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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".[1]

On 14 October 2014, the matter of *P n ff B y s Mo her s L g on u rd n v M n s er for gr on* is listed for hearing in the Federal Circuit Court at Brisbane. This matter has been subject to much media attention.[2] 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 *M gr on Ac* (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 fur

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.[6]

On 20 May 2013, the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act* (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.[7] 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).[8]

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,[9] and must be transferred to a regional processing country[10] as soon as reasonably practicable.[11] 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”.[12]

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

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:

- *Convention relating to the Status of Refugees* "1951 Refugee Convention", read in conjunction with the *Protocol relating to the Status of Refugees*)
- *Convention relating to the Status of Stateless Persons* ("1954 Statelessness Convention")
- *Convention on the Reduction of Statelessness* ("1961 Statelessness Convention")
- *International Covenant on Civil and Political Rights* ("ICCPR")
- *International Covenant on Economic, Social and Cultural Rights* ("ICESCR")
- *Protocol relating to the Status of Refugees* ("1967 Protocol")
- *Convention on the Elimination of All Forms of Discrimination against Women* ("CEDAW")
- *Convention Against Torture and Other Cruel*

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 8(s)-0.300048(t)-4.77to(s)-0.300048(t)-4.77d s t(o)1.32101()1.31968(n)1..93969(r)-2.53846()1.31968

Children are particularly vulnerable to the negative impacts of detention.[22] 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,[23] and the Australian Human Rights Commission's ongoing National Inquiry into Children in Detention.[24] 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 occured, 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).[25]

3.2. Right to registration

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