

1 2010-2011

2

3 The Parliament of the
4 Commonwealth of Australia

5

6 HOUSE OF REPRESENTATIVES

7

8

9

10

11 *Presented and read a first time*

12

13

14

15

16

17

18 **Migration Legislation Amendment**
19 **(Offshore Processing and Other**
20 **Measures) Bill 2011**

21

22 **No. , 2011**

23

24 *(Immigration and Citizenship)*

25

26

27

28 **A Bill for an Act to amend the law relating to**
29 **migration, and for other purposes**

30

1	Contents		
2	1	Short title	3
3	2	Commencement	3
4	3	Schedule(s)	4
5	Schedule 1—Offshore processing		5
6		<i>Migration Act 1958</i>	5
7	Schedule 2—Other amendments		16
8		<i>Immigration (Guardianship of Children) Act 1946</i>	16
9			
10			

1
2
3
4
5

6
7

OPC drafter to complete	
1. Does this Bill need a message? (See H of R Practice, fifth ed, pp409-414, and OGC advice.) If yes: <ul style="list-style-type: none">• List relevant clauses/items—• Prepare message advice (see Drafting Direction 4.9)• Give a copy of the message advice to the Legislation area.	No
2. Does this Bill need a notice? (See H of R Standing Order 178 and Drafting Direction 3.2.) If no list relevant clauses/items—	Yes
3. Is there any constitutional reason why this Bill should not be introduced in the Senate? (See Constitution sections 53 and 55 and Drafting Direction 3.2.)	No

8

9

A Bill for an Act to amend the law relating to migration, and for other purposes

10

11

The Parliament of Australia enacts:

12

1 Short title

13

This Act may be cited as the *Migration Legislation Amendment (Offshore Processing and Other Measures) Act 2011*.

14

15

2 Commencement

16

This Act commences on the day after this Act receives the Royal Assent.

17

1
2
3
4
5
6

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

1 **Schedule 1—Offshore processing**
2

3 *Migration Act 1958*

4 **1 At the end of section 4**

5 Add:

6 (5) To advance its object, this Act provides for the taking of offshore
7 entry persons from Australia to an offshore processing country.

8 **2 Subsection 5(1) (note 1 at the end of the definition of**
9 ***immigration detention*)**

10 Repeal the note, substitute:

11 Note 1: Subsection @198AD(11) provides that being dealt with under
12 subsection @198AD(3) does not amount to *immigration detention*.

13 **3 Subsection 5(1) (paragraph (a) of the definition of *offshore***
14 ***entry person*)**

15 Before “entered”, insert “has, at any time,”.

16 **4 Subsection 5(1)**

17 Insert:

18 *offshore processing country* means a country designated by the
19 Minister under subsection @198AB(1) as an offshore processing
20 country.

21 **5 Subsection 5(1) (paragraph (a) of the definition of *transitory***
22 ***person*)**

23 Before “section”, insert “repealed”.

24 **6 Subsection 5(1) (after paragraph (a) of the definition of**
25 ***transitory person*)**

26 Insert:

27 (aa) an offshore entry person who was taken to an offshore
28 processing country under section @198AD; or

1 **7 Paragraph 36(2)(a)**

2 Omit “to whom”, substitute “in respect of whom”.

3 **8 Subsection 36(3)**

4 Omit “obligations to”, substitute “obligations in respect of”.

5 **9 Subsection 48A(2) (paragraph (aa) of the definition of**
6 ***application for a protection visa*)**

7 Omit “to whom”, substitute “in respect of whom”.

8 **10 Subsection 48A(2) (subparagraph (ab)(i) of the definition**
9 ***of application for a protection visa*)**

10 Omit “to whom”, substitute “in respect of whom”.

11 **11 Subsection 189(3)**

12 After “a person”, insert “(other than a person referred to in
13 subsection (3A))”.

14 **12 Subsection 189(3)**

15 Omit “may detain”, substitute “must detain”.

16 **13 After subsection 189(3)**

17 Insert:

18 (3A) If an officer knows or reasonably suspects that a person in a
19 protected area:

20 (a) is an allowed inhabitant of the Protected Zone; and

21 (b) is an unlawful non-citizen;

22 the officer may detain the person.

23 **14 Subsection 189(5)**

24 After “subsections (3)”, insert “, (3A)”.

25 **15 Paragraph 193(1)(c)**

26 Before “or (4)”, insert “, (3A)”.

27 **16 Subsection 196(1)**

1 Omit “he or she is”.

2 **17 Paragraph 196(1)(a)**

3 Before “removed”, insert “he or she is”.

4 **18 After paragraph 196(1)(a)**

5 Insert:

6 (aa) an officer begins to deal with the non-citizen under
7 subsection @198AD(3); or

8 **19 Paragraph 196(1)(b)**

9 Before “deported”, insert “he or she is”.

10 **20 Paragraph 196(1)(c)**

11 Before “granted”, insert “he or she is”.

12 **21 Subsection 196(3)**

13 Omit “for removal or deportation”, substitute “as referred to in
14 paragraph (1)(a), (aa) or (b)”.

15 **22 Division 8 of Part 2 (heading)**

16 Repeal the heading, substitute:

17 **Division 8—Removal of unlawful non-citizens etc.**

18 **23 Before section 198**

19 Insert:

20 **Subdivision A—Removal**

21 **24 At the end of section 198**

22 Add:

23 (11) This section does not apply to an offshore entry person to whom
24 section @198AD applies.

25 **25 Section 198A**

26 Repeal the section, substitute:

1 **Subdivision B—Offshore processing**

2 **@198AA Reason for Subdivision**

3 This Subdivision is enacted because the Parliament considers that:

- 4 (a) people smuggling, and its undesirable consequences
5 including the resulting loss of life at sea, are major regional
6 problems that need to be addressed; and
7 (b) offshore entry persons, including offshore entry persons in
8 respect of whom Australia has or may have protection
9 obligations under the Refugees Convention as amended by
10 the Refugees Protocol, should be able to be taken to any
11 country designated to be an offshore processing country; and
12 (c) it is a matter for the Minister to decide which countries
13 should be designated as offshore processing countries; and
14 (d) the designation of a country to be an offshore processing
15 country need not be determined by reference to the
16 international obligations or domestic law of that country.

17 **@198AB Offshore processing country**

- 18 (1) The Minister may, in writing, designate that a country is an
19 *offshore processing country*.
- 20 (2) The only condition for the exercise of the power under
21 subsection (1) is that the Minister thinks that it is in the public
22 interest to designate the country to be an offshore processing
23 country.
- 24 (3) The power under subsection (1) may only be exercised by the
25 Minister personally.
- 26 (4) If the Minister designates a country under subsection (1), the
27 Minister may, in writing, revoke the designation.
- 28 (5) The rules of natural justice do not apply to the exercise of the
29 power under subsection (1) or (4).
- 30 (6) A designation under subsection (1), or a revocation under
31 subsection (4), is not a legislative instrument.
- 32 (7) In this section, *country* includes:
-

-
- 1 (a) a colony, overseas territory or protectorate of a foreign
2 country; and
3 (b) an overseas territory for the international relations of which a
4 foreign country is responsible.

5 **@198AC Documents to be laid before Parliament**

- 6 (1) This section applies if the Minister designates a country to be an
7 offshore processing country under subsection @198AB(1).
- 8 (2) The Minister must cause to be laid before each House of the
9 Parliament:
10 (a) a copy of the designation; and
11 (b) a statement of the Minister's reasons for designating the
12 country to be an offshore processing country, referring in
13 particular to the Minister's reasons for thinking it to be in the
14 public interest to designate the country to be an offshore
15 processing country; and
16 (c) a copy of any written agreement between Australia and the
17 country relating to the taking of persons to the country; and
18 (d) a summary of any consultations with the Office of the United
19 Nations High Commissioner for Refugees about any such
20 agreement.
- 21 (3) The Minister must do the things referred to in subsection (2) within
22 2 sitting days of each House of the Parliament after the day on
23 which the designation is made.
- 24 (4) The sole purpose of laying the documents referred to in
25 subsection (2) before the Parliament is to inform the Parliament of
26 the matters referred to in the documents and nothing in the
27 documents affects the validity of the designation. Similarly, the
28 fact that some or all of those documents do not exist does not affect
29 the validity of the designation.
- 30 (5) A failure to comply with this section does not affect the validity of
31 the designation.
- 32 (6) In this section, **agreement** includes an agreement, arrangement or
33 understanding:
34 (a) whether or not it is binding; and

1 (b) whether it is made before, on or after the commencement of
2 this section.

3 **@198AD Taking offshore entry persons to an offshore processing**
4 **country**

5 (1) Subject to sections @198AE, @198AF and @198AG, this section
6 applies to an offshore entry person who is detained under
7 section 189.

8 Note: For when this section applies to a transitory person, see section
9 @198AH.

10 (2) An officer must, as soon as reasonably practicable, take an offshore
11 entry person to whom this section applies from Australia to an
12 offshore processing country.

13 *Powers of an officer*

14 (3) For the purposes of subsection (2) and without limiting that
15 subsection, an officer may do any or all of the following things
16 within or outside Australia:

- 17 (a) place the offshore entry person on a vehicle or vessel;
18 (b) restrain the offshore entry person on a vehicle or vessel;
19 (c) remove the offshore entry person from:
20 (i) the place at which the person is detained; or
21 (ii) a vehicle or vessel;
22 (d) use such force as is necessary and reasonable.

23 (4) If, in the course of taking an offshore entry person to an offshore
24 processing country, an officer considers that it is necessary to
25 return the person to Australia:

- 26 (a) subsection (3) applies until the person is returned to
27 Australia; and
28 (b) section 42 does not apply in relation to the person's return to
29 Australia.

30 *Ministerial direction*

31 (5) If there are 2 or more offshore processing countries, the Minister
32 must, in writing, direct an officer to take an offshore entry person,

-
- 1 or a class of offshore entry persons, under subsection (2) to the
2 offshore processing country specified by the Minister in the
3 direction.
- 4 (6) If the Minister gives an officer a direction under subsection (5), the
5 officer must comply with the direction.
- 6 (7) The duty under subsection (5) may only be performed by the
7 Minister personally.
- 8 (8) The only condition for the performance of the duty under
9 subsection (5) is that the Minister thinks that it is in the public
10 interest to direct the officer to take an offshore entry person, or a
11 class of offshore entry persons, under subsection (2) to the offshore
12 processing country specified by the Minister in the direction.
- 13 (9) The rules of natural justice do not apply to the performance of the
14 duty under subsection (5).
- 15 (10) A direction under subsection (5) is not a legislative instrument.

16 *Not in immigration detention*

- 17 (11) An offshore entry person who is being dealt with under
18 subsection (3) is taken not to be in *immigration detention* (as
19 defined in subsection 5(1)).

20 *Meaning of officer*

- 21 (12) In this section, *officer* means an officer within the meaning of
22 section 5, and includes a member of the Australian Defence Force.

23 **@198AE Ministerial determination that section @198AD does not**
24 **apply**

- 25 (1) If the Minister thinks that it is in the public interest to do so, the
26 Minister may, in writing, determine that section @198AD does not
27 apply to an offshore entry person.

28 Note: For specification by class, see the *Acts Interpretation Act 1901*.

- 29 (2) The power under subsection (1) may only be exercised by the
30 Minister personally.

- 1 (3) The rules of natural justice do not apply to an exercise of the power
2 under subsection (1).
- 3 (4) If the Minister makes a determination under subsection (1), the
4 Minister must cause to be laid before each House of the Parliament
5 a statement that:
6 (a) sets out the determination; and
7 (b) sets out the reasons for the determination, referring in
8 particular to the Minister's reasons for thinking that the
9 Minister's actions are in the public interest.
- 10 (5) A statement under subsection (4) must not include:
11 (a) the name of the offshore entry person; or
12 (b) any information that may identify the offshore entry person;
13 or
14 (c) if the Minister thinks that it would not be in the public
15 interest to publish the name of another person connected in
16 any way with the matter concerned—the name of that other
17 person or any information that may identify that other person.
- 18 (6) A statement under subsection (4) must be laid before each House
19 of the Parliament within 15 sitting days of that House after:
20 (a) if the determination is made between 1 January and 30 June
21 (inclusive) in a year—1 July in that year; or
22 (b) if the determination is made between 1 July and
23 31 December (inclusive) in a year—1 January in the
24 following year.
- 25 (7) The Minister does not have a duty to consider whether to exercise
26 the power under subsection (1) in respect of any offshore entry
27 person, whether the Minister is requested to do so by the offshore
28 entry person or by any other person, or in any other circumstances.
- 29 (8) A determination under subsection (1) is not a legislative
30 instrument.

31 **@198AF No offshore processing country**

32 Section @198AD does not apply to an offshore entry person if
33 there is no offshore processing country.

1 **@198AG Non-acceptance by offshore processing country**

2 Section @198AD does not apply to an offshore entry person if the
3 offshore processing country, or each offshore processing country
4 (if there is more than one such country), has advised an officer, in
5 writing, that the country will not accept the offshore entry person.

6 **@198AH Application of section @198AD to certain transitory**
7 **persons**

8 Section @198AD applies, subject to sections @198AE, @198AF
9 and @198AG, to a transitory person if, and only if:

- 10 (a) the person is an offshore entry person who is brought to
11 Australia under section 198B for a temporary purpose; and
12 (b) the person is detained under section 189; and
13 (c) the person no longer needs to be in Australia for the
14 temporary purpose (whether or not the purpose has been
15 achieved); and
16 (d) in the case where the person has not made a request under
17 section 198C—an assessment of whether or not the person is
18 covered by the definition of *refugee* in Article 1A of the
19 Refugees Convention as amended by the Refugees Protocol
20 was not completed while the person was in the offshore
21 processing country; and
22 (e) in the case where the person has made such a request—a
23 certificate is in force under section 198D in relation to the
24 person.

25 **Subdivision C—Transitory persons etc.**

26 **26 Subsection 198D(3) (paragraph (c) of the definition of**
27 ***uncooperative conduct*)**

28 Repeal the paragraph, substitute:

- 29 (c) the detention of the person under section 189;
30 (d) the taking of the person to an offshore processing country
31 under section @198AD;
32 (e) the detention of the person in an offshore processing country.

33 **27 At the end of section 199**

1 Add:

2 (4) In paragraphs (1)(a), (2)(a) and (3)(a), a reference to remove
3 includes a reference to take to an offshore processing country.

4 **28 Subparagraph 336E(2)(a)(vi)**

5 After “removed”, insert “, taken”.

6 **29 Subparagraph 336F(5)(c)(ii)**

7 Omit “to whom Australia owes”, substitute “in respect of whom
8 Australia has protection”.

9 **30 Paragraph 474(7)(a)**

10 After “197AD,”, insert “@198AE,”.

11 **31 Subsection 486B(1)**

12 After “deportation,”, insert “taking,”.

13 **32 Paragraph 486C(1)(a)**

14 After “deportation,”, insert “taking,”.

15 **33 Paragraph 494AA(1)(d)**

16 Before “section”, insert “repealed”.

17 **34 At the end of subsection 494AA(1)**

18 Add:

19 ; (e) proceedings relating to the performance or exercise of a
20 function, duty or power under Subdivision B of Division 8 of
21 Part 2 in relation to an offshore entry person.

22 **35 After paragraph 494AB(1)(c)**

23 Insert:

24 (ca) proceedings relating to the performance or exercise of a
25 function, duty or power under Subdivision B of Division 8 of
26 Part 2 in relation to a transitory person;

27 **36 Application—section @198AD of the *Migration Act 1958***

1
2

Schedule 2—Other amendments

3

Immigration (Guardianship of Children) Act 1946

4

1 Section 4

5

Insert:

6

migration law means any of the following:

7

(a) the *Migration Act 1958*;

8

(b) regulations made under that Act;

9

(c) any instrument made under that Act or those regulations.

10

2 Section 4

11

Insert:

12

offshore processing country has the same meaning as in the
Migration Act 1958.

13

14

3 Section 6

15

Before “The Minister”, insert “(1)”.

16

4 At the end of section 6

17

Add:

18

(2) Without limiting the meaning of the expression *leaves Australia permanently* in subsection (1), a non-citizen child *leaves Australia permanently* if:

19

20

21

(a) the child is removed from Australia under section 198 or 199 of the *Migration Act 1958*; or

22

23

(b) the child is taken from Australia to an offshore processing country under section @198AD of that Act; or

24

25

(c) the child is deported under section 200 of that Act; or

26

27

(d) the child is taken to a place outside Australia under paragraph 245F(9)(b) of that Act.

28

5 Subsection 6A(4)

29

Repeal the subsection.

1 **6 Section 8 (heading)**

2 Repeal the heading, substitute:

3 **8 Operation of other laws**

4 **7 Section 8**

5 Before “Except as”, insert “(1)”.

6 **8 At the end of section 8**

7 Add:

8 (2) Nothing in this Act:

- 9 (a) affects the operation of the migration law; or
- 10 (b) affects the performance or exercise, or the purported
- 11 performance or exercise, of any function, duty or power
- 12 under the migration law; or
- 13 (c) imposes any obligation on the Minister to exercise, or to
- 14 consider exercising, any power conferred on the Minister by
- 15 or under the migration law.

16 (3) Without limiting subsection (2), nothing in this Act affects the

17 performance or exercise, or the purported performance or exercise,

18 of any function, duty or power relating to:

- 19 (a) the removal of a non-citizen child from Australia under
- 20 section 198 or 199 of the *Migration Act 1958*; or
- 21 (b) the taking of a non-citizen child from Australia to an offshore
- 22 processing country under section @198AD of that Act; or
- 23 (c) the deportation of a non-citizen child under section 200 of
- 24 that Act; or
- 25 (d) the taking of a non-citizen child to a place outside Australia
- 26 under paragraph 245F(9)(b) of that Act.