



Migration Amendment (Detention Arrangements) Bill 2005

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Law and Bills Digest Section

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Migration Amendment (Detention Arrangements) Bill 2005

Date Introduced: 21 June 2005

House: House of Representatives

Portfolio: Immigration and Multicultural and Indigenous Affairs

Commencement: The main provisions commence on Royal Assent

Purpose

To amend the *Migration Act 1958* to allow greater flexibility in the treatment of immigration detainees.

Background

Given the short time between introduction of this Bill and debate in the Parliament, this digest covers key issues only.

On 17 June 2005 Prime Minister Howard announced a series of changes to Australia's immigration detention policy.¹ The key changes are:

- The policy of mandatory immigration detention is to remain but will be made more flexible
- The Minister for Immigration is to be given discretion to release children and their families into community care
- The Minister will also be given additional discretionary power to grant a visa to a person in detention, including a Removal Pending Bridging Visa for long term detainees who cannot be removed from Australia
- All primary protection visa decisions taken by the Department of Immigration will need to occur within three months of application. And all reviews by the Refugee Review Tribunal will have to occur within three months of application.
 - cases where these time limits are not met will be the subject of periodic reports to Parliament
- The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) must provide six monthly reports to the Commonwealth Ombudsman on people in detention for more than 2 years

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- Faster processing of applications from people with temporary protection visas (TPVs) wishing to obtain permanent protection visas, with all outstanding cases to be processed by 31 October 2005
- Implementation of these changes to be overseen by the Secretary of the Department of Prime Minister and Cabinet.

The new measures will apply only to people in immigration detention in Australia and not to those in detention in offshore centres such as Christmas Island or Nauru.

The current Bill implements some of the above measures through amendments to the Migration Act. Amendments implementing other changes will be introduced later in 2005. As the member for Kooyong, Mr Georgiou, said in his second reading speech on the Bill:

There are other parts of this package that are not included in the legislation. One is time limits on the processing of protection visa applications, at both the primary and the Refugee Review Tribunal stage, which involves a three-month time limit or a report to the parliament. As I said, these are not part of this bill; they will be introduced into the parliament in the next sitting.

There is also a very important measure to fast-track the treatment of people seeking permanent protection visas who have got temporary protection visas and are seeking to get permanent protection visas. Currently there are around 4,000 applications for protection visas. In order to facilitate rapid processing, the decision making will proceed on the basis of written materials on the paper, so to speak, except where there is a reasonable prospect of their being a refusal. DIMIA will work with ASIO to work through a fundamental problem, which is a timely resolution of security checks, and DIMIA and the RRT are committed by the government to complete the processing of the around 4,000 applications by 31 October.²

Mr Georgiou also noted that:

Given the history of administrative difficulties in the area of mandatory detention, one has reason to be highly sensitive about the issue of implementation. The government has heeded these lessons and will put into place a special top-level implementation committee, the Immigration Interdepartmental Committee. This committee will be headed by the Secretary of the Department of Prime Minister and Cabinet, Dr Peter Shergold. It will include DIMIA, the Attorney-General's Department, the Department of Foreign Affairs and Trade, ASIO and the Department of Family and Community Services.

... in terms of the government's determination to deliver on the commitments it has made to this package, this IDC is about as failsafe as it gets. The minister and the chairman of the Immigration Interdepartmental Committee will be meeting regularly—I anticipate on a fortnightly basis—with interested members of the government to ensure that the implementation of this package is pursued. I and the

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members for Cook [Bruce Baird], Pearce [Judi Moylan] and McMillan [Russell Broadbent] will certainly be attending those meetings.³

Other relevant background includes:

- The two private members' bills prepared by Mr Georgiou but withdrawn after the Prime Minister's announcement of the above changes. These bills were introduced into the Senate by Greens Senator Kerry Nettle on 16 June 2005:
 - [Migration Amendment \(Act Of Compassion\) Bill 2005](#)⁴
 - [Migration Amendment \(Mandatory Detention\) Bill 2005](#).⁵
- Media commentary on immigration detention debate, eg:
 - 'Coalition stumbles on detention', news.com.au, 26 May 2005.
 - '200 detainees need inquiry: Palmer', *The Australian*, 26 May 2005.
 - 'How Howard got himself out of detention', *Sunday Age*, 19 June 2005
 - 'Pressure grows for greater immigration law reforms', *Canberra Times*, 20 June 2005.
 - 'Political bullying is no key to policy', *Daily Telegraph*, 21 June 2005.
 - 'Why the Libs should thank Petro', *Herald Sun*, 22 June 2005.
 - 'Detention policy serves Australia well', *Hobart Mercury*, 30 June 2005.
- [Media releases](#) from the Minister for Immigration, Senator Vanstone, including statements on long term detainees and the cases of Cornelia Rau and Vivien Alvarez.⁶
- [Submission of the Rau family to the Inquiry into the Detention of Cornelia Rau](#).⁷
- Recent parliamentary library papers:
 - [The High Court and indefinite detention: towards a national bill of rights?](#), Parliamentary Library, Research Brief no.1, 2004-05.⁸
 - [The detention of Cornelia Rau: legal issues](#), Parliamentary Library, Research Brief no. 14, 2004-05.⁹

ALP amendments

In his second reading speech for the bill, the Leader of the Opposition Kim Beazley proposed the following additional measures:

- medical personnel and media representatives should be given independent access to people in detention centres

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- decisions on temporary protection visas must be given within 2 years, with the onus of proof being on the Government to establish that a visa should not be granted; and the system recognising that even if a person may not succeed in an application on the grounds of refugee status, the person may be accepted on the grounds of adding to Australia's social or cultural life
- an Inspector General of Detention should be appointed to hear and resolve complaints from detainees about detention conditions
- children under 18 their siblings and parents should not be held in high security detention unless a judicial assessor determines otherwise, and
- the Ombudsman should report monthly on the continued detention of all detainees held for 90 days.¹⁰

Main Provisions

The explanatory memorandum states that amendments to the Migration Act in the Bill:

...will maintain the integrity of the mandatory detention regime for unlawful non-citizens, whilst:

- incorporating the Parliament's affirmation as a matter of principle that a minor shall only be detained as a measure of last resort;
- providing the capacity to tailor detention requirements, as appropriate, to individual or family circumstances;
- allowing release from immigration detention, through the grant of a visa where the Minister believes this is appropriate; and
- introducing greater transparency in the management of long term detainees through independent assessments by the Commonwealth Ombudsman.¹¹

Schedule 1 of the Bill proposes a series of amendments to the Migration Act.

Detention of Children

Item 1 inserts **new subsection 4AA(1)** in the Migration Act stating that Parliament affirms as a principle that 'a minor' shall only be detained 'as a measure of last resort'. The explanatory memorandum notes that:

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

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where conditions of a residence determination have been breached, primary assessment is being undertaken or removal arrangements are underway.¹²

New subsection 4AA(2) provides that this principle only applies to the holding of children in traditional detention arrangements, not the detention of children under the new ‘residence determinations’ proposed in the Bill.

Items 2, 3 and 5 amend the definitions of ‘detain’, ‘detainee’ and ‘immigration detention’ respectively in section 5(1) of the Migration Act to make it plain that a person who is the subject of a ‘residence determination’ is still in immigration detention, even though the detention takes place at a specified residence without direct supervision, instead of an immigration detention centre.

New discretionary visa power

Item 10 inserts **new subsection 195A(2)** allowing the Minister to grant a visa to a person in detention if the Minister thinks that it is in the ‘public interest’ to do so. The explanatory memorandum states that the new provision is intended to ‘be used to release a person from detention where it is not in the public interest to continue to detain them.’¹³

The Minister will be able to grant a person a visa ‘whether or not the person has applied for the visa’. The explanatory memorandum explains that the Minister will not be bound by the usual requirements that apply to the grant of visas. In other words, the Minister will be able to grant a detainee a visa without the detainee having to undertake the normal application and appeal process, often with a lengthy journey through tribunals and courts, before the Minister considers using her discretion to let the person stay in Australia (as for example, under current section 417 of the Migration Act).

New subsection 195A(4) provides that the Minister ‘does not have a duty to consider whether to exercise’ this new power to grant a visa. As the explanatory memorandum notes, ‘the Minister is under no obligation to exercise the power in subsection (2) and cannot be compelled to do so.’¹⁴ This interpretation was confirmed by the High Court in *Ex Parte S134* (2003), where the court said that such wording means that the Minister's refusal to use a discretionary power under the Migration Act (in that case, under section 417) was not reviewable:

... the prosecutors seek mandamus requiring the Minister to reconsider the exercise of his [discretionary] power under s 417(1). However, s 417(7) states in terms that the Minister does not have a duty to consider whether to exercise the power conferred by s 417(1). That gives rise to a fatal conundrum. In the express absence of a duty, mandamus would not issue without an order that the earlier decision of the Minister be set aside. Further, in that regard, there would be no utility in granting relief to set aside that earlier decision where mandamus could not then issue.¹⁵

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New subsection 195A(6) provides for the tabling of information relating to the granting of visas under this new power. 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.

****Please see analysis in 'Concluding Comments' below concerning the legal effectiveness of proposed subsection 195A(1) which states that 'this section applies to a person who is in detention under section 189' of the Migration Act.**

Community detention

Item 11 inserts **new Subdivision B in Division 7 of Part 2** of the Migration Act giving the Minister a non-compellable discretionary power to determine that a specified person is to reside at a specified place in the community rather than being held at an immigration detention centre or in other 'secured arrangements'.

New subsection 197AB(1) empowers the Minister to make a 'residence determination' if the Minister considers that this is in the 'public interest'. The explanatory memorandum explains that:

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.

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.¹⁶

New paragraph 197A(2)(b) provides that a residence determination will specify conditions that a detainee must comply with. The explanatory memorandum notes that these conditions are expected to require the person to be present at the specified residence during specified hours, and to report to immigration officials at specified times. It notes that:

... 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

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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.¹⁷

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 of the Migration Act.

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. The explanatory memorandum states that:

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.

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.¹⁸

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. As explained above in relation to the Minister's new discretionary power to grant a visa to a person in detention, the legal effect of this provision is to make the Minister's action or inaction under the proposed new 'residence determination' provisions unreviewable.

New section 197AG provides for the tabling of information relating to the making of a residence determination. As the explanatory memorandum notes, this is to inform the Parliament of the Minister's exercise of his or her power to make a residence determination.

Please see analysis in 'Concluding Comments' below concerning the legal effectiveness of **proposed section 197AA which states that '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.'

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Role of the Commonwealth Ombudsman

Item 19 of the Bill inserts **new Part 8C** into the Migration Act giving 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. As the explanatory memorandum states, 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.

New section 486N imposes an obligation on the Secretary of DIMIA to report to the Commonwealth Ombudsman on the Department's long term detainee caseload. For persons who have already been in detention for two years or more at the commencement of this Bill, a report must be given to the Commonwealth Ombudsman as soon as practicable, and within 6 months, after commencement. For all other persons, the report must be given to the Commonwealth Ombudsman within 21 days after a person has been in detention for two years.

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. The explanatory memorandum states that:

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.¹⁹

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. **New subsection 486O(3)** provides recommendations that the Ombudsman could make 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 DIMIA's handling of its detainee caseload.

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

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New subsection 486O(5) provides that the Ombudsman's assessment must include a statement for the purposes of tabling in Parliament setting out as much of the assessment as can be made public without adversely affecting the privacy of any person. **New section 486P** provides that the Minister must table the Ombudsman's statement in Parliament a statement within 15 sitting days. This statement should include any recommendations to the Minister.

New subsection 486Q(1) provides that the *Ombudsman Act 1976* applies in relation to the Commonwealth Ombudsman's preparation of detention assessments as if the assessments were investigations under that Act. The explanatory memorandum notes that:

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.²⁰

The explanatory memorandum also notes that any use or disclosures of personal information made by DIMIA officers for the purposes of responding to requests from the Ombudsman will be regarded as authorised by law, and thus permitted use and disclosures of personal information under the Commonwealth *Privacy Act 1988*.

**Please see Concluding Comments below for analysis of the Commonwealth Ombudsman's power to include assessment of private sector contractors in investigations under the new provisions in the Bill.

Concluding Comments

Effectiveness of new provisions

New sections 195A(1), 197AA, and 197AC(1) and Items 20 and 21 of the Bill all refer to 'persons in detention under section 189' of the Migration Act.

While s 189 authorises the initial detention, it is s 196 that provides for continuing detention, ie. 'an unlawful non-citizen detained under s189 must be kept in detention until he or she is removed, deported or granted a visa.

This raises a possibility that the new provisions in the Bill for the Minister to grant visas and/or make residence determinations may be ineffective. Strictly speaking, people in ongoing detention are 'in detention under s196' so a provision that applies to people 'in detention under 189' can have no application to them.

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The landmark High Court case in 2004 authorising indefinite detention of unlawful non-citizens, *Al-Kateb v Godwin*,²¹ was about whether section 196 allowed ongoing detention even when removal from Australia was not practical in the foreseeable future. As Chief Justice Gleeson explained, Mr Al-Kateb:

...was taken into detention under s 189, and was to be *kept in detention under s 196* until he was removed from Australia under s 198 or granted a visa.²²

'Public interest'

As noted above, the Bill gives new discretionary powers to the Minister in relation to detainees to grant visas and make 'residential determinations' (and to revoke or vary these) when she considers that it is in the 'public interest' to do so. However the term 'public interest' is not defined in the Migration Act. It is unclear what criteria the Minister might use when deciding if granting a visa or making a residential determination is in the public interest. It appears guidelines will need to be developed to specify the factors to be taken into account when deciding whether release from a detention centre would be in the public interest. DIMIA already makes public its guidelines for use of other discretionary powers, such as the Minister's power under sections 351 or 417 to substitute more favourable decisions for determinations of the Migration Review Tribunal or Refugee Review Tribunal.

Detention in the community

Neither the explanatory memorandum nor the second reading speech for the Bill provide details on the support that would need to be provided to people released from detention centres under 'residential determinations'. The explanatory memorandum refers to community detention under 'minimal direct supervision' but it is not clear who would undertake this supervision, i.e. who would ensure that detainees living in the community are properly cared for. This has legal implications for DIMIA, which will retain a 'duty of care' for anyone technically 'in detention', whether they are in a detention centre, residential housing project, or living in the community under a 'residential determination'.

Release of Children

By enshrining the principle that children should only be detained as a last resort, the Bill implements the key recommendation of the 2004 report of the Human Rights and Equal Opportunity Commission into children in immigration detention (titled '[A Last Resort](#)').²³

Ombudsman's powers and private sector detention services

In his second reading speech for the Bill, the Minister for Citizenship and Multicultural Affairs, Peter McGauran, noted that:

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Immigration matters are already subject to considerable scrutiny, including by the Commonwealth Ombudsman. The Ombudsman maintains close oversight of DIMIA operations, including by quarterly report to DIMIA and periodic visits to detention facilities. The Ombudsman's annual report notes that the Ombudsman finalised 908 complaints about DIMIA in 2003-04, identifying 76 instances of defective administration; significantly more investigations did not identify any defect and over 500 complaint issues did not lead to investigation by the Ombudsman. The defect rate—8.4 per cent of all complaints—is a rate that compares reasonably with most other government agencies.²⁴

The Ombudsman Act only allows the Ombudsman to investigate actions by government departments or 'prescribed authorities' (s5(1)). Private sector bodies are not 'prescribed authorities'.

In theory, therefore, a potential issue is to what extent the Ombudsman can investigate the immigration detention and related services contracted out to private sector providers. As highlighted by Justice Finn of the Federal Court in *S v. Secretary, DIMIA* (2005), the Commonwealth has contracted out the day-to-day operations of the Baxter detention centre to GSL (Australia) Pty Ltd. GSL does not provide health care services at Baxter. Rather, it has subcontracted out health care services to two companies—Professional Support Services (PSS) and International Medical Health Services (IMHS). PSS provides psychological and counselling services. IMHS provides general medical services including registered nurses.

For oversight of detention arrangements by the Ombudsman to be comprehensive, it needs to include assessment of the services provided by such private sector contractors. In practice, this is achieved by linking investigations by the Ombudsman to DIMIA's implementation of its '[Immigration Detention Standards](#)'.²⁵ These provide that a private sector provider of detention services is to:

- comply with all relevant legislation
- comply with departmental policies, instructions, directions and procedures, provided they are lawful
- provide all services lawfully, efficiently and in accordance with industry best practice and the Immigration Detention Standards
- refer to the department any issue relating to the migration status of a detainee and any request for access to legal advice.

Compliance by private sector providers with DIMIA's immigration detention standards is therefore a legitimate area of investigation for the Commonwealth Ombudsman under the Ombudsman Act. In relation to such an investigation, the Ombudsman can require any person, including private sector employees, to provide information. This can be by way of subpoena or summons.²⁶

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In 2001 the Ombudsman conducted an ‘own motion’ investigation into immigration detention centres at a time when they were run on DIMIA’s behalf by Australasian Correctional Management (ACM). This included interviews with ACM staff.²⁷ The Ombudsman made a series of recommendations regarding the management and operation of immigration detention centres. The response of the immigration department to these recommendations is included in the Ombudsman’s report. For example, the Ombudsman suggested that:

DIMA reassess the accommodation and conditions in IDCs to avoid overcrowding and provide appropriately for families, women, children and individuals with special needs, to ensure that they are not exposed to harm.²⁸

The response of the department indicated that it accepted that the Ombudsman’s recommendations could affect the provision of detention services by a private contractor such as ACM:

A range of facilities and programs for families, women and children is in place in detention facilities and their review is ongoing. ACM has been asked to review as a matter of urgency all support programs for children, and for women and children. In the newer centres in particular, programs and facilities continue to be developed and enhanced.

Completion of upgrades to facilities at Villawood and Woomera over the next two to three months will provide further flexibility to respond to the needs of women and children. An area within the Port Hedland centre for recreational use by women and children only will be established.²⁹

Endnotes

- 1 Prime Minister Howard, ‘[Immigration Detention](http://www.pm.gov.au/news/media_releases/media_Release1427.html)’, Media Release, 17 June 2005, at http://www.pm.gov.au/news/media_releases/media_Release1427.html.
- 2 House of Representatives, Debates, 21 June 2005, p. 41.
- 3 Ibid.
- 4 <http://parlinfoweb.parl.net/parlinfo/Repository/Legis/Bills/Linked/16060509.pdf>.
- 5 <http://parlinfoweb.parl.net/parlinfo/Repository/Legis/Bills/Linked/16060505.pdf>.
- 6 See http://www.minister.immi.gov.au/media_releases/media05/index05.htm.
- 7 See <http://www.newcastle.edu.au/school/law/centres/UNLCRauFamilySubmissionPublicRelease300505.pdf>.
- 8 <http://www.apf.gov.au/library/pubs/rb/2004-05/05rb01.pdf>

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- 9 <http://www.aph.gov.au/library/pubs/rb/2004-05/05rb14.pdf>.
- 10 House of Representatives, Debates, 21 June 2005, p. 38.
- 11 Explanatory memorandum, p. 4.
- 12 Ibid., p. 6.
- 13 Ibid., p. 8.
- 14 Ibid., p. 9.
15. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 193 ALR 1 at 12 (per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).
- 16 Explanatory memorandum, p. 10.
- 17 Ibid., p. 11.
- 18 Ibid., p. 13.
- 19 Ibid., p. 19.
- 20 Ibid., p. 20.
- 21 208 ALR 124.
- 22 Ibid., at 128 (emphasis added). See also eg. Justice Hayne at 174 and at 181: ‘And so long as the time for performance of that duty [to remove a person from Australia ‘as soon as reasonably practicable’] has not expired, s 196 in terms provides that the non-citizen must be detained’.
- 23 http://www.hreoc.gov.au/human_rights/children_detention_report/report/.
- 24 House of Representatives, Debates, 21 June 2005, p. 36.
- 25 See http://www.dimia.gov.au/detention/standards_index.htm.
- 26 Section 9.
27. See http://www.comb.gov.au/publications_information/Special_Reports/IDCMarch1.pdf.
28. Ibid., p. 6.
- 29 Ibid., p. 7.

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