MIGRATION AMENDMENT (DETENTION ARRANGEMENTS) BILL 2005
EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Immigration and Multicultural and Indigenous Affairs,
Senator the Hon Amanda Vanstone)
MIGRATION AMENDMENT (DETENTION ARRANGEMENTS) BILL 2005

OUTLINE

1. The Migration Amendment (Detention Arrangements) Bill 2005 ("the Bill") amends provisions in the Migration Act 1958 ("the Act") to provide greater flexibility and transparency in the administration of the detention of persons known or reasonably suspected to be unlawful non-citizens. The Bill amends the Act to:

- state that the Parliament affirms as a principle that a minor shall only be detained as a measure of last resort;
- provide a non-compellable power for the Minister to specify alternative arrangements for a person’s detention and to impose conditions to apply to the detention of that person;
- provide a non-compellable power for the Minister to grant a visa to a person who is in detention; and
- require the Secretary to report to the Commonwealth Ombudsman on persons who have been detained for two years or more, and for the Ombudsman to provide assessments and recommendations relating to those persons to the Minister, including statements to be tabled.

Minor to be detained as a last resort

2. New section 4AA is proposed to state an affirmation by the Parliament that, as a matter of principle, a minor shall only be detained as a measure of last resort.

3. The new section is proposed to indicate that the principle relates to the holding of children in traditional detention arrangements. The principle would indicate that, where detention of a child is required under the Act, it should, when and wherever possible, take place in the community, under a residence determination.

Community Detention Arrangements

4. Currently the Act requires that a person in immigration detention be accompanied and restrained by, or on behalf of, an immigration officer or held in secured arrangements. This is required regardless of the particular characteristics of the person, such as their age, health, behaviour, or likelihood to abscond.

5. The new non-compellable power in Subdivision B of Division 7 of Part 2 will allow the Minister, acting personally, to specify alternative arrangements for a person’s detention.

6. In particular, this power will enable the Minister to allow families with children to reside in the community at a specified place (instead of at a detention centre or residential housing project) in accordance with conditions that address their individual circumstances.
7. These conditions are expected to be such as to require the person to be present at the specified residence during specified hours, and to report to immigration officials at specified times. The types of conditions that could be included would not be limited. Under these arrangements, detainees would be free to move about in the community without being accompanied or restrained by an officer under the Act. The only restraint on a person to whom the Minister’s determination applies would be that he or she complies with the conditions specified in that determination.

8. The Minister will be publishing instructions and guidelines in relation to the exercise of this power, with particular emphasis being placed on the Government’s intention that the best interests of children will be taken into account, and where detention of an unlawful non-citizen family (with children) is required under the Act, detention should be under these alternative arrangements where and as soon as possible, rather than under traditional detention.

9. It is the Government’s intention that where persons who are known or reasonably suspected to be unlawful non-citizens who are in a family have made a valid visa application and are awaiting the Minister’s delegate’s decision on that application, or removal is imminent, or a family member has breached the conditions of the Minister’s residence determination, that the family (including the father) will be detained, if possible, in a residential housing project that is in the city nearest to the family’s prior residence.

*Non-compellable power to grant a detainee a visa, including a Removal Pending Bridging Visa*

10. The Bill inserts a new section 195A, which provides the Minister with a non-compellable power to grant a visa to a person who is being held in immigration detention where the Minister is satisfied that it is in the public interest to do so. In the exercise of this power the Minister will not be bound by the provisions of the Migration Act or regulations governing application and grant requirements. The Minister will have the flexibility to grant any visa that is appropriate to that individual’s circumstances, including a Removal Pending Bridging Visa where the detainee has no right to remain in Australia but removal is not practicable in the foreseeable future.

*Ombudsman oversight of long term detainees*

11. The new Part 8C gives the Commonwealth Ombudsman a specific role reviewing the cases of persons who have been in immigration detention for more than two years. The Secretary will be required to provide to the Ombudsman a report on the detainee’s circumstances when the person has been detained for two years or more, and then every six months thereafter if the person is in detention at those times.
12. The Ombudsman will be able to conduct appropriate inquiries on any issues arising from the Secretary’s report, and will have the same powers available to him as he has in relation to investigations under the Ombudsman Act 1976 such as the power to require the Department to furnish further information, answer questions (including under oath) and produce documents, and the power to enter the Department’s premises, including detention centres.

13. The Ombudsman will then provide an assessment of the appropriateness of the person’s detention arrangements and any recommendations regarding a detainee to the Minister. While the Ombudsman’s recommendations will not be binding on the Minister, the Minister will be required to table a statement prepared by the Ombudsman as part of the assessment, including any recommendations from the Ombudsman. The statement will not contain material that the Ombudsman considers could not be tabled without adversely affecting the privacy of any person.

Summary of Changes

14. The amendments to the Migration Act will maintain the integrity of the mandatory detention regime for unlawful non-citizens, whilst:

(a) incorporating the Parliament’s affirmation as a matter of principle that a minor shall only be detained as a measure of last resort;
(b) providing the capacity to tailor detention requirements, as appropriate, to individual or family circumstances;
(c) allowing release from immigration detention, through the grant of a visa where the Minister believes this is appropriate; and
(d) introducing greater transparency in the management of long term detainees through independent assessments by the Commonwealth Ombudsman.

FINANCIAL IMPACT STATEMENT

2. The amendments contained in the Bill are expected to have financial impacts of both a positive and negative nature. The full financial implications of the Bill for DIMIA are uncertain at present. However, overall these are expected to be minor. The Ombudsman will require additional resources.

3. The Commonwealth will need to meet the costs associated with the detention of a person in the community under new Subdivision B of Division 7 of Part 2 of the Act. These costs may vary depending on the number of people held in community arrangements under residence determinations as compared with those held in an immigration detention centres, the nature of the residence specified in a residence determination and the level of Government support needed to give effect to such a determination.

4. Additional resources will be required to meet the additional costs associated with the reports to and assessments by the Ombudsman, provided for in new Part 8C.
NOTES ON INDIVIDUAL CLAUSES

Clause 1  Short title

1. The short title by which this Act may be cited is the Migration Amendment (Detention Arrangements) Act 2005.

Clause 2  Commencement

2. This clause sets out the commencement arrangements for provisions of this Act. Each provision 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.

3. All provisions of this Act, other than items 17 and 18 of Schedule 1, will commence on the day on which this Act receives the Royal Assent.

4. Commencement of items 17 and 18 are dependent on the day on which the Migration Litigation Reform Act 2005 commences.

Clause 3  Schedule(s)

5. This clause provides that each Act specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned. In addition, 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

Item 1 After section 4

Section 4AA Detention of minors a last resort

1. This item inserts a new section 4AA after section 4 which relates to the detention of minors as a last resort.

2. New subsection 4AA(1) states that the Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.

3. The purpose of this new subsection is to reflect the Government’s policy that children shall not be detained, or continue to be detained, in traditional detention arrangements except as a measure of last resort. This is to make plain that where detention of an unlawful non-citizen family (with minor children) is required under the Act and children are detained in an immigration detention centre or a residential housing project, it should only be because there is no other viable option available. This may be done for compelling reasons, including where conditions of a residence determination have been breached, primary assessment is being undertaken or removal arrangements are underway.

4. New subsection 4AA(2) clarifies that the principle relates to the holding of children in traditional detention arrangements, rather than the holding of children under the new residence determinations. The principle would indicate that, where detention of a child under the Act has to occur, it should, when and wherever possible, take place in the community, under a residence determination.

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

5. This item adds a new note in subsection 5(1) at the end of the definition of detain. It explains that the definition of detain extends to persons covered by residence determinations, drawing attention to the operation of new section 197AC.

6. The purpose of this note is to clarify the status of a person who is the subject of a residence determination. Such a person is still in immigration detention, even though the detention takes place at a specified residence without direct supervision, instead of an immigration detention centre.
Item 3       Subsection 5(1) (at the end of the definition of *detainee*)

7. This item adds a new note in subsection 5(1) at the end of the definition of 
   *detainee*. It explains that the definition of *detainee* extends to persons covered by 
   residence determinations, drawing attention to the operation of new section 197AC.

8. The purpose of this note is to clarify the status of a person who is the subject of a 
   residence determination. Such a person is still in immigration detention, even though 
   the detention takes place at a specified residence without direct supervision, instead of 
   an immigration detention centre.

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

9. This item omits the word “Note” in subsection 5(1) at the end of the definition of 
   *immigration detention* and provides for its substitution with the word “Note 1”.

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

10. This item adds a new note in subsection 5(1) at the end of the definition of 
    *immigration detention*. It explains that the definition of *immigration detention* 
    extends to persons covered by residence determinations, drawing attention to the 
    operation of new section 197AC.

11. The purpose of this note is to clarify the status of a person who is the subject of a 
    residence determination. Such a person is still in immigration detention, even though 
    the detention takes place at a specified residence without direct supervision, instead of 
    an immigration detention centre.

Item 6       Subsection 5(1)

12. This item inserts a new definition of *residence determination* in subsection 5(1) 
    of the Act and specifies that this has the meaning given by subsection 197AB(1). 
    This amendment is consequential to the addition of new section 197AB.

Item 7       At the end of subsection 65(1)

13. This item adds a note at the end of subsection 65(1). It refers to new 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). This amendment is consequential the addition of new section 195A.
**Item 8** Before section 188

**Subdivision A** General provisions

14. This item provides for the insertion of a new title “Subdivision A – General provisions” before section 188.

15. This is consequential to the insertion of a new “Subdivision B – Residence determinations” at Item 11 of this Schedule.

**Item 9** At the end of section 189

16. This item adds a new note at the end of section 189. It refers the reader to Subdivision B for the Minister’s power to determine that people 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).

17. The purpose of this note is to clarify that section 189 is not an exhaustive statement of the powers relating to how a person is required or permitted to be detained under the Act.

**Item 10** After section 195

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

18. This item provides for the insertion of a new section 195A after section 195. New section 195A provides for the circumstances in which the Minister may grant a person in immigration detention a visa, whether or not an application has been made.

19. Subsection 195A(1) provides that this section applies to a person who is in detention under section 189 of the Act. Section 189 provides for the detention of a person who is, or is reasonably suspected to be:

- an unlawful non-citizen in the Migration Zone;
- outside the migration zone, but seeking to enter the migration zone and would be an unlawful non-citizen if in the migration zone;
- an unlawful non-citizen in an offshore excised place; or
- seeking to enter an excised offshore place and would be an unlawful non-citizen if in the migration zone.

20. Subsection 195A(2) empowers the Minister to grant to a person who has been detained in accordance with section 189 a visa of a particular class (whether or not the person has applied for the visa) if the Minister thinks that it is in the public interest to do so. This is a non-compellable, discretionary power dependent upon the Minister’s consideration that such grant of a visa would be in the public interest. It is intended that it will be used to release a person from detention where it is not in the public interest to continue to detain them.
21. Subsection 195A(3) specifies that where the Minister chooses to exercise the discretionary power in subsection (2), he or she is not bound by provisions contained in Subdivisions AA (Applications for visas), AC (Grant of visas) or AF (Bridging visas) of Division 3 of Part 2 of the Act or by the regulations, but is bound by all other provisions of the Act. This is to clarify that in the exercise of the section 195A power, the Minister is not bound by the usual requirements that apply to the grant of visas. The Minister will have the flexibility to grant any visa that the Minister considers is appropriate to that individual’s circumstances, including a Removal Pending Bridging Visa where the detainee has no right to remain in Australia but removal is not practicable in the foreseeable future.

22. Subsection 195A(4) makes it clear that this new power to grant a visa to a person in detention is non-compellable. The Minister is under no obligation to exercise the power in subsection (2) and cannot be compelled to do so. There may be circumstances where the Minister is requested to do so, but the Minister is not under any duty or obligation to take into account such requests when choosing whether or not to exercise the power in subsection (2).

23. Subsection 195A(5) makes it clear that the Minister is to exercise this new power to grant a visa to a person in detention personally. The power cannot be delegated.

24. Subsection 195A(6) provides for the tabling of information relating to the granting of visas under this new power. It provides that if the Minister grants a visa under subsection (2), the Minister must cause to be laid before each House of Parliament a statement stating that he or she has granted a visa under section 195A and setting out the reasons for that grant. The purpose of this provision is to inform the Parliament of the Minister’s exercise of his or her powers of grant under this section.

25. The statement setting out the reasons for the grant of the visa must refer to the Minister’s reasons for thinking that the grant is in the public interest.

26. Subsection 195A(7) provides for the protection of the identity of individuals who are the subject of, or otherwise connected to, the grant of the visa. It provides that a statement made by the Minister under subsection (6) must not include any information that may identify the person to whom that visa is granted. This information includes, but is not limited to, the name of the person, their nationality, or place or date of birth.

27. In addition, the Minister may choose not to publish the name of, or any other information that may identify, another person connected with the grant of a visa under this section.

28. Subsection 195A(8) provides that the Minister is to lay statements made under subsection (6) before each House of Parliament after certain prescribed dates. If a decision to grant a visa is made in the first half of a calendar year (1 January to 30 June inclusive), the statement must be laid before each House within 15 sitting days after 1 July of that year.
29. If the decision to grant a visa is made in the second half of a calendar year (1 July to 31 December inclusive), the statement must be laid before each House within 15 sittings days after 1 January in the following year.

**Item 11** At the end of Division 7 of Part 2

**Subdivision B** Residence determinations

30. This item inserts new “Subdivision B – Residence determinations” at the end of Division 7 of Part 2 of the Act.

**Section 197AA** Persons to whom Subdivision applies

31. New section 197AA specifies the persons to whom this new Subdivision applies, that is, to a person who is required or permitted by section 189 to be detained, or who is in detention under that section. It is not intended that this Subdivision apply to persons who are detained under other sections of the Migration Act.

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

32. New Section 197AB provides that the Minister may make a *residence determination* determining that a specified person is to reside at a specified place rather than being held at an immigration detention centre or in other secured arrangements.

33. New subsection 197AB(1) empowers the Minister to make a determination, termed “a residence determination” if the Minister considers this is in the public interest. The residence determination has the effect of allowing one or more specified persons detained under section 189 to reside at a specified place without that person being required to be in the company of and restrained by an officer or authorised person; or being held by, or on behalf of, an officer in secured arrangements. Under these arrangements, detainees would be free to move about in the community without being accompanied or restrained by an officer under the Act. The only restraint on a person to whom the Minister’s determination applies would be that he or she complies with the conditions specified in that determination.

34. The ‘specified place’ would be at a predetermined residential address. Accommodation could include (but is not limited to) a residence provided by a non-government organisation, the home of a supporter, a hospital or clinic, or the family’s current community address. The purpose of this amendment is to enable the detention of families with children to take place in the community under conditions that can meet their individual circumstances. It is envisaged that the specified premises would have minimal direct supervision, unless the Minister believes that the conditions should provide otherwise.
35. New subsection 197AB(2) requires the residence determination to display the following characteristics:
   
   (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.

36. The purpose of this subsection is to clarify the intended operation of residence determinations. Paragraph (a) makes it clear that a person must be specifically named as an individual in a residence determination in order to be covered by its operation. It is not intended that persons be “specified” by a description of a class of persons.

37. The purpose of paragraph (b) is to clarify that a residence determination will specify conditions that a person covered by a determination must comply with. These conditions are expected to be such as to require the person to be present at the specified residence during specified hours, and to report to immigration officials at specified times. The types of conditions that could be included would not be limited. The nature of the conditions attached to the residence determination is intended to minimise the likelihood of a person absconding and will be based on the Minister’s judgment as to what is appropriate in relation to the particular person or family group.

38. New subsection 197AB(3) requires the residence determination to be made by notice in writing to the person or persons covered by the determination. A residence determination only has effect when made by notice in writing to the person covered by the determination. This is to ensure that the person covered by a residence determination knows the conditions with which they must comply to avoid returning to an immigration detention centre.

**197AC Effect of residence determination**

39. New section 197AC explains the intended effect and operation of a residence determination.

40. New subsection 197AC(1) provides that while a residence determination is in force and a person is residing at the place specified in the determination, the Act and the regulations apply as if the person covered by the determination was in immigration detention at that place in accordance with section 189. This is to clarify that a person to whom a residence determination is made is still in immigration detention at that specified place (even though they may not be required to be physically there at all times) for the purposes of any existing legislative provisions. This is subject to an exception in subsection (3) which is explained below.

41. New subsection 197AC(2) specifies that if a person covered by a residence determination is temporarily staying at a place other than the place specified in the determination and 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.
42. The purpose of this subsection is to allow for circumstances where a person temporarily leaves their specified residence, such as to attend hospital (whether as an admitted patient or as a supporting family member), or on approved weekend or other visits to another location. It is intended that such temporary visits will not constitute a breach of the conditions of the residence determination where prior approval for these absences has been obtained.

43. New subsection 197AC(3) makes it clear that subsection 197AC(1) does not apply for the purposes of certain provisions of the Act. Specific provisions which do not apply to persons covered by residence determinations as if those persons were being kept in immigration detention at that place in accordance with section 189, are sections 197 and 197A and sections 252AA to 252E.

44. Sections 197 and 197A address the effect of escape of a detainee from immigration detention and impose consequent penalties. Due to the less restrictive nature of detention under a residence determination and the absence of physical constraints, it is not intended that these provisions apply to persons detained at specified places under a residence determination.

45. In addition, subsection 197AC(3) removes the application of sections 252AA to 252E. These sections provide powers to conduct a screening procedure and strip search in relation to a detainee, and provisions associated with the exercise of those powers.

46. A more general non-application provision is also included in subsection 197AC(3) which allows regulations to be made to remove the application of any other provisions of the Act or regulations that may subsequently be considered to be inappropriate to persons covered by residence determinations.

47. New subsection 197AC(4) specifies what constitutes release from immigration detention. It provides that where a residence determination is in force in relation to a person and a provision of the Act requires that the person be released from detention, or no longer requires or permits the person to be detained, then at that point the residence determination is revoked by force of that subsection. This is to clarify that a residence determination automatically ceases in relation to a person where a provision of the Act requires that person’s release or no longer permits that person’s detention.

48. There is a note at the end of new subsection 197AC(4) to clarify that where a residence determination is revoked, the person to whom the residence determination applied is no longer subject to the conditions specified in the determination.

49. New Subsection 197AC(5) provides that the Secretary must, as soon as possible, notify a person released from immigration detention by operation of 197AC(4) that he or she has been so released.

50. New subsection 197AC(6) requires the Secretary to ensure that a person covered by a residence determination is given forms and facilities as and when required by section 256, notwithstanding that there is no particular person designated as the
person responsible for the detention of the person covered by the residence determination.

197AD Revocation or variation of residence determination

51. New Section 197AD provides that a residence determination may be revoked or varied.

52. New subsection 197AD(1) specifies that the Minister may at any time revoke or vary a residence determination in any respect if the Minister thinks that it is in the public interest to do so. This power to revoke or vary a residence determination is subject to subsection (2) (to be discussed below).

53. Two notes are included at the end of this subsection to clarify its intended operation. Note 1 clarifies that one situation where the Minister may (subject to the public interest test) decide to vary or revoke a residence determination is where a detainee has breached the conditions associated with the determination.

54. Where a detainee has only committed a minor breach of the conditions, the Minister may decide to vary the determination by altering the conditions, for example by imposing additional reporting conditions to minimise the risk of a detainee absconding. Where a detainee frequently breaches the conditions associated with the residence determination, or the circumstances of the breach are considered to be serious, the Minister may decide that it is in the public interest to revoke the residence determination and return the person to an immigration detention centre or other secured arrangements.

55. It is the Government’s intention that where the Minister’s residence determination is revoked, families (with minor children) will be detained (including the father), if possible, in a residential housing project that is in the city nearest to the family’s prior residence, rather than in a detention centre.

56. Note 2 clarifies the effect of a revocation of a residence determination. Where the Minister revokes a residence determination (without making a replacement determination) and the person covered by the determination is still required to be detained under section 189, the person will be taken into detention at a place covered by the definition of immigration detention in subsection 5(1). This is to clarify that where a person is still required to be detained under section 189, revocation of a residence determination under which they are covered does not constitute release of that person from immigration detention.

57. Again, it is the Government’s intention that where the Minister’s residence determination is revoked, and a family (with minor children) is detained in immigration detention at a place covered by the definition of immigration detention in subsection 5(1), that the family (including the father) will be detained, if possible, in a residential housing project that is in the city nearest to the family’s prior residence.

58. New subsection 197AD(2) provides that any variation of a residence determination must be such that the determination, as varied, still specifies the place at which a person is to be detained, specifies the person or persons covered by the
determination by name and specifies the conditions that the person or persons must comply with. This is to ensure that any variation of a residence determination continues to specify all elements necessary for the operation of the determination.

59. New subsection 197AD(3) provides that a revocation or variation of a residence determination must be made by notice in writing to the person or persons covered by the determination. A revocation or variation of a residence determination only has effect when made by notice in writing to the person covered by the determination. This is to ensure that the person covered by a residence determination knows the conditions with which they must comply to avoid returning to an immigration detention centre.
197AE  Minister not under duty to consider whether to exercise powers

60. New section 197AE provides that 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. There may be circumstances where the Minister is requested to make, vary or revoke a residence determination, but the Minister is not under any duty or obligation to take into account such requests when choosing whether or not to exercise the power in subsection 197AD(1). Similarly, the Minister will not be required to consult any person, including a person covered by a determination, prior to the making, varying or revoking of a determination.

197AF  Minister to exercise powers personally

61. New Section 197AF specifies that the power to make, vary or revoke a residence determination may only be exercised by the Minister personally. The power cannot be delegated.

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

62. New Section 197AG provides for the tabling of information relating to the making of a residence determination. This is to inform the Parliament of the Minister’s exercise of his or her power to make a residence determination under this section.

63. Subsection 197AG(1) provides that where the Minister makes a residence determination, he or she must cause to be laid before each House of Parliament a statement that (subject to the necessary exclusions set out in subsection (2)) states that a determination has been made and sets out the reasons for making the determination.

64. The statement setting out the reasons for making the residence determination must refer to the Minister’s reasons for thinking that the determination is in the public interest.

65. Subsection 197AG(2) provides for the protection of the identity of individuals who are covered by, or otherwise connected to, a residence determination. It provides that a statement made by the Minister under subsection (1) must not include any information that may identify the person or the place specified in the residence determination. This information includes, but is not limited to, the name of the specified person, their nationality, or place or date of birth; or the address, name or location of the specified place.

66. In addition, the Minister may choose not to publish the name of, or any other information that may identify, another person connected with a determination made under this section, such as an accommodation provider.
67. Subsection 197AG(3) provides that the Minister is to lay statements made under subsection (1) before each House of Parliament after certain prescribed dates. If the residence determination is made in the first half of a calendar year (1 January to 30 June inclusive), the statement must be laid before each House within 15 sitting days after 1 July of that year.

68. If the residence determination is made in the second half of a calendar year (1 July to 31 December inclusive), the statement must be laid before each House within 15 sitting days after 1 January in the following year.

**Item 12** **After paragraph 276(2A)(a)**

69. This item ensures that the meaning of “Immigration assistance” in subparagraph 276(2A)(a) covers circumstances where a person uses, or purports to use, knowledge of or experience in migration procedures to assist another person by preparing, or helping to prepare, a request to the Minister to exercise a power under sections 195A, 197AB or 197AD. It is not relevant if the exercise of the power relates to the other person.

**Item 13** **Paragraph 276(2A)(b)**

70. This item replaces “such a request” with “a request referred to in paragraph (a) or (aa) in paragraph 276(2A)(b). This amendment is consequential to item 12 above.

**Item 14** **At the end of section 277**

71. This item inserts new subsection 277(5) to provide that a lawyer does not give immigration legal assistance in providing advice for a purpose relating to a request to the Minister to exercise his or her power under sections 195A, 197AB or 197AD. It is not relevant if the exercise of the power relates to the other person.
Item 15  At the end of subsection 282(4)

72. This item provides that a person makes immigration representations if he or she makes representations to, or otherwise communicates with, the Minister, a member of the Minister’s staff or the Department on behalf of a person who has made (or is proposing to make) a request to the Minister to exercise his or her power under sections 195A, 197AB and 197AD in respect of a decision about the request. It is not relevant if the exercise of the power relates to the other person.

Item 16  Paragraph 474(3)(a)

73. This item provides that a decision to vary a determination is a decision for the purposes of section 474 of the Act. This is to clarify that a decision of the Minister to vary a residence determination under the new power in section 197AD is a decision for the purposes of section 474 of the Act.

Item 17  Paragraph 474(7)(a)

74. This item provides that a decision of the Minister not to exercise or not to consider the exercise of the powers in sections 195A, 197AB and 197AD is a privative clause decision.

75. This is to achieve consistency with other provisions of the Act relating to the exercise of a Minister’s non-compellable power.

76. This item amends a provision proposed to be inserted into the Act by the Migration Litigation Reform Bill 2005, which is currently before the Parliament.

Item 18  Subsection 476(2)

77. This item provides that the Federal Court and the Federal Magistrates Court do not have any jurisdiction in relation to decisions made by the Minister under sections 195A, 197AB and 197AD.

78. This is to achieve consistency with other provisions of the Act relating to the exercise of a Minister’s non-compellable power.

79. This item amends a provision proposed to be repealed by the Migration Litigation Reform Bill 2005, which is currently before the Parliament.
Item 19  Before Part 9

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

80. This item inserts new Part 8C which gives the Commonwealth Ombudsman a specific role in reviewing the cases of persons who have been in immigration detention for a period or periods totalling at least 2 years. It is intended that this 2 year period of immigration detention include any form of detention under the Migration Act, including detention in an immigration detention centre, residential housing project, or under a residence determination.

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

81. New section 486L determines the detention reporting start time for a person in detention. For a person who has already been in immigration detention for a period or periods totalling at least 2 years prior to the commencement of this Part, the detention reporting start time for that person is the commencement of this Part.

82. In any other case, the detention reporting start time for a person is the time when that person has been in immigration detention for a period or periods totalling at least 2 years. This period may include detention that occurred prior to the commencement of this Part.

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

83. New section 486M defines the meaning of “detention reporting time” to be the detention reporting start time for the person, or (where the person is being detained after this 2 year period) the end of each successive 6 month period thereafter. After the initial report on a person held in detention for a period or periods totalling at least 2 years, the Department is required to report to the Commonwealth Ombudsman every 6 months thereafter where the person is in detention at the end of the 6 month period.

Section 486N  Secretary’s obligation to report to the Commonwealth Ombudsman

84. New section 486N imposes an obligation on the Secretary to report to the Commonwealth Ombudsman on the Department’s long term detainee caseload.

85. New subsection 486N(1) provides that the Secretary must give the Commonwealth Ombudsman a report relating to the circumstances of the person’s detention within a set timeframe.

86. For persons for whom the detention reporting time is the time when Part 8C commences, the report must be given to the Commonwealth Ombudsman as soon as practicable, and within 6 months, after commencement.

87. For all other persons, the report must be given to the Commonwealth Ombudsman within 21 days of that person’s detention reporting time.
88. It is envisaged that the circumstances of the person’s detention, to be detailed in the report, will include (but are not limited to) the form of detention – such as an immigration detention centre or other secured arrangements or residence determination, the nature and conditions of that form of detention, the address at which the person is being held, the circumstances relating to the initial location and detention of the person, an outline of any visa application details, an outline of any review processes undertaken (whether completed or outstanding), and a summary of any medical treatment received.

89. New subsection 486N(2) is a general provision which allows regulations to be made to specify any matters that may subsequently be found to be necessary and appropriate to include in such a report.

90. New subsection 486N(3) provides that the Secretary must give the Commonwealth Ombudsman a report relating to the circumstances of a person’s detention even if that person has ceased to be in immigration detention since the detention reporting time.

Section 486O Commonwealth Ombudsman to give Minister assessment of report

91. New section 486O requires the Commonwealth Ombudsman to provide an assessment of the Secretary’s report to the Minister.

92. New subsection 486O(1) requires the Commonwealth Ombudsman to provide the Minister with an assessment of the appropriateness of the arrangements for the person’s detention as outlined in the Secretary’s report. It is not intended that there be a set timeframe in which the Ombudsman must provide the Minister with such an assessment. However, this should occur as soon as practicable after the Secretary’s report has been received in order to ensure that any issues raised by the assessment may be addressed in a timely manner.

93. New subsection 486O(2) provides that an assessment made by the Commonwealth Ombudsman may include any recommendation that the Ombudsman considers appropriate.

94. New subsection 486O(3) provides that such recommendations could include, but are not limited to, recommending the continued detention of the person, recommending that another form of detention is more appropriate to the person (such as residing at a place in accordance with a residence determination), recommending the release of the person into the community on a visa, and general recommendations relating to the Department’s handling of its detainee caseload.

95. New subsection 486O(4) makes clear that the Minister is not bound by any recommendation the Commonwealth Ombudsman makes.

96. New subsection 486O(5) provides that the Ombudsman’s assessment must also include a statement, for the purposes of tabling in Parliament, that sets out or paraphrases as much of the assessment as can be made public without adversely affecting the privacy of any person.
97. It is expected that this statement will convey all key facts relating to the assessment of the Secretary’s report of the Department’s long term detainee caseload, but will exclude any material that may personally identify any individual, including (but not limited to) an individual’s name or date of birth. This is necessary to ensure that the privacy of individual detainees, together with any other persons who may be the subject of the assessment, such as individual detention officers, is protected. The Ombudsman will retain control over preparation of this edited statement so as to not undermine his or her role in independently reviewing the appropriateness of the person’s detention arrangements.

98. New subsection 486O(6) provides that the Commonwealth Ombudsman must give the assessment to the Minister even if that person has ceased to be in immigration detention since the detention reporting time.

Section 486P  Minister to table statement from Commonwealth Ombudsman

99. New section 486P provides that the Minister must table in each House of Parliament a statement received from the Commonwealth Ombudsman under section 486O(5) within 15 sitting days of that House after the Minister receives the assessment. This statement should include any recommendations to the Minister. The purpose of this provision is to inform the Parliament of the Department’s management of its long term detainee caseload.

Section 486Q  Application of Ombudsman Act 1976

100. New subsection 486Q(1) provides that 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 assessment were an investigation under that Act.

101. The purpose of this subsection is to confirm that the Ombudsman’s existing powers (including the powers to obtain information and documents, examine witnesses and enter premises) apply to the conduct by the Ombudsman of any inquiries on any issues arising from the Secretary’s report, including interviewing an individual detainee at their place of detention, or asking the Department to answer questions (including under oath) and provide further information.

102. It is intended that any use or disclosures of personal information made by Departmental officers for the purposes of responding to requests from the Ombudsman on the circumstances of a person’s detention will be regarded as authorised by law, and thus permitted use and disclosures of personal information as regulated by Information Privacy Principles 10 and 11.

103. New subsection 486Q(2) provides that the Commonwealth Ombudsman’s functions include the functions conferred on the Commonwealth Ombudsman by Part 8C of the Act. This is to further clarify that the Ombudsman’s powers and functions
under the *Ombudsman Act 1976* apply to and include the Ombudsman’s specific role under Part 8C of the Act.

**Part 2 – Application of amendments**

**Item 20 Application of amendment by item 10**

104. This item provides that section 195A operates to allow the Minister to exercise the discretionary power to grant a visa to any person who has been detained pursuant to section 189. This includes persons who are already in detention at the time of the commencement of section 195A and any persons taken into detention after the commencement of section 195A.

**Item 21 Application of amendment by item 11**

105. This item provides that sections 197AA - AG operate to allow the Minister to exercise the discretionary power to make a residence determination to cover any person who is required or permitted to be detained, or who has been detained, pursuant to section 189. This includes persons who are already in detention at the time of the commencement of sections 197AA - AG and any persons taken into detention after the commencement of sections 197AA - AG.