

Australian Citizenship (Intercountry Adoption) Bill 2014

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 29 May 2014

Purpose

1.35 The Australian Citizenship (Intercountry Adoption) Bill 2014 (the bill) seeks to amend the Australian Citizenship Act 2007 (the Act) to allow for acquisition of Australian citizenship by a person adopted outside Australia by an Australian citizen in accordance with a bilateral arrangement between Australia and another country.

1.36 Specifically, the bill would amend the Act to create an entitlement to citizenship for persons adopted in accordance with a bilateral arrangement.¹ This entitlement is equivalent to that currently provided to persons adopted in accordance with the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention).²

Committee view on compatibility

Rights of the child

1.37 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child (CRC). All children under the age of 18 years are guaranteed these rights. The rights of children include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

1.38 States parties to the CRC are required to ensure to children the enjoyment of fundamental human rights and freedoms and are required to provide for special protection for children in their laws and practices. In interpreting all rights that apply to children, the following core principles apply:

- rights are to be applied without discrimination;
- the best interests of the child are to be a primary consideration;

1 Bilateral arrangements with non-States parties to the Hague Convention appear currently to be in force with Taiwan and South Korea. South Korea signed the Convention on 24 May 2013, but is yet to ratify it. The committee notes in this regard that the texts of the bilateral agreements referred to on the Attorney-General's Department website between Australia and Taiwan and between Australia and South Korea do not appear to be available on that website.

2 The Hague (29 May 1993), Entry into force for Australia: 1 December 1998, [1998] ATS 21.

- there must be a focus on the child's right to life, survival and development, including their physical, mental, spiritual, moral, psychological and social development; and
- there must be respect for the child's right to express his or her views in all matters affecting them.

Extension of citizenship rights to children adopted from countries that are not party to the Hague Convention

1.39 Of particular relevance to the bill, article 21 of the CRC provides special protection in relation to inter-country adoption, seeking to ensure that it is performed in the best interest of the child. Specific protections include that inter-country adoption:

- is authorised only by competent authorities;
- is subject to the same safeguards and standards equivalent which apply to national adoption; and
- does not result in improper financial gain for those involved.

1.40 The Hague Convention establishes a common regime, including minimum standards and appropriate safeguards, for ensuring that inter-country adoptions are performed in the best interests of the child and with respect for the fundamental rights guaranteed by the CRC. The Hague Convention also assists in combatting the sale of children and human trafficking.

1.41 As noted above, the bill seeks to facilitate inter-country adoptions in accordance with a bilateral agreement where the country of the child's birth (or residence) is not a party to the Hague Convention. The 'fast track' arrangements for citizenship are currently only available where the birth country is a party to the Hague Convention. The statement of compatibility states that the bill does not engage human rights:

...as Australia does not generally owe obligations to persons outside its territory and or jurisdiction. As the children to whom these amendments are relevant are located outside Australia's territory and/or jurisdiction, Australia's obligations under the seven core human rights treaties are not engaged. However, once these children come within Australia's territory and/or jurisdiction it is acknowledged that some rights and freedoms articulated under the seven core international human rights treaties will be engaged.³

1.42 The statement of compatibility concludes that the bill is compatible with human rights 'as it does not raise any human rights issues'.⁴

3 Explanatory memorandum (EM), Attachment A, p. 1.

4 EM, Attachment A, p. 1.

1.43 However, the committee notes that, by providing for the grant of Australian citizenship (and the issue of passports) to children adopted by Australian citizens, the bill would clearly provide for the exercise of Australian jurisdiction over any such children both prior to and following their arrival in Australia.

1.44 Moreover, as noted above, article 21 of the CRC imposes obligations on both the country of the child's birth and the country of the adopting parents to ensure that the adoption is in the best interests of the child.

1.45 It follows that the bill is therefore properly seen, in relation to a child the subject of inter-country adoption proceedings under the bill, as potentially engaging the requirement to act in the best interests of the child and the rights guaranteed by the CRC. The committee considers that the assessment in the statement of compatibility, to the extent it suggests that Australia has no jurisdiction over or responsibility in relation to, such children until their arrival in Australia, is based on an unduly restricted view of both the scope of Australia's human rights obligations, and the circumstances in which they may apply.

1.46 In the committee's view, the bill may limit the rights of the child, and particularly the obligation to consider the best interests of the child in relation to inter-country adoptions. This is because the bill specifies no standards or safeguards that will apply to inter-country adoptions under a bilateral agreement, and it is therefore not clear whether lower standards, or fewer safeguards, may apply to inter-country adoptions under a bilateral agreement that apply under the Hague Convention. Nor are such standards or safeguards contained in the *Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 1998*, which provide for the recognition of an overseas adoption under the law of a country with which Australia has a bilateral arrangement.

1.47 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the rational connection between the measure and that objective, and the proportionality of the measure.

1.48 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the bill is compatible with the best interests of the child and the specific protections for inter-country adoptions provided for in article 21 of the CRC and the Hague Convention.