

Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

Introduced into the House of Representatives on 31 October 2012

Portfolio: Immigration and Citizenship

Committee view

1.2 The committee notes that this bill forms part of a complex package of primary and secondary legislation which raise issues of compatibility with human rights and will consider it in the context of the broader package of amendments arising from the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.

Purpose of the bill

1.3 This bill amends the *Migration Act 1958* to:

- implement a recommendation of the Expert Panel on Asylum Seekers to provide that asylum seekers who unlawfully arrive anywhere in Australia are subject to the same regional processing arrangements as asylum seekers who arrive at an excised offshore place;
- ensure that a person does not cease to be a transitory person if they have been assessed to be a refugee; and
- provide for discretionary immigration detention of Papua New Guinea citizens who are unlawful non-citizens and are in a protected area.

Compatibility with human rights

General issues of compatibility with human rights

1.4 In principle, as a matter of international law persons who are not 'lawfully' present in Australian territory nonetheless enjoy a range of rights under the ICCPR and other relevant human rights treaties while they are present in Australia or under Australian jurisdiction. Those rights would include the right not to be arbitrarily deprived of life, to be free from torture or cruel, inhuman or degrading treatment, and a range of other rights. However, they would not enjoy all the rights guaranteed in the treaties, and their enjoyment of some rights may in certain circumstances be lawfully restricted to a greater extent than is the case for those who are lawfully in the country. Those rights in general would be applicable from the time such persons come under the effective control of Australian officials or enter Australian territory (including offshore territories). Australia's international responsibility for the treatment of such persons is also likely to continue even if the persons are transferred to other countries which become involved in the detention of transferred persons or the consideration of their refugee claims.

Any Member or Senator who wishes to draw matters to the attention of the committee under the *Human Rights (Parliamentary Scrutiny) Act 2011* is invited to do so.

Compatibility with human rights

1.5 The statement of compatibility states that the bill is compatible with human rights 'because it does not engage any obligations under relevant human rights treaties.' It states that the bill does not engage or is compatible with the right to freedom of movement (article 12, ICCPR) and the rights of aliens in relation to expulsion (article 13, ICCPR); the right not to be arbitrarily detained (article 9, ICCPR); the rights of children (Convention on the Rights of the Child, in particular article 3); and non-refoulement obligations under the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.

1.6 It is difficult to assess these claims on the basis of this bill alone, given that it forms part of a complex set of legislative and administrative arrangements. Nonetheless, the committee considers that this bill on its face gives rise to issues of compatibility with human rights, in particular in so far as it involves the holding of children in detention and may involve transferring them to other countries as part of a regional processing framework.

1.7 The committee also considers that there may be issues of compatibility with the right not to be arbitrarily detained under article 9 of the ICCPR, if persons are detained while their refugee claims are processed in order to give effect to the 'no – advantage test' and the detention involved deliberate delays to what would otherwise have been the reasonably expeditious processing of such claims. While the Refugee Convention and its Protocol are not treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*, issues of compliance with Australia's obligations under those treaties have also been raised by commentators.