

ARTHUR ROBINSON & HEDDERWICKS
LIBRARY

1992

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT BILL 1992

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be moved
on behalf of the Government

(Circulated by authority of the Minister for
Immigration, Local Government and Ethnic
Affairs, The Hon Gerry Hand MP)

MIGRATION AMENDMENT BILL 1992

OUTLINE OF SUPPLEMENTARY CLAUSES

The amendments are designed to provide an effective means for the detention of boat people who have arrived or who will arrive in Australia without lawful authority between 20 November 1989 and 1 December 1992.

The current arrest and custody provisions in the Migration Act are complex with different custodial consequences flowing from whether a person was apprehended before or after entering Australia.

It is desirable that all boat people be subject to a uniform regime of custody and removal notwithstanding the circumstances of their arrival.

The Government considers it to be in the national interest that people who arrive in Australia without lawful authority not be allowed to enter the Australian community while their claims to do so remain unresolved. To allow entry into the community while individuals' claims are still being considered would erode the integrity of proper processes used to control the rights of persons to enter and to remain in Australia.

Apart from putting in place a clear statutory basis for continued custody and, if the circumstances so justify, the removal of boat people, the legislation does not impact on existing rights and entitlements of detainees.

The Government is currently reviewing the legislative basis for dealing with the custody of persons not lawfully in Australia. Further legislative amendment is proposed for the next Parliamentary sittings.

FINANCIAL IMPACT STATEMENT

The amendments will have no financial impact.

NOTES ON SUPPLEMENTARY CLAUSES

Clause 1 Commencement

This clause has the effect that the amendment made by clause 2A is to commence operation on Royal Assent.

Clause 2A

This clause inserts new Division 4B after Division 4A of Part 2 of the Principal Act.

Section 54J - Reason for the Division

This section is a statement that new Division 4B is enacted because Parliament considers that it is in the national interest for non-citizens who are designated persons to be kept in custody until removed from Australia or granted an entry permit.

Section 54K - Interpretation

This section defines the terms 'custody', 'designated person', 'entry application' and 'commencement' for the purpose of new Division 4B.

The amendment commences operation on Royal Assent.

'Custody' means a place of custody within the meaning of section 11 of the Principal Act and includes a place that is a processing area for the purpose of Division 4A of the Principal Act.

The definition of 'designated person' applies to non-citizens in Australia who arrive or arrived in Australian territorial waters between 19 November 1989 and 1 December 1992. They are boat people who come or came to Australia without prior approval by way of the grant of a visa, who have not been granted an entry permit and who are given an identifier applicable to persons who arrived on the particular boat. For example, a person on the boat code named 'Pender Bay' which arrived in Australia on 1 December 1989 will have been assigned an identifier in the form of a number which can be related back to that particular boat arrival. No other person on that particular boat will have been given the same number.

The term designated person also includes a non-citizen born in Australia whose mother is a designated person.

An 'entry application' is an application by a designated person for a determination by the Minister that the person is a refugee or for an application for an entry permit.

Section 54L - Designated persons to be in custody

This section provides that a designated person must be kept in custody until removed from Australia or granted an entry permit pursuant to section 34 or section 115 of the Principal Act. This provision is subject to time limits set out in section 54R.

Section 54M - Beginning of custody of certain designates

This section provides that a designated person who, on the day of commencement of this legislation, is in a place of custody as defined in Section 11(a) of the Principal Act or in a processing area, is by operation of law taken to be in custody for the purposes of section 54L. Similarly, a designated person who, on that day, is in the control of and restrained by an officer or another person directed by the Secretary to accompany and restrain the person is by operation of law taken to be in custody under section 54L.

Section 54N Detention of designated persons

This section provides for an officer without warrant to detain a designated person and take reasonable steps to keep the person in custody for the purposes of section 54L. An officer may do this even where a court may have released the person from a place of custody or from a processing area before the commencement of this legislation.

The section also deals with the situation where a person escapes from custody. An officer is authorised to detain the person and take reasonable action to ensure that the person is kept in custody.

Section 54Q Removal from Australia of designated persons

This section describes three basic situations in which a designated person must be removed from Australia as soon as practicable:

- . where the person makes a request in writing to be removed;
- . where the person has been in Australia for 2 months without making an application for refugee status or an entry permit. This is to prevent a designated person avoiding removal through inaction on his or her part (there is provision for the period of two months to be made longer if necessary);

where the person has been refused refugee status or the grant of an entry permit. This particular provision prevents removal of the person, if the person has appealed against or requested review of the refusal decision, where the appeal or review has not been finalised. In such cases removal must be effected only after the appeal or review has been finalised.

The provision calls for removal 'as soon as practicable'. This is to allow for appropriate arrangements to be made for removal to take place such as arranging for travel documents and negotiating the return of the person with the receiving country. Immediate removal might also not be practicable if a designated person was medically unfit to travel.

The section also deals with the removal of children under 18 and ties that removal to the removal of the child's parent or parents if the parent or parents are also designated persons. If a child is in the care and control of a person who is not a parent and has no parent who is a designated person, the child must be removed with the person who has care or control of the child.

Section 54R No custody or removal after a certain period

This section provides for two situations. First, the situation where a designated person is in Australia on 27 April 1992. Second, where the designated person came to Australia after that date and before 1 December 1992.

In the first situation, a person ceases to be subject to section 54L and section 54Q where he or she has been in custody for the period of 273 days as calculated under this section. In the second situation the period of 273 days commences on the day an application is made for a determination that the person is a refugee or for an entry permit.

In both cases the 273 day period is interrupted in certain situations. The period will stop running during any time in which information is being sought from third parties (including the applicant and his or her advisors) and any period in which the applicant is exercising any rights of judicial review (including such time where a decision is subject to the deliberations of a court or tribunal). The 273 day period is also interrupted at any other time in which the continued dealing with the application is beyond the control of the Department.

If an entry application has been refused, the person must be removed from Australia. Should an appeal be lodged, the provisions of section 54Q(3)(c) will prevent removal until such time as those proceedings have been finalised.

The 273 day period is intended to allow a sufficient period for consideration of the claims made by a designated person. If consideration results in a rejected application, the person is to be removed from Australia. That must be done as soon as practicable - see explanation under section 54Q.

Section 54B Courts must not release certain persons

This section provides that a court is not to release a designated person from custody. This reflects Parliament's statement in section 54J that it is in the national interest that designated persons remain in custody until their removal from Australia or the grant of an entry permit.

Section 54T Effect of Division on Status

This section clarifies the relationship between this Division and the remainder of the Act. The section makes it clear that the Division has no effect on any other provision of the Principal Act that relates to the status of the person, the rights of a person and the applications that may have been made by the person. New Division 4B is paramount only in so far as it applies to the custody and removal of the person.

Section 54U Division applies despite other laws

This section makes it clear that, to the extent of any inconsistency, this Division applies over any other law in force in Australia other than the Constitution. The purpose of this provision is to give effect to the Parliament's statement of national interest expressed in section 54J.

Section 54V Evidence

This section provides that a statement by an officer that a person has been given a designation under this Division is evidence that the person has been given such a designation. Such a statement is to be considered conclusive evidence by a court.



9 780644 414371