



SENATE STANDING COMMITTEES ON LEGAL AND CONSTITUTIONAL AFFAIRS

MIGRATION AMENDMENT (PROTECTING BABIES BORN IN AUSTRALIA) BILL

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing 200 organisations and over 900 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and refugee and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to comment on the *Migration Amendment (Protecting Babies Born in Australia) Bill 2014*. It is RCOA's long-standing view that all asylum seekers, regardless of their mode of arrival in Australia, should have equal access to Australia's statutory refugee status determination system and those found to be refugees should be granted a durable protection outcome, in line with other international obligations. We oppose policies which penalise or otherwise disadvantage asylum seekers who travel to Australia by boat.

While RCOA recognises that the amendments outlined in this Bill will not apply to the majority of asylum seekers currently in Australia, we welcome efforts to alleviate the negative impacts of Australia's deterrence-based asylum seeker policies, particularly where young children are concerned. RCOA therefore recommends that the Bill be passed. We also recommend that the Committee explore options for amending the Bill to address the situation of stateless children whose parents arrived in Australia by boat.

1. Protecting the wellbeing of children

- 1.1. The consequences of being deemed an "unauthorised maritime arrival" under the *Migration Act 1958* are considerable and have significant implications for health and wellbeing. Possible consequences currently include: forcible transfer to an offshore detention centre; prolonged indefinite detention either in Australia or in an offshore detention centre, potentially for the course of the person's natural life; and denial of access to Australian residency, Australia's statutory visa systems, family reunion opportunities and a range of settlement and other support services.
- 1.2. Past and current experiences with policies which permit prolonged indefinite detention, block access to protection in Australia and limit access to services and support have unequivocally demonstrated that such policies have a serious negative impacts on health (particularly mental health) and wellbeing, impede recovery from past experiences of trauma and hamper the capacity of humanitarian entrants to settle successfully in Australia. Where children are concerned, these impacts can be particularly egregious, potentially resulting in serious developmental delays.
- 1.3. RCOA therefore welcomes the amendments outlined in this Bill as a means of exempting children who were born in Australia from the punitive policy regime targeting asylum seekers who arrive by boat. While it remains RCOA's position that no asylum seeker should be subject to penalties based solely on their mode of arrival in Australia, we support this Bill as a means of alleviating the negative impacts of Australia's current policy regime on this particularly vulnerable group of children.

- 1.4. RCOA believes that the Bill could be further improved through inserting a further amendment stipulating that members of the same family unit of a child born in Australia should be exempt from offshore processing. As the Bill stands, the parents or siblings of a child born in Australia who themselves travelled to Australia by boat could still be transferred to an offshore processing centre. An additional amendment would therefore be necessary to ensure that family unity is preserved.

2. Rectifying unintended consequences

- 2.1. As per amendments made to the *Migration Act* in 2012, a person is deemed to have entered Australia by sea if they “entered the migration zone except on an aircraft that landed in the migration zone”. We understand that this wording was selected so as to encompass all possible means by which a person may attempt to make their way to Australia by sea.
- 2.2. However, this wording has created a situation in which a child born in Australia may be subject to offshore processing even if their parents are not. For example, a child whose parents entered Australia by plane on a temporary visa and subsequently became unlawful could, under the current wording of the Act, be transferred to an offshore processing centre.
- 2.3. RCOA believes that the current wording of the Act is out of step with the purpose of the 2012 amendments, which was to prevent asylum seekers who enter Australia by boat from accessing Australia’s visa system and render them subject to offshore processing. While it remains our position that no asylum seeker should be penalised in this manner, we recommend that the wording of the Act should at the very least be adjusted to rectify the anomaly created by the 2012 amendments. The changes proposed in the Bill would achieve this outcome through clarifying that children who were born in Australia are not considered to have entered Australia by sea.

3. Situation of stateless children

- 3.1. While RCOA would welcome the passing of the Bill, we also believe it should be further expanded to address the situation of stateless children whose parents arrived in Australia by boat. While Australia is obliged under the 1989 Convention on the Rights of the Child to protect the rights and wellbeing of all children under its jurisdiction, it also has additional obligations towards stateless children.
- 3.2. As a signatory to the 1961 Convention on the Reduction of Statelessness, Australia is obliged to “grant its nationality to a person born in its territory who would otherwise be stateless”. This obligation is reflected in Australia’s *Citizenship Act 2007*, under which any child who was born in Australia, is not and has never been a citizen of another country and is not entitled to apply for citizenship elsewhere, is eligible for Australian citizenship. Currently, however, there appears to be some uncertainty as to whether a stateless child born in Australia whose parents arrived in Australia by boat could be subject to the same punitive policy regime as their parents.
- 3.3. In RCOA’s view, it would be completely unacceptable to subject a child who has a legitimate claim to Australian citizenship to policies which would be unlawful if applied to any other Australian child. There are no circumstances, for example, under which it would be acceptable to for any other Australian child, solely due to the actions of their parents, to be subjected to prolonged indefinite detention without charge or conviction; to be forcibly transferred to another country and denied the right to reside in Australia; or to be refused access to services and opportunities available to other children in similar circumstances
- 3.4. RCOA is of the belief that stateless children born in Australia should be granted Australian citizenship regardless of their parents’ immigration status. We therefore recommend that the Committee explore options for amending Australia’s citizenship and migration legislation to clarify beyond doubt that all stateless children born in Australia are entitled to Australian citizenship and should therefore be exempt from any punitive measures targeting non-citizens. In line with the recommendation put forward in Section 1.4 of this submission, these amendments should also include provisions to protect family unity.

4. Summary of recommendations

Recommendation 1

RCOA recommends that the Migration Amendment (Protecting Babies Born in Australia) Bill 2014 be amended to exempt members of the same family unit of a child born in Australia from offshore processing.

Recommendation 2

Subject to the previous recommendation being adopted, RCOA recommends that the Migration Amendment (Protecting Babies Born in Australia) Bill 2014 be passed.

Recommendation 3

RCOA recommends that the Senate Standing Committees on Legal and Constitutional Affairs explore options for Australia's citizenship and migration legislation to clarify beyond doubt that stateless children born in Australia are entitled to Australian citizenship, regardless of their parents' immigration status.