Migration Amendment (Immigration Detention Reform) Bill 2009

No. , 2009

(Immigration and Citizenship)

A Bill for an Act to amend the Migration Act 1958, and for related purposes
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*Migration Act 1958*

3
A Bill for an Act to amend the *Migration Act 1958*,
and for related purposes

The Parliament of Australia enacts:

1 **Short title**

   This Act may be cited as the *Migration Amendment (Immigration Detention Reform) Act 2009*.

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

<table>
<thead>
<tr>
<th>Provision(s)</th>
<th>Commencement</th>
<th>Date/Details</th>
</tr>
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<tbody>
<tr>
<td>1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table</td>
<td>The day on which this Act receives the Royal Assent.</td>
<td></td>
</tr>
<tr>
<td>2. Schedule 1</td>
<td>A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.</td>
<td></td>
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</tbody>
</table>

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

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)

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 Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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

Migration Act 1958

1 After section 4

Insert:

4AAA Immigration detention

(1) The Parliament affirms as a principle that the purpose of detaining a non-citizen is to:

(a) manage the risks to the Australian community of the non-citizen entering or remaining in Australia; and

(b) resolve the non-citizen’s immigration status.

Note: Resolving the non-citizen’s immigration status would result in either a visa being granted to the non-citizen or the non-citizen being removed or deported.

(2) The Parliament affirms as a principle that a non-citizen:

(a) must only be detained in a detention centre established under this Act as a measure of last resort; and

(b) if a non-citizen is to be so detained—must be detained for the shortest practicable time.

2 Subsection 4AA(1)

After “a minor”, insert “(including a person whom an officer reasonably suspects of being a minor)”.  

3 At the end of section 4AA

Add:

(3) If a minor is to be detained as a measure of last resort, the minor must not be detained in a detention centre established under this Act.

(4) If a minor is to be detained (including in accordance with a residence determination), an officer must, for the purposes of determining where the minor is to be detained, regard the best interests of the minor as a primary consideration.
Schedule 1  Amendments relating to immigration detention

Note: The Minister may give written directions specifying how an officer is to have regard to the best interests of the minor: see section 499.

4 Subsection 5(1) (at the end of subparagraph (b)(v) of the definition of immigration detention)

Add “or”.

5 Subsection 5(1) (after paragraph (b) of the definition of immigration detention)

Insert:

(c) being at, or going to, a place in accordance with a temporary community access permission without being in the company of, and restrained by, an officer or another person directed by the Secretary (as mentioned in paragraph (a));

6 Subsection 5(1) (before note 1 to the definition of immigration detention)

Insert:

Note 1A: Subparagraph (b)(v)—places approved by the Minister may include, for example, immigration transit accommodation, immigration residential housing and other places that may be used to provide accommodation.

7 Subsection 5(1)

Insert:

temporary community access permission has the meaning given by subsection 194A(1).

8 Subsection 42(4) (note)

Repeal the note, substitute:

Note: Section 189 provides for the detention of unlawful non-citizens in the migration zone.

9 Subsection 189(1)

Repeal the subsection, substitute:

(1) An officer must detain a person in the migration zone (other than an excised offshore place) if the officer knows or reasonably suspects that:

(a) the person is an unlawful non-citizen; and
(b) any of the following applies:

(i) the person presents an unacceptable risk to the Australian community;

(ii) the person has bypassed immigration clearance;

(iii) the person has been refused immigration clearance;

(iv) the person’s visa has been cancelled under section 109 because, when in immigration clearance, the person produced a document that was false or had been obtained falsely;

(v) the person’s visa has been cancelled under section 109 because, when in immigration clearance, the person gave information that was false.

(1A) For the purposes of subparagraph (1)(b)(i), a person presents an unacceptable risk to the Australian community if, and only if, any of the following applies:

(a) the person has been refused a visa under section 501, 501A or 501B or on grounds relating to national security;

(b) the person’s visa has been cancelled under section 501, 501A or 501B or on grounds relating to national security;

(c) the person held an enforcement visa and remains in Australia when the visa ceases to be in effect;

(d) circumstances prescribed by the regulations apply in relation to the person.

(1B) If a person is detained because an officer knows or reasonably suspects that the person is someone mentioned in paragraph (1)(b) (other than subparagraph (1)(b)(i)), an officer must make reasonable efforts to:

(a) ascertain the person’s identity; and

(b) identify whether the person is of character concern; and

(c) ascertain the health and security risks to the Australian community of the person entering or remaining in Australia; and

(d) resolve the person’s immigration status.

Note: Paragraph (d)—resolving the person’s immigration status would result in either a visa being granted to the person or the person being removed or deported.
Schedule 1 Amendments relating to immigration detention

(1C) Otherwise, if an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer may detain the person.

10 Paragraphs 193(1)(a) and (b)
After “subsection 189(1)”, insert “or (1C)”.

11 Paragraph 194(a)
After “sections”, insert “194A,”.

12 After section 194
Insert:

194A Authorised officer may grant a temporary community access permission

(1) An authorised officer may grant a permission (a temporary community access permission) allowing a person:
(a) in immigration detention (within the meaning of paragraph (a) or (b) of the definition of that expression) but not covered by a residence determination; and
(b) named in the permission;
to be absent from the place of the person’s detention for the period or periods specified in the permission for the purpose or purposes specified in the permission.

(2) An authorised officer may only make a temporary community access permission if the authorised officer considers that it would involve minimal risk to the Australian community to do so.

(3) A temporary community access permission must:
(a) be made by notice in writing; and
(b) be given to the person covered by the permission; and
(c) specify the conditions to be complied with by the person.

(4) An authorised officer does not have a duty to consider whether to exercise the power to make, vary or revoke a temporary community access permission, whether he or she is requested to do so by any person, or in any other circumstances.
(5) A temporary community access permission made by written notice is not a legislative instrument.

194B Revocation of temporary community access permission on release from immigration detention

If:

(a) a temporary community access permission is in force in respect of 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 temporary community access permission is revoked by force of this section.

Note: Because the temporary community access permission is revoked, the person is no longer subject to the conditions specified in the permission.

13 Section 197AF

Repeal the section.

14 Paragraphs 197AG(1)(a) and (b)

Repeal the paragraphs, substitute:

(a) states that a determination has been made under this Subdivision; and

(b) sets out the reasons why the determination was made, referring in particular to the reasons why it was thought that the determination was in the public interest.

15 After paragraph 276(2A)(aa)

Insert:

(ab) preparing, or helping to prepare, a request to an authorised officer to exercise a power under section 194A (whether or not the exercise of the power would relate to the other person); or

16 Paragraph 276(2A)(b)

Omit "or (aa)”, substitute “, (aa) or (ab)”. 
17 At the end of section 277

Add:

(6) 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 an authorised officer to exercise a power
under section 194A (whether or not the exercise of the power
would relate to the other person).

18 At the end of subsection 282(4)

Add:

; or (g) on behalf of a person who has made (or is proposing to
make) a request to an authorised officer to exercise a power
under section 194A (whether or not the exercise of the power
would relate to the other person), about the request.

19 After paragraph 474(7)(a)

Insert:

(aa) a decision of an authorised officer not to exercise, or not to
consider the exercise of, the authorised officer’s power under
section 194A;

20 Transitional provision—existing detainees

(1) If:

(a) a person is in immigration detention under subsection 189(1)
of the Migration Act 1958 immediately before this item
commences; and

(b) at the time this item commences, an officer knows or
reasonably suspects that the person is someone mentioned in
paragraph 189(1)(b) of that Act (as inserted by item 9 of this
Schedule);

the person is taken to be detained, after this item commences, under
subsection 189(1) of that Act (as inserted by item 9 of this Schedule).

(2) If:

(a) a person is in immigration detention under subsection 189(1)
of the Migration Act 1958 immediately before this item
commences; and

(b) the person is not someone covered by subitem (1);
the person is taken to be detained, after this item commences, under subsection 189(1C) of that Act (as inserted by item 9 of this Schedule).

(3) In this item:

- *immigration detention* has the same meaning as in the *Migration Act 1958*.
- *officer* has the same meaning as in the *Migration Act 1958*.

21 Application

(1) The amendments made by this Schedule apply in relation to a person who is in immigration detention on or after the day on which this item commences.

(2) In this item:

- *immigration detention* has the same meaning as in the *Migration Act 1958*.  

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