19</sup> and for the shortest period of time<sup>20</sup> needed to conduct health and security checks.<sup>21</sup>

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<sup>16</sup> See part 2.1 above. Pursuant to section 46A of the Migration Act, "unauthorised maritime arrivals" are barred from making a valid application for a visa for Australia, including a protection visa. However, the Minister retains a non-compellable discretion to determine that this restrictions do not apply to an "unauthorised maritime arrival" (see section 46A(2) of the Migration Act).

<sup>17</sup> Migration Act, s 198B.

<sup>18</sup> Migration Act, ss 198AD, 198AH; Caroline de Costa, "The grim prospects for pregnant asylum seekers on Nauru", *Crikey*, 29 April 2014 <http://www.crikey.com.au/2014/04/29/the-grim-prospects-for-pregnant-asylum-seekers-on-nauru/>.

<sup>19</sup> Migration Act, s 4AA; CRC, art 37(b).

<sup>20</sup> CRC, art 37(b).

<sup>21</sup> For an examination of alternatives to detention, see International Detention Coalition, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, 13 May 2011 <http://www.refworld.org/docid/4f0c14252.html>.



Children are particularly vulnerable to the negative impacts of detention.<sup>22</sup> The human rights implications of detaining children have been analysed and discussed at length by various interest groups and academics. Recent fora for such analysis and discussion have included the Parliamentary Joint Committee on Human Rights' Examination of the Migration (Regional Processing) Package of Legislation,<sup>23</sup> and the Australian Human Rights Commission's ongoing National Inquiry into Children in Detention.<sup>24</sup> We refer the Committee to the findings of these and other bodies.

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 CRC (in all actions concerning children ... the best interests of the child shall be a primary consideration);
- article 22 of the CRC (right of child asylum seekers to receive appropriate protection and humanitarian assistance);
- article 24 of the CRC (right to highest attainable standard of health);
- article 28 of the CRC (right to education);
- article 37 of the CRC (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 ICCPR (right to an effective remedy);
- article 7 of the ICCPR (freedom from torture or to cruel, inhuman, or degrading treatment or punishment);
- article 9 of the ICCPR (freedom from arbitrary detention);
- article 10(1) of the ICCPR (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 CAT (freedom from cruel, inhuman, or degrading treatment or punishment); and
- article 15 of the CRPD (freedom from torture or cruel, inhuman, or degrading treatment or punishment).

Further, transferring asylum seekers to offshore detention centres in regional processing countries may separate families. If this occurred, it would be in breach Australia's international legal obligations under article 17 of the ICCPR and the article 8 of the CRC (which provide that everyone has the right to freedom from arbitrary or unlawful interference with their family), and articles 23(1) and 24(1) of the ICCPR (which provide for the protection of the family and the child, respectively).<sup>25</sup>

### **3.2. Right to registration immediately after birth**

The transfer to offshore detention centres of asylum-seeker children born in Australia may interfere with such children's right to immediate birth registration.

#### **3.2.1. Importance of immediate birth registration**

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<sup>22</sup> Royal Australian and New Zealand College of Psychiatrists, Children in Immigration (Position statement 52, September 2011)  
[https://www.ranzcp.org/Files/Resources/College\\_Statements/Position\\_Statements/ps52-pdf.aspx](https://www.ranzcp.org/Files/Resources/College_Statements/Position_Statements/ps52-pdf.aspx).

<sup>23</sup> Parliamentary Joint Committee on Human Rights, *Examination of the Migration (Regional Processing) Package of Legislation*, 2012–13  
[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Committee\\_Inquiry\\_s/migration/submissions/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiry_s/migration/submissions/index).

<sup>24</sup> See submissions to the National Inquiry into Children in Immigration Detention 2014  
<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014-0>.

<sup>25</sup> As discussed in *Winata and Li v Australia*, UN Doc CCPR/C/72/D/930/2000, United Nations Human Rights Committee, 16 August 2001 <http://www.refworld.org/docid/3f588ef67.html>.

Article 7(1) of the CRC and article 24(2) of the ICCPR provide that a child should be registered immediately after birth. The right to immediate birth registration is a distinct and separate right by which the State records and acknowledges the existence and legal personality of a child.<sup>26</sup> The Committee on the Rights of the Child has interpreted immediate birth registration to mean that registration “should take place as soon as practically possible, within days rather than months after birth”.<sup>27</sup>

The right to a birth certificate is necessarily implied into the right to immediate birth registration, as it is the birth certificate that provides the substance to the right to birth registration.<sup>28</sup>

### **3.2.2. Birth registration process in Australia**

The UN Committee on the Rights of the Child has recommended that a standard birth certificate should be provided free of charge at the time of the registration of the birth.<sup>29</sup> By contrast, in Australia, birth registration is not automatic upon the birth of a child, and a birth certificate is not automatically issued upon birth registration.<sup>30</sup>

To register a birth in Australia, parents or guardians must complete and submit a birth registration application to the relevant state or territory authority. A birth certificate will not be issued if the birth is not registered with the relevant authority. The required supporting documents and fees to apply for a birth certificate vary between each state and territory.<sup>31</sup>

For children born in Australian onshore detention centres, or children born in Australian hospitals to asylum seekers detained in closed or community detention in Australia (including Christmas Island), detention operation officers arrange for the submission of completed registration forms to the relevant registration authority.<sup>32</sup> The costs associated with the submission of completed registration forms are covered by the Department of Immigration and Border Protection (“the Department”).<sup>33</sup>

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<sup>26</sup> United Nations Children’s Fund, *Implementation Handbook for the Convention on the Rights of The Child*, United Nations Children’s Fund, New York, 2002, 97

[http://www.unicef.org/publications/files/Implementation\\_Handbook\\_for\\_the\\_Convention\\_on\\_the\\_Rights\\_of\\_the\\_Child.pdf](http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf).

<sup>27</sup> Ibid, 100.

<sup>28</sup> Paula Gerber, Andy Gargett and Melissa Castan, ‘Does the Right to Birth Registration Include a Right to a Birth Certificate?’ (2011) 29 *Netherlands Quarterly of Human Rights* 434, 435–36.

<sup>29</sup> Concluding Observations on the Committee of the Rights of the Child regarding Australia, 28 August 2012, UN Doc CRC/C/AUS/CO4, 9

[http://www2.ohchr.org/english/bodies/crc/docs/co/CRC\\_C\\_AUS\\_CO\\_4.pdf](http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf).

<sup>30</sup> Gerber, Gargett and Castan (n 28) 437.

<sup>31</sup> For example, ‘Births, Deaths, and Marriages NT’ (Northern Territory), 2 July 2014, <http://www.nt.gov.au/justice/bdm/#certificate>; cf Queensland Government, ‘Applying for a Birth Certificate’ <http://www.qld.gov.au/law/births-deaths-marriages-and-divorces/birth-death-and-marriage-certificates/birth-certificates/applying-for-a-birth-certificate/>.

<sup>32</sup> The Hon Scott Morrison MP, Letter to Australian Churches Refugee Taskforce, Australian Churches Refugee Taskforce, 12 January 2014

<http://www.australianchurchesrefugeetaskforce.com.au/wp-content/uploads/2014/05/MorrisonResponse.pdf>.

<sup>33</sup> Ibid. It is unclear whether this includes assistance to apply for both birth registration and a birth certificate. It has been revealed that Serco, the service provider for Australian onshore immigration detention centres, is not required to record births in detention, and so it is unclear how the Department is informed of births in onshore detention centres in Australia. See Paul Farrell, ‘Immigration detention centres no longer formally report childbirth’, *The Guardian*, 25 November 2013 <http://www.theguardian.com/world/2013/nov/25/immigration-detention-centres-no-longer-formally-report-childbirth>. It is of concern that there have been reports that children born to detained asylum seekers in Australian hospitals do not have birth certificates, and are therefore at risk of statelessness. See Sophie Peer, ‘A child will die in immigration detention unless the system changes’,

However, there is no information available as to the process followed by the Department for registering the births of children whose parents (“unauthorised maritime arrivals”) are detained in a regional processing country but transferred to Australia for the birth.

Under section 198AD of the Migration Act, “an officer must, as soon as reasonably practicable, take an ‘unauthorised maritime arrival’ ... from Australia to a regional processing country”. There is no information published by the Department (or otherwise available) as to how the Department interprets the timeframe of “reasonably practicable” for asylum seekers who are transferred back to Australia for childbirth. A recent media report revealed that mothers are returned to detention on Christmas Island four weeks after birth,<sup>34</sup> so it could be assumed that a similar timeframe may apply to transferring new mothers and their babies from Australia back to offshore detention centres in regional processing countries.

Assuming that the baby and mother are well, and the timeframe for return to an offshore detention centre is four weeks, the following factors may increase the risk of a child being transferred to an offshore detention centre in a regional processing country before the necessary registration form is completed and submitted to the relevant authority, and a birth certificate is issued to the applicant:

- The submitted birth registration forms may contain errors, which could delay the processing of the application;
- The birth registration and birth certificate process can take a number of weeks depending on the state or territory in which the birth is registered, and the child and family may be transferred before the birth certificate is received by the parents. For example, in Queensland, the processing of a child’s registration can take up to 10 business days and the birth certificate is posted to the applicant following completion of the birth registration process.<sup>35</sup> In NSW, it can take up to six weeks for a non-urgent registration (which includes the issuing of a birth certificate);<sup>36</sup> and
- the complexity of the birth certificate application forms, and the fees and documentary requirements associated with applying for a birth certificate, are likely to prohibit many asylum seekers in detention from applying for a birth certificate for their newborn children.

Similarly, there is no information available as to the assistance provided to asylum seekers to register a child’s birth with the authority in the relevant state or territory, once they are transferred to offshore detention centres in regional processing countries.

Based on the available information, it is very likely that Australia is in breach of its international legal obligations to register births immediately by transferring newborn children to offshore detention centres in regional processing countries.

If the Bill is passed, asylum-seeker children will not be transferred to offshore detention centres in regional processing countries, and will instead remain in Australia. In Australia, parents and guardians of asylum-seeker children are more likely to receive the assistance

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*The Guardian*, 3 July 2014 <http://www.theguardian.com/commentisfree/2014/jul/03/a-child-will-die-in-immigration-detention-unless-the-system-changes>.

<sup>34</sup> de Costa (n 18).

<sup>35</sup> Births, Deaths, Marriages and Divorces (Queensland), ‘Register a birth’, 30 June 2014 <https://www.qld.gov.au/law/births-deaths-marriages-and-divorces/birth-registration-and-adoption-records/register-a-birth/>.

<sup>36</sup> Registry of Births Deaths and Marriages (NSW), ‘Forms Fees and Turnaround’, 18 August 2014 [http://www.bdm.nsw.gov.au/bdm\\_fft.html](http://www.bdm.nsw.gov.au/bdm_fft.html).



required to immediately and effectively register births,<sup>37</sup> in accordance with Australia's international legal obligations.

### **3.3 Right to acquire a nationality and the right to a grant of nationality for individuals who would otherwise be stateless**

The right to acquire a nationality is contained in article 24(3) of the ICCPR and article 7(1) of the CRC. The right to a grant of nationality for individuals who would otherwise be stateless is contained in articles 1 and 2 of the 1961 Statelessness Convention.

Birth registration is an important tool for the prevention of statelessness<sup>38</sup> because it establishes a legal record of where a child was born and who his or her parents are.<sup>39</sup> If lack of birth registration and access to nationality is not addressed, children may grow up to become stateless adults, incapable of transferring a nationality to their children, and thereby perpetuating statelessness.<sup>40</sup>

Descendants of stateless asylum seekers and refugees born in Australia can apply for "conferral" of Australian citizenship.<sup>41</sup> That is, pursuant to section 21(8) of the Citizenship Act, a child is eligible to become an Australian citizen 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, and is not entitled to acquire the nationality or citizenship of a foreign country. The Minister cannot refuse an application under section 21(8) if he or she is satisfied as to the requirement of section 21(8) of the Citizenship Act.<sup>42</sup> This complies with article 1 of the 1961 Statelessness Convention. However, the Minister must not approve the person becoming an Australian citizen unless the Minister is satisfied of the identity of the person.<sup>43</sup>

If the births of children born to asylum seekers and refugees in detention are not registered as per Australia's international legal obligations (as detailed above in section 3.2), the children will have difficulty proving their time and place of birth, and will therefore have difficulty proving links to their parents and their parents' nationality. Such children will be at risk of statelessness. For children born to stateless refugees and asylum seekers, if their births are not registered pursuant to Australia's legal obligations, the children will have difficulty proving their time and place of birth and accessing Australian citizenship under

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<sup>37</sup> Morrison (n 32).

<sup>38</sup> The 1954 Statelessness Convention defines a stateless person as a "person who is not considered as a national by any State under the operation of its law" (art 1). Populations who are stateless or at risk of statelessness have limited access or no access to basic rights such as education, employment, housing, and health services. These populations are also at a heightened risk of exploitation, human trafficking, arrest, and arbitrary detention because they cannot prove who they are or where they come from. With no legal identity populations are often unable to pay taxation, buy and sell property, open a bank account, get married legally, or register the birth of a child. Also, there are inherent risks to a State's ability to govern when there is limited information available and recorded on all of the populations residing within a State's borders. See generally United Nations High Commissioner for Refugees (UNHCR), *Nationality and Statelessness: Handbook for Parliamentarians No 22*, July 2014 <http://www.refworld.org/docid/53d0a0974.html>.

<sup>39</sup> UNHCR, 'Birth Registration' (Issue Brief, August 2013) <http://www.refworld.org/pdfid/523fe9214.pdf>.

<sup>40</sup> Inge Sturkenboom, 'Under the Radar and Under Protected: The Urgent Need to Address Stateless Children's Rights', European Network on Statelessness, 8 November 2012 <http://www.statelessness.eu/blog/under-radar-and-under-protected-urgent-need-address-stateless-children%E2%80%99s-rights>.

<sup>41</sup> The acquisition of Australian citizenship is governed by the *Australian Citizenship Act 2007* (Cth). Birth in Australia does not automatically mean that a child is an Australian citizen (unless at least one of his or her parents is a citizen or permanent resident) – section 12(1)(a). A child may become an Australian citizen on his or her 10<sup>th</sup> birthday if the child was born in Australia has been ordinarily resident in Australia for those 10 years – section 12(1)(b).

<sup>42</sup> Citizenship Act, s 24(2).

<sup>43</sup> Citizenship Act, s 24(3).

section 21 of the Citizenship Act. Such children will be at risk of statelessness (or in fact stateless) if they do not acquire Australian citizenship. In all of these circumstances, Australia may be in breach of its international legal obligations with respect to the right to acquire a nationality and right to grant nationality for individuals who would otherwise be stateless.

Further, if a child born in Australia (who is stateless or at risk of statelessness) is detained in an offshore detention centre in a regional processing country, he or she will be deprived of the protections provided to stateless persons under the 1954 Stateless Convention and the 1961 Statelessness Convention. Such protections include freedom of movement and freedom from discrimination.

If the Bill is passed, asylum-seeker children will have better access to immediate birth registration as they will not be transferred to offshore detention centres in regional processing countries, and will instead remain in Australia. Immediate birth registration is one step towards ensuring that asylum-seeker children have full access to their rights under international law to acquire a nationality by descent (that is, to follow the nationality of their parents) or be granted Australian nationality if they are stateless.

#### **4. Human rights implications of the Bill**

We support the Bill if it discontinues the transfer of children born in Australia to offshore detention centres and allows them to apply for protection in Australia. However, from the perspective of international human rights law, these amendments also raise a number of human rights concerns.

##### **4.1. Parents and children may have a different legal status**

We are concerned that the proposed amendments may lead to children having a different legal status from their parents, and thus different protection entitlements.

As mentioned above, a child born in Australia to an “unauthorised maritime arrival” is also classified as an “unauthorised maritime arrival”. Under the proposed amendments, such a child would no longer be classified in this way, but his or her parents would remain “unauthorised maritime arrivals”. As “unauthorised maritime arrivals”, the parents would only be entitled to apply for protection in Australia if the Minister exercised his or her discretion to deem their protection applications to be valid.<sup>44</sup> As “unauthorised maritime arrivals”, the parents would remain subject to transfer to a regional processing country,<sup>45</sup> unless the Minister exercised his or her discretion to make a determination that section 198AD of the Migration Act did not apply.<sup>46</sup>

Therefore, without any guarantee that the parents could also apply for protection in Australia and would not be transferred to a regional processing country, the Bill could inadvertently encourage the separation of children from their parents.

The separation of children from their parents on this basis may breach a number of international human rights obligations, such as:

- Article 17(1) of the ICCPR (right to respect for privacy, family, home and correspondence);
- Article 23(1) of the ICCPR (protection of the family);
- Article 24(1) of the ICCPR (protection of the child);
- Article 3(1) of the CRC (best interests of the child); and

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<sup>44</sup> Migration Act, s 46A(2)–(7).

<sup>45</sup> Migration Act, s 198AD.

<sup>46</sup> Migration Act, s 198AE.

- Article 8 of the CRC (right of the child to preserve his or her identity, including ... family relations as recognized by law without unlawful interference).

#### **4.2. Children born in Australia are still subject to onshore detention, even if they are not classified as “unauthorised maritime arrivals”**

To the extent that the Bill would end the transfer to regional processing countries of children born to asylum seekers in Australia, this is a welcome step. However, even if a child born to an “unauthorised maritime arrival” were not classified as an “unauthorised maritime arrival” him- or herself, and were permitted to remain in Australia, the child would still be an unlawful non-citizen in Australia.<sup>47</sup> As an unlawful non-citizen, the child would be subject to onshore detention in Australia (either in closed or community detention) while his or her protection claim were assessed,<sup>48</sup> unless the Minister were to grant the child a bridging visa under section 73 of the Migration Act.<sup>49</sup>

A slightly different situation would arise for a child born in Australia to stateless asylum seekers who came to Australia by boat. This is because a child born in Australia to stateless parents has access to Australian citizenship via section 21(8) of the Citizenship Act. If a child is granted Australian citizenship, he or she is no longer a non-citizen and cannot be detained pursuant to section 189 of the Migration Act.

### **5. Conclusion**

Our recommendation is that this Bill should be passed. First, it will end the transfer to offshore detention centres of children born in Australia to asylum seekers who are “unauthorised maritime arrivals”. Secondly, it will enable such children to seek protection in Australia. Thirdly, by remaining in Australia, such children will have better access to immediate birth registration and, following birth registration, will have access to the right to acquire their parent’s nationality by descent, or the grant of Australian nationality (if they are stateless).

However, we acknowledge that from the perspective of international human rights law, these amendments do not go far enough in protecting the human rights of asylum-seeker children born in Australia. As outlined above, we are concerned that the Bill could potentially lead to the separation of children from their parents if the parents and children have different legal statuses. Such separation would be in breach of a number of Australia’s international legal obligations. The better approach would be to read the Bill consistently with Australia’s obligations relating to the best interests of children and the protection of family unity, and to ensure that such children’s parents are also able to obtain protection.

We are also concerned that even if children born to “unauthorised maritime arrivals” are no longer classified as “unauthorised maritime arrivals” themselves, they will be non-citizens in Australia and subject to detention (either closed or community-based). Children should only be detained as a matter of last resort and for the shortest possible period.

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<sup>47</sup> Migration Act, s 14.

<sup>48</sup> Migration Act, s 189.

<sup>49</sup> This is to be contrasted with the Explanatory Memorandum to this Bill (at 2), which states that “this Bill ensures that children born in Australia to asylum seeker parents are not subjected to arbitrary arrest or detention” with respect to article 26 of the ICCPR. See section 3.1 above on the impacts of detention on children.