

Bills Digest
No. 104 2003–04

Migration Amendment (Duration of Detention) Bill 2004

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No. 104 2003–04

Migration Amendment (Duration of Detention) Bill 2004

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Migration Amendment (Duration of Detention) Bill 2004

Date Introduced: 19 February 2004

House: House of Representatives

Portfolio: Immigration and Multicultural and Indigenous Affairs

Commencement: One day after Royal Assent

Purpose

To amend the *Migration Act 1958* to prevent courts from issuing interim orders for the release of immigration detainees.

Background

The Migration Amendment (Duration of Detention) Bill 2003 ('the 2003 Bill') was introduced to prevent 'interlocutory' (that is, interim) orders for the release of any immigration detainee, whether or not in the context of broader judicial review proceedings. The 2003 Bill was amended during passage so that it only prevented the courts issuing interlocutory orders in relation to persons of character concern. Those matters initially addressed by the 2003 Bill but not enacted in the *Migration Amendment (Duration of Detention) Act 2003* (that is, the making of interim orders in relation to persons who are in immigration detention but who are not persons of character concern) are addressed in the Migration Amendment (Duration of Detention) Bill 2004 ('the present Bill'). The widening of the limitation on interim orders from that enacted in 2003 would prevent the courts making interim orders in relation to any person who is in immigration detention and who is seeking judicial review of their case.

The issues raised by the 2003 Bill, including issues relating to those provisions which form the basis of the present Bill, were discussed in [Bills Digest No.182 2002-03](#).¹

In essence, the key issue is that the Federal Court has held that s.196 of the *Migration Act 1958* (as in force prior to the commencement of the Migration Amendment (Duration of Detention) Act 2003) does not prevent it making an interlocutory order that a person be released from immigration detention pending the court's final determination of the person's application for judicial review. The Court has indicated that if the parliament

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wishes to prevent a court from ordering the interlocutory release of a person from immigration detention it must make this intention 'unmistakably clear'. The current Bill is intended to do this.

The Government's stated view is that any person who is, or who is suspected of being, an unlawful non-citizen should not be allowed into the community until the question of their status is resolved.² Furthermore, the Government's view is that section 196 of the *Migration Act 1958* (introduced by the *Migration Reform Act 1992*) clearly reflected Parliament's intention that no person or court could release from detention an unlawful non-citizen being held lawfully in immigration detention.

The current Bill is designed to give effect to that intention in 'unmistakably clear' terms.

Parliamentary consideration of the 2003 Bill

The 2003 Bill as originally introduced would have prevented interlocutory or interim orders for the release of any immigration detainee.

Members of the Australian Labor Party indicated opposition to the scope of the original Bill in the debate on the Bill.³ The then opposition spokesperson for Population, Immigration, Reconciliation and Indigenous affairs Ms Gillard distinguished between failed asylum seekers, criminal deportees, and persons whose visa has been cancelled on character grounds, and stated that 'Labor [was] not prepared to support a bill which deals with failed asylum seekers in a way which would prevent the Federal Court from ordering their release on an interim basis if that were called for'.⁴

The Australian Democrats opposed the legislation. Senator Bartlett stated that the courts should retain the power to determine whether or not people are a risk to the community.⁵

The Australian Greens oppose the policy of mandatory detention and opposed both the original and the amended 2003 Bill. In particular, in speaking on the 2003 Bill Mr Organ stated that it was 'right and just' that a person be released into the community until a court determined their application for judicial review.⁶

However, the Australian Labor Party indicated that it was prepared to consider government suggestions in relation to criminal deportees and persons who had had their visas cancelled on character grounds.⁷ In response the Government introduced amendments limiting the scope of the Bill to preventing courts from making interim orders in relation to persons of character concern.

The amendments had the effect that the Bill as passed dealt only with the position of criminal deportees and persons whose visa has been cancelled on character grounds. It did not deal with asylum seekers or other immigration detainees.

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During consideration of the 2003 Bill the then Minister for Immigration and Multicultural and Indigenous Affairs stated that amendments limiting the scope of the Bill had been moved by the Government ‘to protect the Australian community against the possibility of people of character concern being released from detention and of some tragic event occurring for which those of us who allowed a situation where a person who was at large might well be blamed’, in the face of opposition to the Bill as it had been introduced.⁸ He went on to say that he would subsequently introduce a new bill ‘to cover broader concerns on interlocutory relief for all persons from immigration detention before final resolution of their court proceedings’.⁹ The current Bill addresses those broader concerns.

Possible constitutional issue – indeterminate detention of children

The case of *Woolley*¹⁰ currently before the High Court involves an application for the release from immigration detention of 4 children who had, as at the date of hearing, been held in immigration detention for over 3 years. Argument in the case was heard on 4 February 2004 and judgment reserved. The significance of the case to the current Bill is that it was argued that the present scheme of mandatory detention is unconstitutional insofar as it provides for administrative detention of indeterminate term that, at least in relation to children, is ‘not reasonably capable of being seen as necessary’.¹¹

If this argument were to be accepted by the High Court it would have the effect that administrative detention of children under section 196 of the Migration Act would be constitutionally invalid.

It is arguable that a mandatory detention scheme which does not allow the courts to make interim orders for release of children from detention in appropriate circumstances is less likely to be held to be ‘reasonably capable of being seen as necessary’ than one which allows for such orders.

Depending on the precise reasoning adopted by the Court, a finding of invalidity in *Applicants M276* may also cast doubt upon the validity of the provisions to be inserted in the Migration Act by the current Bill in relation to adults. It may be arguable that a total removal from the courts of the power to make interim orders for release in appropriate cases is also not ‘reasonably capable of being seen as necessary’.

Release where deportation is not reasonably practical

As discussed in [Bills Digest No.182 2002-03](#), in the 2002 case of *Al Masri v MIMIA*,¹² Merkel J held that detention was only lawful so long as removal was ‘reasonably practicable’ ‘in the sense that there must be a real likelihood or prospect of removal in the foreseeable future’.¹³ This conclusion was based on the terms of sections 196 and 198 of the Migration Act, in which Merkel J found a limitation on the power to detain to such a time as was reasonably necessary to give effect to purposes associated with the processing and removal of aliens.

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Main Provisions

Clause 4 provides that the amendments made by **Schedule 1** are not retrospective.

Schedule 1 amends the *Migration Act 1958*.

Item 1 omits subsections 196(4) and (4A) of the Act and substitutes **new subsection (4)**. This subsection is as initially proposed by the Government in the 2003 Bill. It provides that detention is to continue until a court finally determines that detention is unlawful or the detainee is not an unlawful non-citizen.

Furthermore, by virtue of existing subsection 196(5) this rule applies regardless of whether or not there is:

- a ‘real likelihood [of removal or deportation] in the reasonably foreseeable future’, or
- a visa decision that is, or may be, unlawful.

Item 3 repeals subsection 196(5A). This subsection provided that subsections 196(4) and (4A) did not, by implication, affect the detention of a person to whom the subsections did not apply. It is not now necessary as **new subsection (4)** will apply to all persons in immigration detention.

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Concluding Comments

Comments made in relation to the 2003 Bill in Bills Digest No.182¹⁴ apply equally to this Bill.

It appears that the High Court will be increasingly asked to consider the constitutional limitations upon the power of the Commonwealth to provide for indefinite detention, or detention beyond the period that is reasonably necessary for processing or deportation. The decision of the Court in *Applicants M276* may, at least in relation to children, strike down section 196 of the Migration Act (whether in its current form or as proposed to be amended by this Bill) as exceeding such limitations.

In addition, the Bill will prevent a Court from ordering interim relief in circumstances where, subsequently, the detention is found to be unlawful and to have been unlawful when the interim relief was sought. This means that in a situation where a court could find that there is a serious question to be tried as to the lawfulness of a detention, and that the balance of convenience favours an order for release, the court will be prevented from making such an order by amended section 196. The detention could be found to be unlawful either because it did not fall within the scope of the Migration Act or on constitutional grounds. It is doubtful that Parliament could legislate to require a person to be kept in immigration detention if that detention was constitutionally invalid.

There may be claims for compensation in circumstances where the amended section 196 has prevented the release of a person from detention where that person's detention has subsequently been found to be unlawful.

Endnotes

- 1 <http://www.aph.gov.au/library/pubs/bd/2002-03/03bd182.htm>
- 2 The Hon Gary Hardgrave, MP, Minister for Citizenship and Multicultural Affairs and Minister Assisting the Prime Minister, Migration Amendment (Duration of Detention) Bill 2004, Second Reading Speech, House of Representatives, *Debates*, 19 February 2004, p. 24859.
- 3 Speakers included Ms Julia Gillard, MP, (then shadow minister for Population, Immigration, Reconciliation and Indigenous affairs), Migration Amendment (Duration of Detention) Bill 2003, Second Reading, House of Representatives, *Debates*, 26 June 2003, p. 17645 and 17756.

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- 4 op. cit. p. 17645.
- 5 Senator Bartlett, Migration Amendment (Duration of Detention) Bill 2003, Second Reading, Senate, *Debates*, 8 September 2003, p. 14465.
- 6 Mr Michael Organ, MP, Migration Amendment (Duration of Detention) Bill 2003, Second Reading, House of Representatives, *Debates*, 26 June 2003, p. 17749.
- 7 Ms Julia Gillard MP (then shadow minister for Population, Immigration, Reconciliation and Indigenous affairs) Migration Amendment (Duration of Detention) Bill 2003, Second Reading, House of Representatives, *Debates*, 26 June 2003, p. 17645.
- 8 The Hon Philip Ruddock, MP, Minister for Immigration and Multicultural and Indigenous Affairs, Migration Amendment (Duration of Detention) Bill 2003, Consideration of Senate Message, House of Representatives, *Debates*, 10 September 2003, p. 19726.
- 9 *ibid.*
- 10 Applicants M276/2003, Ex parte – Re Woolley & Anor [2004] HCA Trans 002
<http://www.austlii.edu.au/au/other/HCATrans/2004/2.html>, accessed on 1 March 2004.
- 11 It was argued for the children that the Commonwealth only has power to provide for administrative detention for a purpose within power (such as for the detention of aliens), that such detention (that is, detention which is not ordered by a Court) is only valid if the detention is ‘reasonably capable of being seen as necessary’ (relying on *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; discussed in Digest No. 182; op cit. pp.2-3) and that, at least in relation to children, s.196 is not ‘reasonably capable of being seen as necessary’.
- 12 *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1009 (15 August 2002).
- 13 *ibid.*, at p. 38.
- 14 op. cit. pp. 10–11.

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