Australian Human Rights Commission

President
Professor Gillian Triggs

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Secretary,

Inquiry into the Migration Amendment (Protecting Babies Born in Australia) Bill 2014

Thank you for the opportunity to make a submission to this inquiry.

The Commission supports the proposed amendment to the *Migration Act 1958* (Cth) (Migration Act) to ensure that a child who is born in Australia is not classified as having 'entered Australia by sea'.

As the Migration Act currently stands, s 5AA and s 10 appear to produce the problematic result that whenever a non-citizen child is born in the migration zone,[1] he or she is to be taken as having 'entered Australia by sea'. Section 10 provides that a child who was born in the migration zone and was a non-citizen when he or she was born shall be taken to have entered Australia when he or she was born. Section 5AA(2)(a) provides that if a person entered the migration zone except on an aircraft that landed in the migration zone, then the person will be taken to have 'entered Australia by sea'.

If the parents of the baby do not have a current visa at the time the baby is born, the baby will be an 'unlawful non-citizen' at birth.[2] As a person deemed to have entered Australia by sea and become an unlawful non-citizen as a result, the baby will be an 'unauthorised maritime arrival' (unless he or she is a New Zealand citizen, a resident

1 The 'migration zone' means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations: see Migration Act, s 5.

2 Migration Act, ss 13, 14 and 78.

of Norfolk Island, or a person within a prescribed class).[3] As an 'unlawful non-citizen', the baby would be liable to detention under s 189. As an 'unauthorised maritime arrival' the baby would then be liable to removal to a regional processing country pursuant to s 198AD.

This result seems to apply regardless of how the baby's parents came to be in Australia. For example, it appears that if a woman arrives in Australia by air, overstays her visa and gives birth to a child who is not a citizen of Australia, then the child will be deemed to have 'entered Australia by sea' and be liable to be detained and then taken to a regional processing country.

Entry into Australia by sea

It does not appear that this result was intended at the time that s 5AA was inserted into the Migration Act. In particular, it appears that in enacting s 5AA, insufficient consideration was given to the interaction between the new section and s 10 of the Migration Act.[4]

Section 5AA of the Migration Act was inserted by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2012* (Cth). The aim of this amendment was to implement recommendation 14 of the Report of the Expert Panel on Asylum Seekers handed to the Prime Minister and the Minister for Immigration and Citizenship on 13 August 2012. Recommendation 14 was that the Migration Act 'be amended so that arrival anywhere on Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive in an excised offshore place'.

There was no reference in recommendation 14 to changing the status of children born in Australia.

Section 5AA(2)(a) defines the phrase 'entered Australia by sea' in the following way:

> A person entered Australia by sea if … the person entered the migration zone except on an aircraft that landed in the migration zone.

It is clear from the explanatory memorandum to the amending Bill that the defined term 'entered Australia by sea' was not merely a deeming provision but was actually intended to be descriptive of entry into Australia by maritime means. This form of words was:[5]

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3 Migration Act, s 5AA(1) and (3). Currently, the only prescribed class for the purposes of s 5AA(3)(c) comprises people who either hold an 'ETA-eligible passport' or when they enter Australia are accompanied by another person who holds an 'ETA-eligible passport' and are included in that passport: *Migration Regulation 1994* (Cth), reg 1.15J. This provision will not apply to people who are born in Australia.

4 Section 10 is a provision of long standing. It was first introduced, in substantially the same form that it currently has, as s 5D following the passage of the *Migration Legislation Amendment Act 1989* (Cth).

5 Explanatory Memorandum to the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth), at [48].

> … intended to cover *people who make their way to Australia by sea* without being rescued or intercepted and who enter the migration zone.
>
> (emphasis added)

Further it was:[6]

> … intended to cover all possible situations *where a person can enter Australia by sea* apart from where they are being dealt with under subsection 245F(9) of the Act or are rescued at sea.
>
> (emphasis added)

The form of words chosen was in the negative. A person entered by sea if they entered Australia other than by air. The explanatory memorandum to the amending Bill noted that this form of definition was chosen:[7]

> 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 … .

Nowhere in the explanatory memorandum was it suggested that this form of words was intended to capture a person who entered Australia by being born in Australia.

The Commission's position

The Commission supports the *Migration Amendment (Protecting Babies Born in Australia) Bill 2014* (Cth).

The amendments proposed are consistent with article 37(b) of the Convention on the Rights of the Child (CRC) which provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

Without these amendments, non-citizen children who:

- are born in Australia to parents who do not hold a current visa;
- are therefore deemed to have 'entered Australia by sea'; and
- become 'unauthorised maritime arrivals'

will be liable to detention and offshore processing.

The amendments are also consistent with the rights of children who are seeking refugee status, or who are considered to be refugees, to receive appropriate protection and humanitarian assistance (article 22 of the CRC). This is because if a

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

7 Explanatory Memorandum to the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth), at [58].

child is not an 'unauthorised maritime arrival' he or she would be able to make an application for protection in Australia.[8]

I note that in the second reading speech for this Bill, Senator Sarah Hanson-Young referred to the situation of children born in Australia to parents seeking asylum here. Senator Hanson-Young said:[9]

> The best option for these children is to be able to stay in Australia with their parents while their claims for protection are assessed.

In the case of children born in Australia whose parents are not unlawful maritime arrivals (and therefore not subject to offshore processing), the proposed amendments will further the rights of children not to be separated from their parents against their will (article 9 of the CRC).

In the case of children born in Australia whose parents are unlawful maritime arrivals (and are themselves subject to offshore processing), it may be necessary to make a further legislative amendment to ensure that the parents are not liable to be taken to a regional processing country pursuant to s 198AD. Alternatively, the Minister could make a determination pursuant to s 198AE to the same effect. This would again allow the whole family to have their applications for asylum assessed in Australia.

Yours sincerely,

Gillian Triggs
President

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8 *Cf* Migration Act, s 46A.

9 Commonwealth, *Parliamentary Debates*, Senate, 18 June 2014, p 63 (Senator Hanson-Young).