



Migration Amendment (Detention Arrangements) Act 2005

No. 79, 2005

An Act to amend the *Migration Act 1958*, and for related purposes

Note: An electronic version of this Act is available in SCALEplus
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)

Contents

1	Short title.....	1
2	Commencement.....	2
3	Schedule(s).....	3
	Schedule 1—Detention arrangements	4
	Part 1—Amendments	4
	<i>Migration Act 1958</i>	4
	Part 2—Application of amendments	15



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An Act to amend the *Migration Act 1958*, and for related purposes

[Assented to 29 June 2005]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Migration Amendment (Detention Arrangements) Act 2005*.

2 Commencement

- (1) Each provision of this Act 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.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	29 June 2005
2. Schedule 1, items 1 to 16	The day on which this Act receives the Royal Assent.	29 June 2005
3. Schedule 1, item 17	The later of: (a) the start of the day on which this Act receives the Royal Assent; and (b) immediately after the commencement of item 15 of Schedule 1 to the <i>Migration Litigation Reform Act 2005</i> . However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	1 December 2005 (paragraph (b) applies)
4. Schedule 1, item 18	The day on which this Act receives the Royal Assent. However, if item 17 of Schedule 1 to the <i>Migration Litigation Reform Act 2005</i> commences on or before the day on which this Act receives the Royal Assent, the provision(s) do not commence at all.	29 June 2005
5. Schedule 1, items 19 to 21	The day on which this Act receives the Royal Assent.	29 June 2005

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

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- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

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.

Schedule 1—Detention arrangements

Part 1—Amendments

Migration Act 1958

1 After section 4

Insert:

4AA Detention of minors a last resort

- (1) The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.
- (2) For the purposes of subsection (1), the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a residence determination.

2 Subsection 5(1) (at the end of the definition of *detain*)

Add:

Note: This definition extends to persons covered by residence determinations (see section 197AC).

3 Subsection 5(1) (at the end of the definition of *detainee*)

Add:

Note: This definition extends to persons covered by residence determinations (see section 197AC).

4 Subsection 5(1) (note at the end of the definition of *immigration detention*)

Omit “Note:”, substitute “Note 1:”.

5 Subsection 5(1) (at the end of the definition of *immigration detention*)

Add:

Note 2: This definition extends to persons covered by residence determinations (see section 197AC).

6 Subsection 5(1)

Insert:

residence determination has the meaning given by subsection 197AB(1).

7 At the end of subsection 65(1)

Add:

Note: See also section 195A, under which the Minister has a non-compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.

8 Before section 188

Insert:

Subdivision A—General provisions

9 At the end of section 189

Add:

Note: See Subdivision B for the Minister's power to determine that people who are required or permitted by this section to be detained may reside at places not covered by the definition of *immigration detention* in subsection 5(1).

10 After section 195

Insert:

195A Minister may grant detainee visa (whether or not on application)

Persons to whom section applies

- (1) This section applies to a person who is in detention under section 189.

Minister may grant visa

- (2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).

- (3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

Minister not under duty to consider whether to exercise power

- (4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

Minister to exercise power personally

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

Tabling of information relating to the granting of visas

- (6) If the Minister grants a visa under subsection (2), he or she must cause to be laid before each House of the Parliament a statement that (subject to subsection (7)):
- (a) states that the Minister has granted a visa under this section; and
 - (b) sets out the Minister's reasons for granting the visa, referring in particular to the Minister's reasons for thinking that the grant is in the public interest.
- (7) A statement under subsection (6) in relation to a decision to grant a visa is not to include:
- (a) the name of the person to whom the visa is granted; or
 - (b) any information that may identify the person to whom the visa is granted; or
 - (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the grant of the visa—the name of that other person or any information that may identify that other person.
- (8) A statement under subsection (6) is to be laid before each House of the Parliament within 15 sitting days of that House after:
- (a) if the decision to grant the visa is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

- (b) if the decision to grant the visa is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

11 At the end of Division 7 of Part 2

Add:

Subdivision B—Residence determinations

197AA Persons to whom Subdivision applies

This Subdivision applies to a person who is required or permitted by section 189 to be detained, or who is in detention under that section.

197AB Minister may determine that person is to reside at a specified place rather than being held in detention centre etc.

- (1) If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a *residence determination*) to the effect that one or more specified persons to whom this Subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of *immigration detention* in subsection 5(1).
- (2) A residence determination must:
 - (a) specify the person or persons covered by the determination by name, not by description of a class of persons; and
 - (b) specify the conditions to be complied with by the person or persons covered by the determination.
- (3) A residence determination must be made by notice in writing to the person or persons covered by the determination.

197AC Effect of residence determination

Act and regulations apply as if person were in detention in accordance with section 189

- (1) While a residence determination is in force, this Act and the regulations apply (subject to subsection (3)) to a person who is covered by the determination and who is residing at the place

specified in the determination as if the person were being kept in immigration detention at that place in accordance with section 189.

- (2) If:
- (a) a person covered by a residence determination is temporarily staying at a place other than the place specified in the determination; and
 - (b) the person is not breaching any condition specified in the determination by staying there;
- then, for the purposes of subsection (1), the person is taken still to be residing at the place specified in the determination.

Certain provisions do not apply to people covered by residence determinations

- (3) Subsection (1):
- (a) does not apply for the purposes of section 197 or 197A, or any of sections 252AA to 252E; and
 - (b) does not apply for the purposes of any other provisions of this Act or the regulations that are specified in regulations made for the purposes of this paragraph.

What constitutes release from immigration detention?

- (4) If:
- (a) a residence determination is in force in relation to a person; and
 - (b) a provision of this Act requires the person to be released from immigration detention, or this Act no longer requires or permits the person to be detained;
- then, at the time when paragraph (b) becomes satisfied, the residence determination, so far as it covers the person, is revoked by force of this subsection and the person is, by that revocation, released from immigration detention.

Note: Because the residence determination is revoked, the person is no longer subject to the conditions specified in the determination.

- (5) If a person is released from immigration detention by operation of subsection (4), the Secretary must, as soon as possible, notify the person that he or she has been so released.

Secretary must ensure section 256 complied with

- (6) The Secretary must ensure that a person covered by a residence determination is given forms and facilities as and when required by section 256.

197AD Revocation or variation of residence determination

- (1) If the Minister thinks that it is in the public interest to do so, the Minister may, at any time, revoke or vary a residence determination in any respect (subject to subsection (2)).

Note 1: If a person covered by a residence determination does not comply with a condition specified in the determination, the Minister may (subject to the public interest test) decide to revoke the determination, or to vary the determination by altering the conditions, whether by omitting or amending one or more existing conditions or by adding one or more additional conditions.

Note 2: If the Minister revokes a residence determination (without making a replacement determination) and a person covered by the determination is a person whom section 189 requires to be detained, the person will then have to be taken into detention at a place that is covered by the definition of *immigration detention* in subsection 5(1).

- (2) Any variation of a residence determination must be such that the determination, as varied, will comply with subsections 197AB(1) and (2).
- (3) A revocation or variation of a residence determination must be made by notice in writing to the person or persons covered by the determination.

197AE Minister not under duty to consider whether to exercise powers

The Minister does not have a duty to consider whether to exercise the power to make, vary or revoke a residence determination, whether he or she is requested to do so by any person, or in any other circumstances.

197AF Minister to exercise powers personally

The power to make, vary or revoke a residence determination may only be exercised by the Minister personally.

197AG Tabling of information relating to the making of residence determinations

- (1) If the Minister makes a residence determination, he or she must cause to be laid before each House of the Parliament a statement that (subject to subsection (2)):
 - (a) states that the Minister has made a determination under this section; and
 - (b) sets out the Minister's reasons for making the determination, referring in particular to the Minister's reasons for thinking that the determination is in the public interest.
- (2) A statement under subsection (1) in relation to a residence determination is not to include:
 - (a) the name of any person covered by the determination; or
 - (b) any information that may identify any person covered by the determination; or
 - (c) the address, name or location of the place specified in the determination; or
 - (d) any information that may identify the address, name or location of the place specified in the determination; or
 - (e) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the determination—the name of that other person or any information that may identify that other person.
- (3) A statement under subsection (1) is to be laid before each House of the Parliament within 15 sitting days of that House after:
 - (a) if the residence determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
 - (b) if the residence determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

12 After paragraph 276(2A)(a)

Insert:

- (aa) preparing, or helping to prepare, a request to the Minister to exercise a power under section 195A, 197AB or 197AD (whether or not the exercise of the power would relate to the other person); or

13 Paragraph 276(2A)(b)

Omit “such a request”, substitute “a request referred to in paragraph (a) or (aa)”.

14 At the end of section 277

Add:

- (5) A lawyer does not give immigration legal assistance in giving advice to another person that is for the purpose of the preparation or making of a request to the Minister to exercise a power under section 195A, 197AB or 197AD (whether or not the exercise of the power would relate to the other person).

15 At the end of subsection 282(4)

Add:

- ; or (f) on behalf of a person who has made (or is proposing to make) a request to the Minister to exercise a power under section 195A, 197AB or 197AD (whether or not the exercise of the power would relate to the other person), about the request.

16 Paragraph 474(3)(a)

After “making,”, insert “varying,”.

17 Paragraph 474(7)(a)

After “91Q,”, insert “195A, 197AB, 197AD,”.

18 Subsection 476(2)

After “91Q,”, insert “195A, 197AB, 197AD,”.

19 Before Part 9

Insert:

Part 8C—Reports on persons in detention for more than 2 years

486L What is the *detention reporting start time* for a person?

For the purposes of this Part, the *detention reporting start time* for a person is whichever of the following times (if any) applies to the person:

- (a) if the person is in immigration detention on the commencement of this Part and has been in immigration detention before then for a period of at least 2 years, or for periods that total at least 2 years—the time when this Part commences; or
- (b) otherwise—the time after the commencement of this Part when the person has been in immigration detention for a period of 2 years, or for periods that total at least 2 years (some of which detention may have occurred before the commencement of this Part).

486M What is a *detention reporting time* for a person?

For the purposes of this Part, a *detention reporting time* for a person is:

- (a) the detention reporting start time for the person; or
- (b) the end of each successive period of 6 months after that time at the end of which the person is in immigration detention.

486N Secretary's obligation to report to Commonwealth Ombudsman

- (1) The Secretary must give the Commonwealth Ombudsman a report relating to the circumstances of the person's detention. The report must be given:
 - (a) if the detention reporting time is the time when this Part commences—as soon as practicable, and in any event within 6 months, after that commencement; or
 - (b) otherwise—within 21 days after the detention reporting time.

- (2) Without limiting subsection (1), the report must include any matters specified in regulations made for the purposes of this subsection.
- (3) The Secretary must give the report to the Commonwealth Ombudsman even if the person has, since the detention reporting time, ceased to be in immigration detention.

486O Commonwealth Ombudsman to give Minister assessment of detention arrangements

Commonwealth Ombudsman to give Minister assessment of appropriateness of detention arrangements

- (1) As soon as practicable after the Commonwealth Ombudsman receives a report under section 486N, he or she is to give the Minister an assessment of the appropriateness of the arrangements for the person's detention.

Assessment may include recommendations

- (2) The assessment may include any recommendations the Commonwealth Ombudsman considers appropriate.
- (3) Without limiting subsection (2), the kinds of recommendations the Ombudsman may make include the following:
 - (a) a recommendation for the continued detention of a person;
 - (b) a recommendation that another form of detention would be more appropriate for a person (for example, residing at a place in accordance with a residence determination);
 - (c) a recommendation that a person be released into the community on a visa;
 - (d) general recommendations relating to the Department's handling of its detainee caseload.

- (4) The Minister is not bound by any recommendations the Commonwealth Ombudsman makes.

Assessment to include statement for tabling in Parliament

- (5) The assessment must also include a statement, for the purpose of tabling in Parliament, that sets out or paraphrases so much of the content of the assessment as the Commonwealth Ombudsman

considers can be tabled without adversely affecting the privacy of any person.

Assessment to be given even if person no longer in detention

- (6) The Commonwealth Ombudsman must give the assessment to the Minister even if the person has, since the detention reporting time, ceased to be in immigration detention.

486P Minister to table statement from Commonwealth Ombudsman

The Minister must cause the statement included in an assessment as mentioned in subsection 486O(5) to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives the assessment.

486Q Application of *Ombudsman Act 1976*

- (1) Subject to this Part, the *Ombudsman Act 1976* applies in relation to the Commonwealth Ombudsman's preparation of an assessment under section 486O (including his or her consideration of the report under section 486N to which the assessment relates), as if the preparation of the assessment were an investigation under that Act.
- (2) The Commonwealth Ombudsman's functions include the functions conferred on the Commonwealth Ombudsman by this Part.

Part 2—Application of amendments

20 Application of amendment made by item 10

The amendment made by item 10 applies to all persons in detention under section 189 of the *Migration Act 1958* after the commencement of that item (including persons who are already in detention under that section when that item commences).

21 Application of amendment made by item 11

The amendment made by item 11 applies to all persons who, after the commencement of that item, are required or permitted by section 189 of the *Migration Act 1958* to be detained, or are kept in detention under that section (including persons who are already in detention under that section when that item commences).

*[Minister's second reading speech made in—
House of Representatives on 21 June 2005
Senate on 23 June 2005]*

(127/05)
