2008 - 2009

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

MIGRATION AMENDMENT (IMMIGRATION DETENTION REFORM) BILL 2009

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Citizenship,
Senator the Hon. Chris Evans)
The Migration Amendment (Immigration Detention Reform) Bill 2009 (the “Bill”) amends the Migration Act 1958 (the “Act”) to support the implementation of the Government’s New Directions in Detention policy, announced by the Government on 29 July 2008.

The New Directions in Detention policy included the introduction of seven key Immigration Detention Values to guide and drive new detention policy and practice into the future. The amendments in this Bill implement the New Directions in Detention policy that has developed from the values as laid down by the Government to increase clarity, fairness and consistency in the way the Minister and the Department of Immigration and Citizenship responds to unlawful non-citizens.

In particular, the Bill amends the Act to:

- state that the Parliament affirms as a principle that the purpose of detaining a non-citizen is to manage the risks to the Australian community of the non-citizen entering or remaining in Australia and to resolve the non-citizen’s immigration status;
- state that the Parliament affirms as a principle that a non-citizen must only be detained in a detention centre established under this Act as a last resort and if a non-citizen is to be so detained the non-citizen must be detained for the shortest practicable time;
- strengthen the existing principle in section 4AA of the Act that the detention of a minor is a measure of last resort by providing that a minor, including a person reasonably suspected of being a minor, must not be detained in a detention centre established under this Act; and if a minor is to be detained, 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;
- expand the definition of immigration detention in subsection 5(1) of the Act to allow for a person in immigration detention to be at, or go 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;
- clarify in a note to the definition of immigration detention in subsection 5(1) of the Act the examples of the places of immigration detention that the Minister has the power in writing to approve include immigration transit accommodation, immigration residential housing and other places that may be used to provide accommodation;
- give an authorised officer a non-compellable discretionary power to grant a temporary community access permission if the officer considers that it would involve a minimal risk to the Australian community to enable a person in immigration detention, who is not subject to a residence determination, to be absent from the place of the person’s detention for a certain period of time for a purpose or purposes specified;
- provide that an officer must detain a person in the migration zone (other than an excised offshore place) if the officer knows or reasonably suspects that the person is an unlawful non-citizen and:
  - the person has bypassed immigration clearance;
o the person has been refused immigration clearance;

o 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;

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

If a person is detained because one of the points above applies to them, an officer must make reasonable efforts to ascertain the person’s identity; identify whether the person is of character concern; ascertain the health and security risks to the Australian community of the person entering or remaining in Australia; and resolve the person’s immigration status;

• further provide that an officer must detain a person in the migration zone (other than an excised offshore place) if the officer knows or reasonably suspects that the person is an unlawful non-citizen and presents an unacceptable risk to the Australian community if, and only if, any of the following applies:

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

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

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

  o circumstances prescribed by the regulations apply in relation to the person;

• otherwise provide that 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;

• provide that the Minister’s non-compellable residence determination power may be delegated to an officer and that the Minister or the delegate must set out in a statement the reasons why the determination was made in the public interest to be tabled before each House of Parliament; and

• allow for further consequential amendments as a result of the measures above.

FINANCIAL IMPACT STATEMENT

The financial impact of these amendments is low. Any consequential costs will be met from within existing resources.
MIGRATION AMENDMENT (IMMIGRATION DETENTION REFORM) BILL 2009

NOTES ON INDIVIDUAL CLAUSES

Clause 1  Short title

1. Clause 1 provides that the short title by which this Act may be cited is the Migration Amendment (Immigration Detention Reform) Act 2009.

Clause 2  Commencement

2. Subclause 2(1) provides that 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.

3. Table item 1 provides that sections 1 to 3 of this Act and anything in this Act not elsewhere covered by the table will commence on the day on which this Act receives the Royal Assent.

4. Table item 2 provides that Schedule 1 to this Act commences on a single day to be fixed by Proclamation. However, it also provides that if any 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.

5. An explanatory note is provided to assist the reader at the end of this table. It specifies that the table relates only to the provisions of this Act as originally passed by both Houses of Parliament and assented to. It states clearly that the table will not be expanded to deal with provisions inserted in this Act after it receives the Royal Assent.

6. Subclause 2(2) explains that column 3 of the table contains additional information that is not part of this Act. It specifies that information in this column may be added to or edited in any published version of this Act.

Clause 3  Schedule(s)

7. This clause provides that the Act specified in a Schedule to the Migration Amendment (Immigration Detention Reform) Act 2009 is amended or repealed as set out in the applicable items in the Schedule concerned. In addition, any other item in a Schedule to the Migration Amendment (Immigration Detention Reform) Act 2009 has effect according to its terms.
SCHEDULE 1 – Amendments relating to immigration detention

Migration Act 1958

Item 1 After section 4

1. This item inserts new section 4AAA after section 4 of Part 1 of the Act.

2. New section 4AAA provides that 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. Further, 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.

3. An explanatory note is provided to assist the reader at the end of subsection 4AAA(1) in relation to the principle that the purpose of detaining a non-citizen is to resolve the non-citizen’s immigration status. The note specifies that 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.

4. The purpose of this item is to establish as a principle that the purpose of detaining a non-citizen is to manage the risks to the Australian community of the non-citizen entering or remaining in Australia and to resolve the non-citizen’s immigration status. This item further provides as a principle that a non-citizen must only be detained in a detention centre established under this Act as a last resort and if a non-citizen is to be so detained the non-citizen must be detained for the shortest practicable time.

Item 2 Subsection 4AA(1)

5. This item inserts “(including a person whom an officer reasonably suspects of being a minor)” after “a minor” in subsection 4AA(1) of Part 1 of the Act.

6. Section 4AA of the Act provided that the Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.

7. The addition of the words (including a person whom an officer reasonably suspects of being a minor) clarifies that the principle in section 4AA of the Act only applies where an officer reasonably suspects the person of being a minor. This item is consequential to the amendments made by item 3 below.

Item 3 At the end of section 4AA

8. This item adds new subsections 4AA(3) and (4) at the end of section 4AA of Part 1 of the Act.

9. New subsection 4AA(3) provides that 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.
10. New subsection 4AA(4) provides that 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.

11. An explanatory note is provided to assist the reader at the end of section 4AA in relation to how an officer is to have regard to the best interests of the minor. The note specifies that the Minister may give written directions specifying how an officer is to have regard to the best interests of the minor: see section 499.

12. The purpose of this item is to strengthen the existing principle in section 4AA of the Act that the detention of a minor is a measure of last resort by providing that a minor, including a person reasonably suspected of being a minor, must not be detained in a detention centre established under this Act; and if a minor is to be detained, 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.

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

13. This item adds the word “or” at the end of subparagraph (b)(v) of the definition of immigration detention in subsection 5(1) of Part 1 of the Act.

14. This item is consequential to the amendments made by item 5 below.

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

15. This item inserts new paragraph (c) into the definition of immigration detention in subsection 5(1) of Part 1 of the Act.

16. New paragraph (c) provides that “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));”.

17. The purpose of this amendment is to expand the definition of immigration detention to allow for a person to be at, or go 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.

18. This item is complementary to the amendments made in item 12 that inserts new sections 194A and 194B to provide that an authorised officer may grant a temporary community access permission and when a temporary community access permission is taken to be revoked on a person’s release from immigration detention.

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

19. This item inserts new note 1A before note 1 to the definition of immigration detention in subsection 5(1) of Part 1 of the Act.
20. New note 1A provides that in relation to 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.

21. This explanatory note is provided to assist the reader at the end of the definition of immigration detention in subsection 5(1) of the Act. It clarifies the examples of the places of immigration detention that the Minister has the power in writing to approve include immigration transit accommodation, immigration residential housing and other places that may be used to provide accommodation.

**Item 7  Subsection 5(1)**

22. This item inserts the new defined term of “temporary community access permission” in subsection 5(1) of Part 1 of the Act.

23. This new defined term provides that temporary community access permission has the meaning given by subsection 194A(1) of the Act.

24. This item is necessary to ensure that readers are directed to subsection 194A(1) of the Act for the definition of a temporary community access permission.

25. This item is consequential to the amendments made by item 12 that inserts new section 194A and 194B to provide that an authorised officer may grant a temporary community access permission and when a temporary community access permission is taken to be revoked on a person’s release from immigration detention.

**Item 8  Subsection 42(4) (note)**

26. This item repeals the note in subsection 42(4) and substitutes a new note in Division 3 of Part 2 of the Act.

27. The new substituted note provides that section 189 provides for the detention of unlawful non-citizens in the migration zone.

28. The explanatory note is provided to assist the reader at the end of section 42 of the Act and is consequential to the amendments made by item 9 in relation to section 189 of the Act.

**Item 9  Subsection 189(1)**

29. This item repeals subsection 189(1) and substitutes new subsection 189(1) and inserts new subsections 189(1A), (1B) and (1C) in Division 7 of Part 2 of the Act.

30. Subsection 189(1) provided that 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 must detain the person.

31. Substituted subsection 189(1) provides that 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.

32. New subsection 189(1A) provides that for the purposes of subparagraph 189(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.

33. New subsection 189(1B) provides, if a person is detained because an officer knows or reasonably suspects that the person is someone mentioned in paragraph 189(1)(b) (described in paragraph 31 above) (other than subparagraph 189(1)(b)(i) – the person presents an unacceptable risk to the Australian community), 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.

An explanatory note is provided to assist the reader with paragraph 189(1B)(d) at the end of this subsection. It provides that resolving the person’s immigration status would result in either a visa being granted to the person or the person being removed or deported.

34. New subsection 189(1C) provides that, 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.

35. The purpose of the amendments in this item is to implement the value that unauthorised arrivals (persons who have bypassed immigration clearance; or been refused immigration clearance; or had their visa cancelled under section 109 of the Act because, when in immigration clearance, the person produced a false or falsely obtained document or information) are subject to mandatory detention and must be detained for the purposes of managing identity, health and security risks to the Australian community.

36. Further, the amendments are to implement the value that unlawful non-citizens (that are not in an excised offshore place) that present an unacceptable risk to the Australian community are subject to mandatory detention and must be detained. A person who presents an unacceptable risk to the Australian community includes a person who: has been refused a visa or has had a visa cancelled under section 501, 501A or 501B or on grounds relating to
national security; a person who held an enforcement visa and remains in Australia when the visa ceases to be in effect; or circumstances prescribed by the regulations apply in relation to a person. It is proposed that the regulations will provide that where, for example, a person presents an unacceptable risk to the Australian community by not complying with the conditions imposed on their visa, the person will fall within paragraph 189(1A)(d) of the Act.

37. The amendments also provide officers with discretion to detain or not detain unlawful non-citizens who do not fall into one of the mandatory detention categories listed in paragraphs 31 and 32 above.

**Item 10  Paragraphs 193(1)(a) and (b)**

38. This item inserts “or (1C)” after subsection 189(1) of Division 7 of Part 2 of the Act.

39. This item is consequential to the amendments made by item 9 above.

**Item 11  Paragraph 194(a)**

40. This item inserts “194A,” after “sections” in paragraph 194(a) of Division 7 of Part 2 of the Act.

41. This item is consequential to the amendments made by item 12 below.

**Item 12  After section 194**

42. This item inserts new sections 194A and 194B after section 194 of Division 7 of Part 2 the Act.

43. New subsection 194A(1) provides that an authorised officer may grant a permission allowing a person:

   (a) in immigration detention (within the meaning of paragraph (a) or (b) of the definition of immigration detention) 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.

44. New subsection 194A(2) provides that 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.

45. New subsection 194A(3) provides that 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.

46. New subsection 194A(4) provides that 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.
47. New subsection 194A(5) provides that a temporary community access permission made by written notice is not a legislative instrument.

48. New section 194B provides that if a temporary community access permission is in force in respect of a person; and 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 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, the temporary community access permission is revoked by force of this section.

49. An explanatory note is provided to assist the reader at the end of new section 194B. This note provides, because the temporary community access permission is revoked, the person is no longer subject to the conditions specified in the permission.

50. The purpose of new section 194A is to provide that an authorised office may grant a temporary community access permission to allow a person that is in immigration detention, but not covered by a residence determination, to be absent from the place of detention for a period of time specified in the permission for the purpose(s) specified in the permission. The amendments also provide that an authorised officer may only grant a temporary community access permission if it is considered it would involve minimal risk to the Australian community. Further, the amendments specify the requirements that must be met to grant a temporary community access permission. This includes how a temporary community access permission must be made, who it must be given to and that the conditions specified by the authorised office are to be complied with by the person subject to the permission.

51. Subsection 33(3) of the Acts Interpretation Act 1901 allows an instrument to be varied or revoked in the same way in which it is made. This means that a temporary community access permission will be able to be varied or revoked subject to the minimal risk to the Australian community requirement being satisfied in subsection 194A(2) of the Act.

52. Subsection 194A(4) also provides that the power for an authorised officer to make, vary or revoke a temporary community access permission is non-compellable. The purpose of subsection 194A(5) is to make it clear that a temporary community access permission made by written notice is not a legislative instrument as it is not of legislative character as defined in section 5 of the Legislative Instruments Act 2003.

53. The purpose of new section 194B is to specify that a temporary community access permission is taken to be revoked at the time of a person’s release from immigration detention.

**Item 13 Section 197AF**

54. This item repeals section 197AF from Division 7 of Part 2 of the Act.

55. Section 197AF of the Act provided that the power to make, vary or revoke a residence determination may only be exercised by the Minister personally.

56. The purpose of this item is to allow the Minister’s non-compellable residence determination power to be delegated to an officer. This item is to enable Department of Immigration and Citizenship officers to manage the range of detention placement options
without the need of the Minister for Immigration and Citizenship’s intervention in individual placement decisions.

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

57. This item repeals paragraphs 197AG(1)(a) and (b) and substitutes new paragraphs 197AG(1)(a) and (b) in Division 7 of Part 2 of the Act.

58. Subsection 197AG(1) provided that 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.

59. New paragraphs 197AG(1)(a) and (b) provide that: (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 as to why it was thought that the determination was in the public interest.

60. The purpose of this item is to provide that the Minister or the delegate must set out in a statement the reasons why the determination was made in the public interest to be tabled before each House of Parliament. This item is complementary to the amendments made by item 13 above.

**Item 15  After paragraph 276(2A)(aa)**

61. This item inserts new paragraph 276(2A)(ab) in Division 1 of Part 3 of the Act.

62. Subsection 276(2A) provides that for the purposes of Part 3, a person also gives immigration assistance if the person uses, or purports to use, knowledge of or experience in migration procedure to assist another person by preparing, helping to prepare or advising a person in certain circumstances as listed in paragraphs (a) to (b).

63. New paragraph 276(2A)(ab) provides that: “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”.

64. This purpose of this item is to ensure that preparing, or helping to prepare a request to an authorised officer to exercise a power under section 194A is taken to be immigration assistance for the purposes of Part 3 of the Act.

**Item 16  Paragraph 276(2A)(b)**

65. This item omits “or (aa)” and substitutes “, (aa) or (ab)” in paragraph 276(2A)(b) of Division 1 of Part 3 of the Act.

66. This item is consequential to the amendment made by item 15 above.
**Item 17  At the end of section 277**

67. This item adds new subsection 277(6) at the end of section 277 of Division 1 of Part 3 of the Act.

68. Section 277 provides the circumstances in which a lawyer gives *immigration legal assistance*.

69. New subsection 277(6) provides that: 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).

70. The purpose of this item is to ensure that a lawyer is not taken to 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 of the Act. This item is consequential to the amendment made by item 12 above.

**Item 18  At the end of subsection 282(4)**

71. This item adds new paragraph 282(4)(g) at the end of subsection 282(4) in Division 2 of Part 3 of the Act.

72. Subsection 282(4) provides a range of circumstances for the purposes of section 282, where a person *makes immigration representations*.

73. New paragraph 282(4)(g) provides a new circumstance where a person *makes immigration representations* 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.

74. The purpose of this item is to add the new circumstance where a person *makes immigration representations* to include a request to an authorised officer to exercise a power under section 194A of the Act. This item is consequential to the amendment made by item 12 above.

**Item 19  After paragraph 474(7)(a)**

75. This item inserts new paragraph 474(7)(aa) after paragraph 474(7)(a) in Division 1 of Part 8 of the Act.

76. Subsection 474(7) provides that certain decisions are privative clause decisions.

77. New paragraph 474(7)(aa) provides that: (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 is a privative clause decision.

78. The purpose of this amendment is to provide that a decision of an authorised officer to grant a temporary community access permission is a privative clause decision. This item is consequential to the amendment made by item 12 above.
Item 20  Transactional provision – existing detainees

79. This item provides for transitional arrangements for existing detainees at the time of commencement.

80. Subitem 20(1) provides that 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 the 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 the Act (as inserted by item 9 of this Schedule).

81. Subitem 20(2) provides that 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 20(1), the person is taken to be detained, after this item commences, under subsection 189(1C) of the Act (as inserted by item 9 of this Schedule).

82. Subitem 20(3) provides that in this item: immigration detention has the same meaning as in the Migration Act 1958 and officer has the same meaning as in the Migration Act 1958.

83. The purpose of this item is to provide the transitional arrangements that apply to existing detainees in immigration detention under subsection 189(1) of the Act at the time of commencement.

84. Existing detainees who are known or reasonably suspected to fall within the groups identified to be subject to mandatory detention under new subsection 189(1) will continue to be subject to mandatory detention after commencement. All other existing detainees will be taken to be detained under subsection 189(1C).

Item 21  Application

85. This item provides for the application of amendments made by this Schedule.

86. Subitem 21(1) provides that 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.

87. Subitem 21(2) provides that in this item immigration detention has the same meaning as in the Migration Act 1958.