

1995

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION LEGISLATION AMENDMENT BILL (No. 4) 1995

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister
for Immigration and Ethnic Affairs,
Senator the Hon. Nick Bolkus)



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OUTLINE

1 The Migration Legislation Amendment Bill (No.4) 1995 ("the Bill") seeks to amend the *Migration Act 1958* ("the Act") as a response to the decision of the Federal Court in NG 327 of 1994 (unreported) and to prevent non-citizens from making further applications for protection visas in certain cases.

2 In the above mentioned case the Minister for Immigration and Ethnic Affairs challenged a decision of the Refugee Review Tribunal ("RRT") that a married couple satisfied the definition of "refugee" within the meaning of the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ("the Refugees Convention") on the basis that each of the couple had a "well-founded fear of being persecuted for reasons of ... membership of a particular social group".

3 The RRT had found that, as a result of the policies and practices of the Government of the People's Republic of China ("PRC"), "those who having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised" are a "particular social group".

4 The Federal Court held it was open for the RRT to make these findings, rejecting the Minister's argument that the existence of a "particular social group" cannot be described or determined by reference to the very persecution feared by a protection visa applicant. The Court made broad statements in finding the existence of a "particular social group" including:

- (at 44-45): But if government policies and practices identify such people as having special characteristics and impose a system of rewards and sanctions by reference to those characteristics, the people concerned are likely to constitute a particular social group. Thus, if official practices in China or elsewhere identify people with one child, who wish to have another child, as the subject of a system of rewards and sanctions designed to prevent them having further children, those people in my view will be likely to form a particular social group. (Of course, the existence of a social group in a society can be recognised otherwise than by official policies and practices. However, such policies and practices are one important way in which particular groups can be identified and defined);
- (at 48-49)...some people in China voluntarily decide to have only one child. Others do not accept the limitations imposed by official policy and wish to have further children. The latter group exists as the result of government policy....The point is that the group is defined by official policy and the manner of its administration;
- (at 50): (the particular social group) could have been defined as comprising parents with one child, wishing to have another child, who are subjected to official incentives or sanctions designed to discourage them from acting upon their wishes.

5 The Government believes that the Court's interpretation is inconsistent with the definition of a refugee under the Refugees Convention in that it effectively extends the concept of a "particular social group" so as to include all persons subject to the fertility control policies of a government.

6 The Government is concerned that the decision may provide a precedent whereby the fertility control policies of other governments could define a "particular social group" for the purposes of the Refugees Convention without reference to other characteristics.

7 Therefore, the Bill means that the fertility control policies of the government of a foreign country are to be disregarded in deciding whether a class of persons is a "particular social group" (for the purposes of applying the Refugees Convention) when considering an application for a protection visa.

8 Fertility control policies may be enunciated differently from country to country and even within different regions of the same country. This amendment will apply however the policies are described and in whatever form the policies are stated, by any person or body acting on behalf of the foreign government.

9 The Bill will not preclude a finding that a person is a member of a "particular social group" defined by reference to factors other than fertility control policies.

10 The Bill also makes it clear that if an applicant is found to be a member of a "particular social group" by reference to factors other than a foreign government's fertility control policies, then a finding on the applicant's "well-founded fear of being persecuted" may take into account the fertility control policies of the foreign government.

11 Claims of a "well-founded fear of persecution" based upon other Convention grounds (race, religion, nationality, political opinion) by persons who may be subject to fertility control policies, will be considered in the normal way and are not affected by this Bill.

12 The Act is also being amended to stop the use of repeat applications for protection visas by non-citizens to delay their removal and to circumvent the immigration requirements of Australia. This amendment will contribute to increasing the efficiency of Australia's refugee determination system and to minimising ill-founded protection visa applications. Where the Minister thinks it is in the public interest to do so, he or she will have the power to exercise a non-compellable discretion in favour of allowing a particular individual to lodge a repeat application. The Minister must table a statement in Parliament setting out his or her reasons for thinking this decision is in the public interest.

FINANCIAL IMPACT STATEMENT

13 The amendment relating to fertility control policies is likely to reduce the numbers of people accessing Australia's refugee determination system. The barring of repeat applications will result in a reduction in the number of protection visa applications considered. This is likely to result in some savings.

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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. 4) 1995*.

Clause 2 Commencement

2 This clause provides that the amendments commence on Royal Assent.

Clause 3 Schedule

3 This clause provides that the *Migration Act 1958* is amended as set out in the Schedule. Items 1 and 8 do not amend the Act but have effect according to their respective terms.

Schedule Amendment of the *Migration Act 1958*

Item 1 Objects of amendments

4 This item sets out the objects of items 2 and 4 which are to amend section 36 of the Act as a response to the decision of the Federal Court in NG 327 of 1994 (unreported) and to amend the Act (by the insertion of new sections 48A and 48B) to prevent non-citizens from making applications for protection visas in certain cases where the non-citizens have already made such applications.

Item 2 Section 36:

5 The amendment to section 36 is to ensure that the fertility control policies of the government of a foreign country are disregarded in deciding whether a class of persons is a "particular social group" (for the purposes of applying the Refugees Convention) when considering an application for a protection visa.

6 Proposed new paragraph 36(3)(a) deals with the description of a class of persons. It provides that a class of persons is not to be treated as a "particular social group" if the description of the class contains a reference to the whole or any part of the fertility control policies of the government of a foreign country.

7 Proposed new paragraph 36(3)(b) provides that the fertility control policies of the government of a foreign country are to be disregarded in determining if a class of persons, once described, is a "particular social group". Thus, a class of persons, even one described without reference to fertility control policies, cannot be determined to be a "particular social group" because of the application of the fertility control policies to that class or if the determination of the group involves as one of its criteria the fertility control policies.

8 Proposed new paragraph 36(3)(c) makes it clear that the fertility control policies of a foreign government may nevertheless be taken into account in ascertaining whether a person has a "well-founded fear of being persecuted", once that person has been found to be a member of a "particular social group" consistently with proposed new subparagraphs 36(3)(a) and (b). For example, the proposed new subparagraphs would not preclude a finding that forced abortion or sterilisation is "persecution" within the meaning of the Refugees Convention. Similarly, the Bill does not prevent the application of the fertility control policies of a foreign government from being considered in deciding whether there is a "well-founded fear of being persecuted" where other grounds (race, religion, nationality, political opinion) are relied upon.

9 Proposed new subsection 36(4) provides that the fertility control policies of the Government of the PRC are an example of such policies.

10 Proposed new subsection 36(5) makes it clear that subsection 36(3) does not prevent the finding of a "particular social group" provided this is achieved by reference to factors other than fertility control policies.

11 The changes to section 36 will not preclude *consideration* of fertility control policies in *identifying* a class of people for *examination* as to whether it is a "particular social group". It would however preclude the policies from being taken into account in *describing* the class and in *determining* whether that class is a "particular social group".

Item 3 Paragraph 46(1)(d):

12 This item proposes to amend section 46 of the Act to include references to proposed section 48A and section 91E.

Item 4 After section 48:

13 Proposed new section 48A provides that a non-citizen, while he or she remains in the migration zone, who has made an application or applications for protection visas which have been refused may not make a further application for a protection visa. This provision applies even if a non-citizen's application for a protection visa has not been finally determined (that is, if, for example, it is being reviewed by the RRT). An application for a protection visa, for the purposes of this proposed section, includes any application by a person for refugee status or for a visa or entry permit in existence before or after 1 September 1994, a criterion for which is refugee status. Dependents of such persons are also included in this definition.

14 Proposed new section 48B provides the Minister with the power to exercise a non-compellable discretion in favour of allowing a particular individual to lodge a repeat application if the Minister thinks it is in the public interest to do so. In exercising this power, the Minister must table a statement in Parliament setting out the determination and the reasons for it, referring particularly to the Minister's reasons for thinking his or her actions are in the public interest.

Item 5 Subsection 49(3):

15 Subsection 49(3) of the Act is amended to ensure that a refused visa application within the meaning of proposed new section 48A does not include an application that has been withdrawn.

Item 6 Section 50:

16 A note is inserted at the end of section 50 to indicate that new section 48A prevents repeat applications for protection visas in most circumstances where the applicant is in the migration zone.

Item 7 Paragraph 475(2)(e):

17 This proposed amendment adds to the cross-references in this paragraph which lists the Minister's non-compellable powers.

Item 8 Application of amendments:

18 Subitem 8(1) makes it clear that the amendment in item 2 relating to fertility control policies applies to protection visa applications that have not been finally determined at the commencement of this item.

19. Subitem 8(2) makes it clear that the amendment made by item 2 does not apply to a non-citizen in respect of whom it has been determined before the commencement of item 2 that Australia has protection obligations under the Refugees Convention.

20. Subitem 8(3) provides that the amendment made by item 7 applies to decisions whether made before or after the commencement of item 8.

