

1983/84

THE PARLIAMENT OF THE COMMONWEALTH

HOUSE OF REPRESENTATIVES

PASSPORTS AMENDMENT BILL 1984

EXPLANATORY MEMORANDUM

Circuly authority of the Minister for Foreign Affairs,

Mr Bill Hayden.

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This Bill amends the Passports Act 1938 (the Act) in three main areas. It removes the present distinction between British subjects who are not Australian citizens and other non-citizens, and prohibits the issue of passports to all non-citizens. Secondly, it provides for a more simplified procedure for the issue of passports to children in exceptional circumstances. Thirdly, it makes certain decisions under the Act and Regulations subject to review by the Administrative Appeals Tribunal.

The removal of references to British subjects in the Act places all persons who are not Australian citizens on an equal footing, and reflects more modern practice. It is also in accord with similar amendments to the Electoral Act and other legislation.

The new procedure for issuing passports to children is intended to operate in exceptional circumstances where the ordinary procedures under the Act cannot be followed. Currently, these cases are referred to the Minister for Foreign Affairs. Provision is made in the Bill for written guidelines to be formulated by the Minister and for a senior officer acting in accordance with those guidelines to decide these exceptional cases. This procedure will not reduce the

effectiveness of existing controls on the departure of minors from Australia.

The Bill provides for review of decisions under the Act by the Administrative Appeals Tribunal. In particular, decisions to issue, renew or endorse a passport, or to refuse to do so, or to cancel a passport or endorsement may be subjected to appeal. The provisions for review of decisions by the Administrative Appeals Tribunal will be consistent with other legislation on that matter, and accords with the Government's policy to extend the jurisdiction of the Tribunal into all appropriate areas. If the Minister concludes that factors of foreign relations are determining in reaching a decision under paragraphs 7E(1)(b) or 8(1B)(b) of the Act, he may, at the time of issuing his direction to an authorised officer, make a written declaration to that effect. If the Minister makes such a declaration the Administrative Appeals Tribunal may still review the Minister's decision but it may only affirm that decision or remit the decision to the Minister for his reconsideration in accordance with recommendations of the Tribunal. This procedure is also consistent with other legislation, notably the deportation provisions under the Migration Act and some of the exemption provisions of the Freedom of Information Act 1982.

Other features of the Bill are the amendment of penalties to give greater flexibility in sentencing by allowing for the imposition of fines, and the clarification of the

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Minister's power to refuse to issue a passport. The Minister will no longer have a general discretion to refuse a passport to an applicant.

This measure is not likely to have any financial consequences in the first year of operation or any succeeding year.

NOTES ON CLAUSES

Clause 1 - Short Title

Formal.

Clause 2 - Interpretation

The clause inserts a number of new definitions into the Act, relating to "approved officer", "approved representative", "approved senior officer" and "prescribed minor". Definitions of "British passport" and "British subject" are omitted. The Clause adds sub-sections including documents of identity in references to passports in certain sections of the Act, and makes it clear that overseas custody orders registered under section 68 of the Family Law Act 1975 are to be treated as orders made pursuant to that Act for the purposes of the Passports Act 1938.

Clause 3 - Administration of Act in external Territories, Approved senior officer and Approved officer

This clause repeals section 6 of the Act and inserts a number of new provisions (sections 6, 6AA and 6AB).

The new section 6 will allow the Minister to delegate his powers under the Act to the Administrator of an external Territory of Australia.

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The new section 6AA provides for the appointment of an officer, to be known as an "approved senior officer", to exercise passport issuing powers under the Act.

The new section 6AB provides for the appointment of an officer, to be known as an "approved officer", to exercise powers of direction under section 7B of the Act.

Clause 4 - Issue of Passports

This clause amends section 7 of the Act by omitting references in sub-section (1) to "British subjects". It adds a new sub-section (4) which makes it clear that the Minister is not entitled to refuse to issue a passport except in circumstances provided for in sections 7A, 7B, 7C, 7D or 7E. It also, by a new sub-section (5), requires that written notice of decisions to refuse a passport under section 7(1) be given to applicants along with reasons for that decision.

Clause 5 - Passport not to be issued to unmarried minors except in special circumstances

A new sub-section (1) of section 7A is substituted, prohibiting the issue to a prescribed minor of a passport except under sub-sections (2), (5) and (7). Minor amendments are made to sub-section (2). New sub-sections (3), (4), (5) and (6) provide procedures to be adopted in "special circumstances".

By sub-section (3) an applicant for a passport for a prescribed minor may furnish a written statement that special circumstances exist which require the issue of that passport, whereupon the authorized officer shall refer the matter to the approved senior officer.

By sub-section (4) the approved senior officer may refer the application to the Minister, or himself consider the application according to guidelines issued by the Minister and notify the authorized officer that he is satisfied as to the special circumstances if that is the case.

Upon receipt of such notice the authorized officer, by new sub-section (5), shall issue the passport to the minor unless otherwise directed by the Minister.

Finally, by sub-section (6) the Minister may issue written guidelines to be used by the approved senior officer under sub-section (4).

This clause also, by new sub-section (7), allows authorized officers to issue replacement passports when satisfied that passports issued to prescribed minors have been lost, stolen or destroyed.

Clause 6 - Passports not to be issued to certain persons

This clause amends section 7B of the Act to include the approved senior officer and the approved officer as persons who may direct an authorized officer to issue a passport.

Clause 7 - Passports not to be issued if moneys owing to Commonwealth

This clause amends section 7C of the Act to allow approved representatives to issue directions under that section, along with minor consequential amendments.

Clause 8 - Issue of concurrently valid passports

This clause amends section 7D of the Act to allow approved representatives or the approved senior officer to give directions under the section.

Clause 9 - Passports not to be issued to certain other persons

This clause substitutes new sub-sections 7E(1) and 7E(1A). Sub-section 7E(1) will empower the Minister to notify an authorized officer not to issue a passport to a nominated person if the Minister has formed certain opinions and sub-section 7E(1A) will prohibit an authorized officer who is so notified from issuing a passport to that person. These restraints are within the derogations from the right of freedom of movement permitted by Article 12.3 of the International

Covenant on Civil and Political Rights to which Australia is a party.

Sub-section 7E(1) will empower the Minister to notify an authorized officer not to issue an Australian passport to a person only if:

- (a) the Minister has formed the opinion that, if an Australian passport were issued, that person would be likely to engage in conduct that:
 - (i) might prejudice the security of Australia or of a foreign country;
 - (ii) might endanger the health or physical safety of other persons, whether in Australia or in a foreign country; or
 - (iii) might interfere with the rights or freedoms of other persons, as set out in the International Covenant on Civil and Political Rights, whether in Australia or in a foreign country; and
- (b) the Minister considers, in the circumstances, that action to prevent the person engaging in objectionable conduct should be taken by way of not issuing a passport.

The main differences between clause 9 and section 7E, that was inserted in the Passports Act 1938 by the Passports Amendment Act 1979, are:

- (i) the likelihood of prejudice to, endangering of or interference with the specified rights, interests and freedoms in Australia as well as in foreign countries will be a matter for the Minister to consider. (It is an obvious weakness in the present section 7E of the Passports Act 1938 that it does not empower the Minister to act under this section to protect the specified interests in Australia); and
- (ii) the clause includes a specific reference to the rights and freedoms of other persons as set out in the International Covenant on Civil and Political Rights.

As with the present section 7E of the Passports Act, this power to notify an authorized officer not to issue a passport may be exercised only by the Minister or his delegates under section 6.

Clause 10 - Cancellation of passports etc.

This clause contains a number of amendments to section 8 of the Act. A substituted sub-section (1) allows for the cancellation of passports. Approved representatives and the approved senior officer are empowered to act under this section. A new sub-section (1B) will empower the Minister to

cancel a passport. This power will arise if the Minister forms an opinion similar to that which he must form for the purposes of sub-section 7E(1) and if he also considers that, in the circumstances, action should be taken to cancel the passport. A new sub-section (1C) makes it an offence to fail to surrender a cancelled passport on demand, and sub-section (1D) allows an authorized officer to cancel a passport when issuing another passport to the same person.

Clause 11 - Power to order passport to be delivered up

The clause substitutes for sub-section 9(1) of the Act new sub-sections (1) and (1A). Sub-section (1) defines a "prescribed document" as a passport obtained by means of a false or misleading statement, or a passport or other document used in connection with the commission of an offence against the Act or regulations. Sub-section (1A) makes it an offence to fail to deliver up such a document on demand.

Clause 12 - Offences relating to the issue of passports

This clause removes the reference to "a British subject" in section 9C.

Clause 13 - Penalty for making false statement

This clause inserts into sub-section 10(1) of the Act the word "knowingly" in connection with offences for the making of false and misleading statements.

Clause 14 - Prosecution of offences

This clause substitutes a new sub-section 11(1) in the Act, distinguishing between indictable and summary offences in the Act.

Clause 15 - Review of certain decisions, Notice of decisions and Delegation

This clause establishes the procedure which will allow decisions made under the Act to be subject to review by the Administrative Appeals Tribunal, by the insertion of new sections 11A, 11B and 11C.

Section 11A contains, in sub-section (1), definitions of 'decision', 'Ministerial decision' and 'reviewable decision'. By sub-sections (2), (3) and (4), any person dissatisfied with a reviewable decision may apply to the Minister for a review of that decision. The Minister may affirm, vary, or set aside that decision. Any person not then satisfied by the Ministerial review, or with any other Ministerial decision, may by sub-section (5) apply to the Administrative Appeals Tribunal for a review of those matters. Sub-section (6) will empower the Minister to issue a certificate signed by him where he makes a Ministerial decision for the purposes of paragraph 7E(1)(b) in which the determining factors were matters of international relations. The Minister will be empowered to issue a similar certificate when

exercising the section 8 power to cancel a passport. In such cases, pursuant to sub-section (7) the Administrative Appeals Tribunal may affirm the decision or remit it to the Minister for his reconsideration in accordance with the Tribunal's recommendations. In all other cases the Tribunal will be able to exercise the full range of its powers under section 43 of the Administrative Appeals Tribunal Act 1975.

Sub-section 11A(8) ensures that prescribed documents under section 9 remain prescribed while the review procedure is in progress, and sub-section 11A(9) requires the giving of notice of decisions by the Minister on review of reviewable decisions to those involved in the review procedure.

The formal requirements for the giving of notice are set out in the new section 11B.

Delegation by the Minister of his powers under section 11A is provided for in section 11C.

Clause 16 - Regulations

The major change effected by this clause is by the adding of a new sub-section 12(2) which enables the making of regulations concerning the endorsement of passports with particulars of prescribed minors who are likely to travel with the passport holder.

Clause 17 - Penalties

This clause provides amendments, as set out in Schedule 1, to penalties in the Act. These amendments give greater flexibility in sentencing offenders by providing the alternatives of fines or terms of imprisonment.

Clause 18 - Minor amendments

A number of minor textual amendments to the Act are set out in Schedule 2.