

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Independent Health Advice Panel) Regulations 2019

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

Additionally, subsection 199B(3) of the Migration Act provides that the regulations may prescribe Australian professional bodies who may nominate a person to be appointed by the Minister as a member of the Independent Health Advice Panel (IHAP).

The function of the IHAP is to monitor, assess and report on the physical and mental health of transitory persons (as defined in section 5(1) of the Migration Act) who are in regional processing countries, and the standard of health services provided to them. The IHAP will consist of:

- the person occupying the positions of Chief Medical Officer of the Department of Home Affairs and the Surgeon-General of the Australian Border Force;
- the person occupying the position of Chief Medical Officer of the Commonwealth; and
- not less than six other members appointed by the Minister, including one nominated by the President of the Australian Medical Association, one by the Royal Australian and New Zealand College of Psychiatrists, one by the Royal Australasian College of Physicians and one who has expertise in paediatric health.

The Minister may also appoint persons nominated by the Australian Psychological Society, and/or an Australian professional body prescribed by the regulations.

Members appointed by the Minister are appointed for a minimum of three years and are not entitled to remuneration.

The *Migration Amendment (Independent Health Advice Panel) Regulations 2019* (the proposed Regulations) would amend the *Migration Regulations 1994* (the Migration Regulations) to prescribe the following bodies for the purpose of subsection 199B(3):

- the Royal Australian College of General Practitioners;
- the Australian College of Rural and Remote Medicine; and
- the Royal Australasian College of Surgeons.

The purpose of prescribing additional professional bodies that the Minister may invite to nominate medical professionals is to expand the pool of qualified and experienced persons with relevant expertise who the Minister may appoint to the IHAP.

The relevant bodies have been consulted in relation to being prescribed as Australian professional bodies.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at Attachment A.

Details of the Regulations are set out in Attachment B.

The Office of Best Practice Regulation (the OBPR) has not been consulted in relation to the amendments made by the Regulations.

The Migration Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after the Regulations are registered.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

**Migration Amendment (Independent Health Advice Panel)
Regulations 2019**

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Subsection 199B(3) of the *Migration Act* provides that the regulations may prescribe Australian professional bodies who may nominate a person to be appointed by the Minister as a member of the Independent Health Advice Panel.

The *Migration Amendment (Independent Health Advice Panel) Regulations 2019* (the proposed Regulations) would amend the *Migration Regulations 1994* (the Migration Regulations) to prescribe the following bodies for the purpose of subsection 199B(3):

- the Royal Australian College of General Practitioners;
- the Australian College of Rural and Remote Medicine; and
- the Royal Australasian College of Surgeons.

Human Rights Implications

The prescription of the Royal Australian College of General Practitioners, the Australian College of Rural and Remote Medicine, and the Royal Australian College of Surgeons as professional bodies who may nominate a person to be appointed to the Independent Health Advice Panel (IHAP) allows the possibility for these bodies to nominate persons for consideration for inclusion on the IHAP, but does not otherwise operate to effect the consideration or operation of the IHAP in Australia, and therefore does not engage Australia's human rights obligations.

The Australian Government's long-standing view is that Australia's human rights obligations are essentially territorial. Persons in regional processing countries are outside Australia's territory. Australia has accepted that there may be exceptional circumstances in which the rights and freedoms may apply to persons beyond the territory of a State party, and the extent of the obligations that a State may owe under international human rights law where it is operating extraterritorially will be informed by the degree of control exercised by the State. In general, the Government's position is that Australia does not exercise the degree of control necessary in regional processing countries to enliven Australia's international obligations. The objective of the IHAP is outlined in Subsection 199A of the Migration Act and is restricted to transitory persons who are in regional processing countries; therefore, these regulations do not engage Australia's human rights obligations.

Conclusion

The measures proposed in this legislative instrument do not engage human rights issues.

The Hon. David Coleman, Minister for Immigration, Citizenship and Multicultural Affairs

ATTACHMENT B**Details of the Migration Amendment (Independent Health Advice Panel) Regulations 2019****Section 1 – Name**

This section provides that the title of the Regulations is the *Migration Amendment (Independent Health Advice Panel) Regulations 2019* (the Regulations).

Section 2 – Commencement

Subsection 2(1) provides that each provision of the Regulations specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms. The table provides that the amendments commence the day after the Regulations are registered. A note clarifies that this table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

Subsection 2(2) provides that any information in column 3 of the table is not part of the Regulations. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

The purpose of this section is to provide for the commencement of the Regulations.

Section 3 – Authority

This section provides that the Regulations are made under the *Migration Act 1958* (the Migration Act).

The purpose of this section is to set out the Act under which the Regulations are made.

Section 4 – Schedules

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

The effect of this section is that the *Migration Regulations 1994* (the Migration Regulations) are amended as set out in the applicable items in the Schedules to the Regulations.

The purpose of this section is to provide for how the amendments made by these Regulations operate.

Schedule 1 – Amendments

Item [1] – After regulation 1.16AA

This item inserts regulation 1.17 after regulation 1.16AA into Division 1.3 of Part 1 of the Migration Regulations.

New regulation 1.17 prescribes professional bodies that may nominate persons for appointment to the Independent Health Advice Panel for the purposes of subparagraph 199B(3)(b)(v) of the Migration Act.

The professional bodies inserted by the new regulation are:

- the Royal Australian College of General Practitioners Limited
- the Australian College of Rural and Remote Medicine
- the Royal Australasian College of Surgeons.

On 13 February 2019 the Australian Parliament passed the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2019, Schedule 6 of which amends the Migration Act to establish a framework for the transfer of transitory persons (and their family members, and other persons whom are recommended to accompany the transitory person) from regional processing countries (RPCs) to Australia for the purposes of medical or psychiatric assessment or treatment. They also provide for the transfer of transitory persons who are minors to Australia, irrespective of any medical or psychiatric condition.

As part of those amendments, the Independent Health Advice Panel (IHAP) was established by new Subdivision D of Part 2 of Division 8 of the Migration Act. The IHAP is a statutory body whose functions are set out in subsection 199C(2) of the Migration Act. The objective of IHAP is to monitor, assess and and report on the physical and mental health of transitory persons who are in regional processing countries and the standard of healthcare services provided to them. The IHAP is made up of not less than 8 members, 6 of whom are to be nominated by the following professional bodies, listed at paragraph 199B(3)(b) of the Act:

- The Australian Medical Association
- The Royal Australian and New Zealand College of Psychiatrists
- The Royal Australasian College of Physicians
- The Australian Psychological Society
- An Australian professional body prescribed by the regulations.

The purpose of new regulation 1.17 is to prescribe bodies for the purposes of subparagraph 199B(3)(b)(v).