

Asylum Seekers (Regional Processing Centre) Bill 2012

EXPLANATORY MEMORANDUM

BACKGROUND

On 29 August 2012 the Republic of Nauru and the Commonwealth of Australia signed a Memorandum of Understanding relating to the transfer to Nauru from Australia of certain persons who arrived, or attempted to arrive, in Australia by sea for the purpose of seeking asylum. Under that Memorandum of Understanding a site, or more than one site, was to be established in Nauru as a processing centre where transferees would live pending the making of an assessment of their eligibility for refugee status.

The *Asylum Seekers (Regional Processing Centre) Bill 2012* regulates the operation of any such centre. It sets out certain protections for the transferees living there (in this Bill referred to as ‘protected persons’) and imposes obligations on them. It imposes a general duty on the manager of operations at a centre to treat protected persons in a fair and humane manner. The Bill also imposes a series of particular duties on the manager. In this Bill a centre is referred to as a ‘regional processing centre’ (RPC).

The Bill provides for the issue of health and security clearance certificates following an assessment as to whether a protected person poses a risk to public health, safety or security. The holder of such a certificate can generally leave an RPC between 7 am and 7pm each day.

A number of bodies are contracted to provide services at an RPC, including security services. The Bill enables the Head of Department, on behalf of the Government of Nauru, to enter into an agreement with a service provider relating to compliance with the Bill and for imposing reporting obligations. Importantly, the agreement will provide for the giving by the service provider to the Government of Nauru, the Minister and the Head of Department of an indemnity against any liability that may be incurred arising out of the operation of the RPC. The Head of Department may appoint as authorised officers certain staff members of a service provider who has entered into such an agreement.

The Bill gives an authorised officer limited powers to search protected persons and things in their possession for items that they are not allowed to have. Included among those items are firearms, knives, explosives, alcohol and illicit drugs. Police officers are given by the Bill broader search powers for such items, including the power to search premises at an RPC. It is not necessary that a police officer has to suspect that a protected person is about to commit a cognisable offence and arrest him or her before being able to carry out a search. And the kind of item that may be searched for and seized is not limited to items the

possession of which constitutes an offence or that are evidence of an offence. Those kinds of limitations applying under the *Criminal Procedure Act 1972* are overridden by this Bill.

The Bill also establishes the Minister as guardian of any unaccompanied child who is brought to Nauru under the arrangements with Australia and enables the Minister to delegate to appropriate persons powers and functions that he or she has as guardian.

EXPLANATION OF CLAUSES

PART 1 – PRELIMINARY

Clauses 1 and 2 are formal provisions.

Clause 3 contains definitions for the purposes of the Bill and also enables the Head of Department to declare who is the Operational Manager of an RPC for the purposes of the Bill.

Clause 4 states that the Bill does not affect the protections that a refugee has under the Refugees Convention and the Refugees Protocol. These were given effect to in Nauru by the recently enacted *Refugees Convention Act 2012*. Clause 4 also covers the protections that a refugee has under that Act. These include the right to apply to the Refugee Status Review Tribunal for a review of decisions made in relation to a claim for refugee status. Clause 4 also covers protections under the Convention Against Torture and the Optional Protocol to that Convention, to both of which Nauru recently became a party.

PART 2 – REGIONAL PROCESSING CENTRES

Division 1 – Duties of Operational Manager

Clause 5 imposes a duty on the Operational Manager of a RPC to ensure that protected persons living there are treated in a fair and humane manner consistent with the law of Nauru.

Clause 6 sets out a number of particular duties that the Operational Manager has. These include

- a duty to give certain information to protected persons in a language they can understand
- a duty to provide protected persons with appropriate food, clothing, bedding and other essential items
- a duty to give protected persons access to facilities including washing facilities, medical services, interpreters, counsellors, facilities for conducting religious ceremonies, exercise facilities and (for children) education facilities

- a duty to facilitate the processing of refugee claims by providing protected persons with access to transport facilities and to an area where legal advice can be given in confidence and privacy.

The Operational Manager must encourage protected persons to look after their mental and physical health and participate in recreational activities. He or she also has a duty to ensure that restrictions on the movement of protected persons are kept to a minimum and that they are not subjected, by way of punishment, to having instruments of restraint (such as handcuffs, strait jackets and chemical substances) used on them or to being kept in solitary confinement. This does not prevent anything being done that is necessary in the interests of safety or of a protected person's mental health. The express reference to these kinds of punishment does not mean that other forms of punishment may impliedly be used against protected persons.

The Operational Manager also has a duty to give to the Head of Department whatever information about the operation of the centre that he or she may request and, in particular, to report any use of force by an authorised officer.

Finally, the Operational Manager has a duty to facilitate visits by certain officials.

Division 2 – Centre rules

Clause 7 requires the Operational Manager to make rules for the running of the RPC. An important aspect of centre management will be to have procedures in place for ensuring that items that protected persons are not allowed to have are not brought into the centre. For this purpose the rules may regulate access arrangements. The security and good order of an RPC will necessitate creating restricted areas within the centre. This may be done by the rules. The rules can also deal with the issue of when protected persons may be absent from the RPC and must establish procedures for finding and returning to the centre a protected person who does not come back on time. The rule-making power is a broad one with the only restriction being that the rules must not be inconsistent with this Bill. However, the rules must put in place procedures for legal practitioners to have access to clients in the RPC.

Clause 8 enables the Minister to require the rules to be changed.

Division 3 – Obligations of protected persons

Clause 9 lists the obligations of protected persons. They include:

- complying with the centre rules
- not having prohibited items in their possession
- keeping their living space and other facilities in a clean condition

- not endangering the safety of other protected persons at the RPC or damaging any property there, including the centre’s infrastructure
- not doing anything to affect adversely the security or good order of the RPC
- complying with the law of Nauru.

Division 4 – Health and security clearance

Clause 10 provides for the making of an assessment in respect of each protected person as to whether their presence in the community would pose a risk to public health, safety or security. Regard may be had to any checks done by Australia. If an assessment is positive the Head of Department must issue a health and security clearance certificate.

Clause 11 enables the Head of Department to cancel a health and security clearance certificate at any time if a fresh assessment leads to the view that their presence in the community would pose a risk to public health, safety or security.

Clause 12 provides for the suspension of a health and security clearance certificate if behavioural issues warrant that. The effect of a suspension would be that the protected person loses their right to leave the RPC between 7 am and 7 pm daily for a period of up to 30 days determined by the Secretary.

Division 5 – Inspection

Clause 13 gives a right to enter and inspect a RPC at any time to a Supreme Court judge, a member of the Refugee Status Review Tribunal, a member of the Joint Committee established under the Memorandum of Understanding with Australia, a representative of the United Nations High Commissioner for Refugees or a person authorised by the Head of Department. Clause 6(6) supports this right of inspection by putting a duty on the Operational Manager to facilitate it and, in particular, to ensure that the inspector can meet with protected persons in privacy.

PART 3 – PROTECTION OF CHILDREN

Clause 14 expresses the intention of Parliament that, in the treatment of protected persons who are children, regard is to be had to the Convention on the Rights of the Child. Nauru acceded to that Convention on 27 July 1994.

Clause 15 deals with the guardianship of unaccompanied children, that is protected persons who are children and arrive in Nauru unaccompanied by their parents or guardians. Before leaving Australia an Australian Minister would have been the guardian of these children by force of Australian legislation. This clause has the effect that, on their arrival in Nauru, the Minister will become their guardian. The clause does not prevent a guardianship order being subsequently made under the *Guardianship of Children Act 1975* or a parent arriving

in Nauru having guardianship of his or her child. The Minister may delegate any of his or her powers or functions as guardian to anyone whom the Minister is satisfied is a fit and proper person and connected with a body corporate established for advancing the welfare and protection of children. An interested person may apply to the Supreme Court to have a delegation reviewed. The Supreme Court may revoke the delegation if satisfied that it is not in the child's best interests.

PART 4 – ENFORCEMENT

Division 1 – Service providers and authorised officers

Clause 16 provides for agreements between the Head of Department and a body contracted to provide services at a RPC. The agreement will set out the measures to be taken by the service provider to ensure compliance with the Bill. It will also contain the reporting obligations of the service provider on its operations. There is a possibility that conduct at a RPC may give rise to a legal liability on the part of Nauru, the Minister or the Head of Department. Under the agreement the service provider will provide an indemnity against any such liability.

Clause 17 deals with the appointment of authorised officers. It is necessary in the interests of the security and good order of a RPC for residents there to be banned from possessing firearms, knives, explosives and other items capable of causing injury. They are also not to have alcohol or illicit drugs. Clause 9(b) puts an obligation on protected persons not to have a prohibited item in their possession. Ensuring compliance with this obligation involves giving search powers. As is not practicable for only police officers to have search powers it is necessary to give some search powers to staff members of service providers operating at a RPC. The only staff members with these powers will be those identified by the Head of Department as fit and proper persons who are competent and willing to exercise them. This clause requires the Head of Department to issue identity cards to authorised officers and requires an officer to wear the card when on duty and produce it on request.

Division 2 – Powers of authorised officers and police

Clause 18 sets out the powers that authorised officers may exercise for the purpose of finding out whether a protected person has a prohibited item in their possession. These are:

- power to conduct a frisk search or scanning search of a protected person
- power to require a protected person to turn out the contents of their pockets
- power to search any bag or other thing that a protected person is carrying.

A frisk search involves the officer quickly running his or her hands over the person's outer clothes. A scanning search is done by using an electronic or mechanical device over or close

to the person's outer clothes. An authorised officer cannot require a person to remove any clothes and cannot search their clothes by, for example, putting a hand in their pockets.

If an authorised officer finds a prohibited item during a search he or she must seize it. If the item is of a kind that possession of it constitutes an offence, such as illicit drugs, it must be handed over to a police officer. Otherwise the item must be returned to the protected person when he or she ceases to live at the RPC, if that is practicable.

Clause 19 regulates the exercise of search powers by an authorised officer. It requires the officer to have due respect for the person being searched and not subject him or her to greater indignity than is reasonably necessary. It restricts frisk searches to officers of the same gender as the person being searched.

Clause 20 makes it clear that staff members who are not authorised officers have no powers under this Part, but also that this clause does not affect any powers that a staff member may have in particular circumstances under the Criminal Code 1899, the Criminal Procedure Act 1972, or any other law. This is a reference to the powers of any person, in limited circumstances specified in those other laws, to use force, arrest a person and seize instruments of violence.

Clause 21 gives a police officer power to search a protected person if he or she suspects on reasonable grounds that the person may have a prohibited item in their possession. The police officer may carry out a search of the person (other than his or her private person) and of his or her clothes or anything that is in his or her possession. A search of the person can only be carried out by a police officer of the same gender as the person being searched. Any prohibited item found will be seized. If it is not an item of a kind that possession of it constitutes an offence, the item must be returned to the protected person when he or she ceases to live at a RPC. The powers given by this section can be exercised anywhere in Nauru.

Clause 22 gives a police officer power to break, enter and search anywhere within a RPC where the officer suspects on reasonable grounds that a prohibited item may be found. Any prohibited item found will be seized and dealt with according to law.

Clause 23 empowers a police officer to arrest without warrant and return to the RPC a protected person who does not come back after an authorised absence. Such a failure to return would be a breach of the centre rules but not an offence. The power being given to police officers by this clause is purely for the purpose of ensuring the safe return to the RPC of a protected person.

Clause 24 allows a police officer (but not an authorised officer) to use reasonable force in exercising search powers. Both police officers and authorised officers may use reasonable force to stop a protected person injuring him or herself or other persons or damaging property. An authorised officer who uses force for this purpose must report doing so to the

Operational Manager. The Operational Manager must then provide a detailed report on this to the Head of Department (clause 6(5)(a)).

Clause 25 gives police officers and authorised officers protection from civil or criminal liability for anything that they do in exercising or purporting to exercise a power under this Part if they acted in good faith and on reasonable grounds.

Clause 26 provides that the powers given to police officers by this Bill are additional to any other powers that they have.

PART 5 – MISCELLANEOUS

Clause 27 enables the Head of Department to delegate his or her functions or powers under the Act.

Clause 28 gives a general regulation-making power to Cabinet.