

1998-99

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION LEGISLATION AMENDMENT BILL (No. 1) 1999

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Immigration and Multicultural Affairs,
the Hon. Philip Ruddock MP)

**THIS MEMORANDUM TAKES INTO ACCOUNT AMENDMENTS MADE BY
THE SENATE TO THE BILL AS INTRODUCED**

MIGRATION LEGISLATION AMENDMENT BILL (No. 1) 1999

OUTLINE

Overview

1. The Migration Legislation Amendment Bill (No. 1) 1999 ("the Bill") seeks to:
 - amend the *Migration Act 1958* ("the Migration Act") to clarify the rights of certain people in immigration detention;
 - ensure that the Bill refers to the correct name of the Human Rights and Equal Opportunity Commission ("HREOC"); and
 - create new and strengthen existing people trafficking offences.
2. Section 189 of the Migration Act provides for the mandatory detention of a non-citizen who does not hold a valid visa. Such people are in Australia unlawfully and are not entitled to be at liberty in the community.
3. Certain rights for detainees and obligations on officials responsible for the detention are set out in the Migration Act. For example, detainees to whom section 193(1) does not apply have the right to be advised that they may apply for a visa within the statutory time limits.
4. Section 256 of the Migration Act establishes that a person in immigration detention has a right to access facilities to make a statutory declaration or obtain legal advice or take legal proceedings only when requested. The intention is to place the onus on unlawful non-citizens to make a request for such assistance.
5. This Bill seeks to clarify the law so that this onus cannot be overcome through communication by sealed envelopes between HREOC or the Ombudsman and detainees, except where those communications are in relation to a complaint to one of those agencies made by the person detained. The Bill is in response to the decision of the Federal Court in *Human Rights and Equal Opportunity Commission and Human Rights Commissioner v Secretary of the Department of Immigration and Multicultural Affairs* (1996) 137 ALR 207.
6. This Bill also seeks to ensure that the Migration Legislation Amendment Bill (No. 1) 1999 refers to the correct name of the Commission when the change of name comes into effect; and creates new, and strengthens existing, people trafficking offences.
7. The proposed amendments to the Migration Act seek to:

- ensure that there is no obligation on the Minister or any officer to provide a person to whom section 193(1) applies with an application form for a visa. However, there will be an obligation on the person responsible for a non-citizen's immigration detention to provide applications forms for a visa on that detainee's request;
 - provide that paragraph 20(6)(b) of the *Human Rights and Equal Opportunity Commission Act 1986* ("the HREOC Act") and paragraph 7(3)(b) of the *Ombudsman Act 1976* ("the Ombudsman Act") do not apply to persons who, having arrived in Australia as unlawful non-citizens, are in immigration detention – unless such persons themselves initiate a complaint either in writing to HREOC, or orally or in writing to the Ombudsman;
 - ensure that references to HREOC in the Bill are correct, consequential to the proposed Human Rights Legislation Amendment Bill (No. 2) 1999 which was introduced into the House of Representatives on 17 February 1999. That Bill proposes to rename the Human Rights and Equal Opportunity Commission as the Human Rights and Responsibilities Commission;
 - increase existing penalties for people trafficking offences in sections 233, 234 and 236 of the *Migration Act 1958* ("the Act") from imprisonment for 2 years to imprisonment for 10 years and / or 1,000 penalty units, in line with Commonwealth criminal law policy;
 - create new offences relating to people trafficking. The new offences are aimed at people who intentionally organise, or participate in, the trafficking of groups of 5 or more people. The proposed penalty for each of these new offences is 20 years imprisonment and / or 2,000 penalty units;
 - amend section 492 of the Act to make reference to section 233 and proposed new sections 232A and 233A of the Act. The amendments will ensure that prosecutions of offences under sections 232A, 233 and 233A will be able to be commenced at any time after the commencement of the amendments; and
 - make references to the people trafficking offences in the *Telecommunications (Interception) Act 1979* to provide a legal basis for the use of interception devices in relation to those offences, in certain circumstances.
8. The proposed amendments do not seek:
- to limit any powers or responsibilities of HREOC or the Ombudsman, other than those that relate to the delivery of sealed envelopes by those two agencies to persons to whom section 193(1) of the Act applies; or

- to limit the rights of detainees, to whom section 193(1) applies, to request advice including legal advice from any body, including HREOC and the Ombudsman.

FINANCIAL IMPACT STATEMENT

9. The amendments to the Migration Act will have no financial impact.

MIGRATION LEGISLATION AMENDMENT BILL (No. 1) 1999**NOTES ON INDIVIDUAL CLAUSES****Clause 1 Short Title**

1. This clause provides that the Act may be cited as the *Migration Legislation Amendment Act (No. 1) 1999*.

Clause 2 Commencement

2. Subclause 2(1) provides for sections 1, 2 and 3 of the Migration Legislation Amendment Bill (No. 1) 1999 to commence on the day it receives the Royal Assent.

3. Subclause 2(2) provides for items 1, 2, 4 and 10 of Schedule 1 and Schedule 3 to be taken to have commenced on the date of the introduction of the Bill into the Senate. This is to ensure that these provisions cover any issues that may occur between the date of introduction until the Act commences.

4. Subclause 2(3) provides for item 3 of Schedule 1 to commence immediately after the commencement of item 2 of Schedule 1 to the *Human Rights Legislation Amendment Act (No. 2) 1999*.

5. Subclause 2(4) provides that, subject to subsection 2(5), the items of Schedule 1, other than those cited in subsections 2(2) and 2(3), and Schedule 2 commence on a day to be fixed by Proclamation.

6. Subclause 2(5) provides that the items of Schedule 1 referred to in subsection 2(4), and Schedule 2 will commence 6 months after the Royal Assent unless Proclamation occurs first.

Clause 3 Schedule(s)

7. This clause provides that, subject to section 2, the Acts specified in the Schedules are amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule is to operate according to its terms.

SCHEDULE 1

AMENDMENT OF THE MIGRATION ACT 1958

Item 1 Subsection 193(2)

8. Section 193(1) provides that sections 194 and 195 do not apply to a person who is in immigration detention having been detained as an unlawful non-citizen on arrival in Australia. Those sections set out obligations on officials to advise a detainee that they may apply for a visa within the statutory time frame and will be kept in immigration detention until either they are removed, deported or are granted a visa.

9. Proposed subsection 193(2) provides that apart from the rights contained in section 256, there is no obligation on the Minister or any officer to provide to a person to whom subsection 193(1) applies with:

- any advice as to whether the person may apply for a visa;
- any opportunity to apply for a visa; or
- access to advice (legal or otherwise) in relation to applications for visas.

10. It also provides that in addition to these provisions, neither the Minister nor any officer has any obligation to provide a person to whom section 193(1) applies with an application form for a visa (unless that person requests one).

Item 2 Section 193

11. This item inserts subsections (3) and (4) into section 193.

12. Paragraph (3)(a) provides that paragraph 20(6)(b) of the *Human Rights and Equal Opportunity Commission Act 1986*, does not apply to those persons covered by subsection 193(1) unless these persons themselves initiate a complaint in writing to HREOC.

13. This provision relates only to detainees covered by subsection 193(1). The effect of the proposed amendment is that if such a detainee does not initiate a written complaint to HREOC, then the detainee does not have the right to have the sealed envelope delivered to them from HREOC.

14. Similarly, paragraph (3)(b) provides that paragraph 7(3)(b) of the *Ombudsman Act 1976* does not apply to those persons covered by subsection 193(1) unless these persons themselves initiate a complaint to the Ombudsman. Pursuant to the Ombudsman Act, the complaint may be made orally or in writing.

15. This paragraph relates only to detainees covered by subsection 193(1). The effect of the proposed amendment is that if such a detainee does not initiate a written or oral complaint

to the Ombudsman, then the detainee does not have the right to have the sealed envelope delivered to them from the Ombudsman.

16. Subsection (4) makes it clear that section 193 is to apply to a person covered by subsection (1) as long as the person remains in immigration detention.

Note: A notation is made after the proposed amendment to section 193 to provide that the heading to section 193 (Sections do not apply) is to be replaced with "Application of law to certain non-citizens while they remain in immigration detention".

Item 3 Paragraph 193(3)(a)

17. This item repeals and substitutes paragraph 193(3)(a) in order to reflect the proposed change of name of the Human Rights and Equal Opportunity Commission to the Human Rights and Responsibilities Commission and the proposed change of name of the *Human Rights and Equal Opportunity Commission Act 1986* to the *Human Rights and Responsibilities Commission Act 1986* by the Human Rights Legislation Amendment Bill (No. 2) 1999.

18. This item will only take effect once the *Human Rights Legislation Amendment Act (No. 2) 1999* has commenced. The amendments seek to ensure that the Migration Legislation Amendment Bill (No. 1) 1999 refers to the correct name of the Commission, as in existence at the time the change of name comes into effect pursuant to the changes made by the Human Rights Legislation Amendment Bill (No. 2) 1999.

Item 4 Subsection 198(4)

19. This item repeals subsection 198(4) of the Migration Act. This subsection is no longer necessary in view of the amendments in this Bill to subsection 193(2) and the clarification provided by new subsection 193(4).

Item 5 After section 232

New section 232A Organising bringing groups of non-citizens into Australia

20. This item inserts new section 232A after section 232 of the Act. New section 232A provides a new offence in relation to the trafficking of groups of 5 people or more to Australia. The offence is aimed at organised operations and attracts a penalty of imprisonment for 20 years or 2,000 penalty units, or both.

Item 6 Section 233 (penalty)

21. This item amends section 233 to increase the penalty for the bringing or coming to Australia of a non-citizen in contravention of the Act, or for the concealing of a non-citizen

or an unlawful non-citizen or a deportee in certain circumstances (as set out in section 233). The penalty is increased to 10 years imprisonment or 1,000 penalty units, or both.

Item 7 After section 233

New section 233A Other offences relating to groups of non-citizens etc.

22. This item inserts new section 233A after section 233 of the Act. New section 233A provides a new offence in relation to the trafficking of groups of 5 people or more to Australia, and specifically deals with false statements, false or forged papers, and the fraudulent use of documents. The offence is aimed at organised operations and attracts a penalty of imprisonment for 20 years or 2,000 penalty units, or both.

Item 8 Section 234 (penalty)

23. This item amends section 234 to increase the penalty in relation to the making of or use of false statements, false or forged papers, or the fraudulent use of documents, in certain circumstances, as set out in section 234 of the Act. The penalty is increased to 10 years imprisonment or 1,000 penalty units, or both.

Item 9 Section 236 (penalty)

24. This item amends section 236 to increase the penalty in respect of the situation where a person uses a visa that was granted to another person, or where the person has a visa in his or her possession or under his or her control without reasonable excuse, as set out in section 236 of the Act. The penalty is increased to 10 years imprisonment or 1,000 penalty units, or both.

Item 10 Section 256

25. Section 256 of the Migration Act establishes that the person responsible for a person's immigration detention must, at the detainees request, provide all reasonable facilities necessary to make a statutory declaration for the purposes of the Migration Act, or for obtaining legal advice or taking legal proceedings in relation to their immigration detention.

26. This item amends section 256 to provide that the custodian must also give visa application forms to a person in immigration detention if that person so requests.

27. The purpose of section 256 is to ensure that the onus is clearly placed on the detainee to first request assistance set out in that section. Once a detainee has made a request for that assistance, there is an obligation on the person responsible for that detention to facilitate that assistance.

28. Section 256 is not intended to limit or interfere with the powers of either HREOC or the Ombudsman. Both HREOC and the Ombudsman have the right to access an immigration detention centre for the purposes of an investigation, and their power to initiate their own motion inquiries is not intended to be affected by these amendments.

29. The amendments made by this Act to section 193 do limit HREOC's and the Ombudsman's powers to send sealed envelopes to a detainee to whom subsection 193(1) applies and who has not made a complaint to those bodies, but are not intended to restrict their remaining powers.

Note: A notation is made after the proposed amendment to section 256 to provide that the heading to section 256 (Persons in immigration to have access to legal advice) is to be replaced with "Person in immigration detention may have access to certain advice, facilities etc".

Item 11 Subsection 492(1)

30. This item amends subsection 492(1) to substitute the reference to "subsection (2)" with a reference to "this section", consequential to the amendment to section 492 in item 12, below.

Item 12 At the end of section 492

31. This item adds new subsection 492(3) to section 492. New subsection 492(3) provides that a prosecution of a person for an offence against new sections 232A or 233A, or against section 233, may be instituted at any time after the commencement of new subsection 492(3). Offences under the Act that are not mentioned in subsection 492(2) or new subsection 492(3) may only be instituted within 5 years after they are committed.

SCHEDULE 2

CONSEQUENTIAL AMENDMENTS OF THE TELECOMMUNICATIONS (INTERCEPTION) ACT 1979

Item 1 Subsection 5(1)

32. This item amends subsection 5(1) of the *Telecommunications (Interception) Act 1979* to insert a definition of an "immigration offence", consequential to the amendments to section 5D, below. The offences mentioned in the definition are all people trafficking offences.

Item 2 At the end of paragraph 5D(3)(d)

33. This item adds new subparagraph 5D(3)(d)(xii) to section 5D of the *Telecommunications (Interception) Act 1979* so that the offences contained in sections 232A, 233, 233A, 234 and 236 of the Migration Act may qualify as class 2 offences under the *Telecommunications (Interception) Act 1979*, in certain circumstances. Certain communications may be intercepted in respect of class 2 offences pursuant to the *Telecommunications (Interception) Act 1979*.

SCHEDULE 3

TRANSITIONAL

Item 1 Effect of certain Schedule 1 amendments

34. This item provides that the amendments made in items 1, 2, 4 and 10 of Schedule 1 are not intended to alter the effect of any orders made by a Court before the commencement of those provisions.