



Migration and Ombudsman Legislation Amendment Bill 2005

Sue Harris Rimmer
Law and Bills Digest Section

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Migration and Ombudsman Legislation Amendment Bill 2005

Date Introduced: 15 September 2005

House: Senate

Portfolio: Immigration and Multicultural and Indigenous Affairs

Commencement: Sections 1 to 3 and Schedules 1, Schedule 2 Part 1, Schedules 3 and 4 commence on date of Royal Assent. Schedule 2 part 2 items commence at various times depending on events under the *Postal Industry Ombudsman Act 2005*.

Purpose

The bill amends the *Migration Act 1958* (the Migration Act) to:

- introduce 90 day processing time limits for the determination of Protection Visa applications and for the completion of reviews by the Refugee Review Tribunal (the RRT)
- permit disclosure of identifying information to individuals or the public to assist with identifying or locating a person who is otherwise unable to be identified or located, and
- enable the Ombudsman to contact an immigration detainee where that person has not made a complaint to the Ombudsman.

The bill amends the *Ombudsman Act 1976* (the Ombudsman Act) to:

- allow the Ombudsman to use the title ‘Immigration Ombudsman’ when performing functions in relation to immigration and detention
- make it explicit that the Ombudsman can perform functions and exercise powers under other Commonwealth or ACT legislation
- enable an agency or person to provide information to the Ombudsman notwithstanding any law that would otherwise prevent them doing so, and
- clarify that the actions of contractors and subcontractors, in exercising powers or performing functions for or on behalf of Australian Government agencies, will be taken to be the actions of the relevant agency.

The bill also amends the Migration Act and the *Migration Legislation Amendment Act (No. 1) 2001* to make technical amendments as a consequence of the commencement of the *Legislative Instruments Act 2003* (‘Legislative Instruments Act’).

Warning:

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Background

Processing Times

On 17 June 2005 the Prime Minister [announced](#) that the Migration Act would be amended to require all primary protection visa applications to be determined within three months of the receipt of the application.¹ Likewise, reviews by the RRT will be completed within three months. For further background, refer to the [Bills Digest](#) on the *Migration Amendment (Detention Arrangements) Bill 2005*.

Immigration Ombudsman

On 14 July 2005, the Minister for Immigration and Multicultural and Indigenous Affairs [announced](#) the government's decision that the Commonwealth Ombudsman, [Professor John McMillan](#), should have a strengthened role in immigration and detention matters.² The government has requested that the Ombudsman complete investigations into 200 potential wrongful detention cases referred to Mr Mick Palmer, former Australian Federal Police commissioner, and Mr Neil Comrie, former Victoria Police Chief Commissioner. The proposed amendments are intended to assist the Ombudsman in completing these investigations.

The Ombudsman is currently investigating;

- the case of Vivian Alvarez Solon, an Australian citizen wrongly deported to the Philippines in 2001
- two hundred detainees later found to be lawful, including 56 detained for more than three weeks, and
- all people detained for more than two years.³

The Commonwealth Ombudsman Professor John McMillan has statutory powers similar to a Royal Commission conferred by the [Ombudsman Act 1976](#) (Cth). When conducting investigations he can:

- provide protection and immunity for witnesses (s.9)
- require witnesses to attend and give evidence on oath (s.13)
- protect witnesses against any civil or criminal liability resulting from any evidence given (s.9)
- require the production of relevant documents from any person (s.9), and
- enter premises (s.14).

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Disclosure of Public Identifiers

Part 4A of the Migration Act provides a scheme with protections for personal identifiers collected in a wide range of circumstances, including specific obligations on officers about the handling of this kind of information. In particular, section 336E makes it an offence to disclose ‘identifying information’ (defined in section 336A to include any personal identifier, or a derivative or result of the analysis of a personal identifier) if the disclosure is not a ‘permitted disclosure’. Subsection 336E(2) provides that permitted disclosures include, for example, disclosures that are for the purpose of:

- data matching
- administering the storage of identifying information
- modifying identifying information to enable it to be matched with other identifying information, to correct errors or comply with appropriate standards
- disclosure to foreign countries in the circumstances authorised under section 336F of the Migration Act
- making a non-citizen’s information available to them, or
- action under an arrangement with a Commonwealth, State or Territory agency.

One of the concerns of the [Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau](#) about the handling of Ms Rau’s case was that DIMIA had been reluctant to publicly release photographs of Ms Rau in an effort to identify her. Palmer found that:

The Commonwealth’s *Privacy Act 1988* is not intended to prevent circulation of personal information when it is in the public interest to disclose that information.

The Inquiry recommended, among other things, that the Department of Immigration and Multicultural and Indigenous Affairs (‘the Department’) review its position in relation to privacy in all its public policy operations associated with immigration detention. The Inquiry recommended that in doing so, the Department should seek the advice of the Privacy Commissioner and the Minister, and increase the awareness of departmental staff of the principles and provisions of the *Privacy Act 1988* (‘Privacy Act’). The Inquiry recommended that the Department revise and strengthen procedures relating to identifying persons in immigration detention to ensure that wider options are considered.

The amendments in Schedule 3 of the bill are part of the Government’s response to the recommendations of the Inquiry. For further background on the Cornelia Rau incident, readers are directed to the Parliamentary Library publication ‘[The Detention of Cornelia Rau: legal issues](#)’.

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Main Provisions

Schedule 1 — Amendments to the Migration Act 1958 relating to processing periods

Item 1 would insert **new section 65A** to introduce a 90 day period during which the Minister is required to decide applications for protection visas. **Item 3** would insert **new section 414A** to require the Refugee Review Tribunal ('RRT') to decide applications for review of protection visa decisions within 90 days.

The commencement of the 90 day period is to be prescribed by regulations under **new paragraph 65A(1)(d)**. Draft regulations, which have been published, deal with the commencement dates for various categories of protection visas. For example, in relation to subclass 785 (Temporary Protection) visas, the 90 day period would only commence after 30 months has expired, unless the Minister has specified a shorter period at her discretion.

Item 2 inserts **new section 91Y**, which would require the Secretary of the Department of Immigration and Multicultural and Indigenous Affairs to report to the Minister, on a four monthly cycle, about protection visa applications and review applications that take longer than 90 days to decide. **Item 4, new section 440A** applies the same obligation to the Principal Member of the RRT. The Minister can request further reports to be provided by the Secretary and the Principal Member. The Minister is required to table such reports before each House of the Parliament within 15 sitting days after receiving them.

Schedule 2 — Amendments to the Ombudsman Act 1976

Item 3 inserts **new subsection 3(4B)** which provides that the actions of contractors and subcontractors, in exercising powers or performing functions for or on behalf of Australian Government agencies, in the provision of goods and or services to the public, will be taken to be the actions of the relevant agency; and defines 'Commonwealth service providers' (**item 6, new section 3BA**).

Item 7 makes it explicit that the Ombudsman can perform functions and exercise powers under other Commonwealth or Australian Capital Territory legislation.

Item 8 inserts **new subsection 4(4)** to allow the Ombudsman to use the title 'Immigration Ombudsman' when performing functions in relation to immigration and detention.

Items 9 and 10 inserts **new subsections 7A(1A) to (1E) and 8(2A) to (2E)** to enable an agency or person to provide information to the Ombudsman notwithstanding any law that would otherwise prevent them doing so. This would be relevant where an official might incriminate themselves by providing information to the Ombudsman, or breach privacy laws.⁴

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Item 26 amends **paragraph 193(3)(b)** of the Migration Act to enable the Ombudsman to contact an immigration detainee even where that person has not made a complaint to the Ombudsman.

Schedule 3 — Amendments to the *Migration Act 1958* relating to disclosure of public identifiers

Current subsection 336E(1) of the Migration Act makes it an offence if any person's conduct causes identifying information, within the meaning of section 336A to be disclosed and that disclosure is not authorised. **Item 2** inserts **new sections 336FA, 336FB, 336FC, and 336FD** in Division 3 of Part 4A of the Migration Act to authorise the disclosure of identifying and other necessary information if authorised by the Secretary.

New section 336FA would allow disclosure of certain personal identifiers to selected individuals (defined as a natural person) to obtain the individual's help to identify, or authenticate the identity of, or locate, in connection with the administration of the Migration Act, a person.

New section 336FC would allow disclosure of identifiers in order to obtain the public's help to identify, or authenticate the identity of, or locate, in connection with the administration of the Migration Act, a person when other reasonable means of identifying the person have not been successful.

The types of personal identifiers which are proposed for disclosure are limited to measurements of a person's height and weight, photographs or images of a person's face and shoulders, audio or video recordings of a person, and signatures (existing paragraphs (b), (c), (d) or (f) of the definition of 'personal identifier' in subsection 5A(1)). The disclosure of other kinds of identifiers that may be collected under the Migration Act, for example fingerprints or iris scans, is not permitted under these amendments.

Schedule 4 — technical amendments to the *Migration Act 1958* and the *Migration Legislation Amendment Act (No. 1) 2001*

This schedule allows the Minister to maintain the ability to remake from time to time instruments incorporated into the *Migration Regulations 1994* ('the Migration Regulations') and instruments fixing the number of visas of a class which may be granted in a year; and make other technical amendments which are consequential to the Legislative Instruments Act.

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Concluding Comments

The question raised by this Bill is to what extent these proposed amendments address the acknowledged problems with DIMIA's administration of immigration detention identified by the Palmer report. This Bill is not a full response. Areas not yet addressed include:

- the development of a national missing persons policy (recommendation 5.3), and
- the implementation of a review within 24 hours of every decision to detain (recommendation 7.4).

Palmer notes that the current Privacy Act exceptions are flexible enough for the Department to have permitted the release of Ms Rau's information legally, but DIMIA staff 'asked the wrong question.'⁵

Ms Vivian Solon could have confirmed her identity if she had been given the opportunity by the relevant DIMIA official. Instead the officials involved acted on a presumption that she was an illegal sex-worker, and were later criticised by the Senate Foreign Affairs Defence and Trade Committee.⁶

The Bill does not necessarily address this problem. The Bill gives the Secretary the discretion to publish photographs in order to find possible missing persons. However, there is no requirement in this Bill for the primary decision maker to make compulsory checks of missing person registers or other relevant databases.

In relation to the 90-day processing times, a decision is not rendered invalid even if it is made after 90 days. The question arises whether the requirement to report to Parliament on 'late' decisions will provide enough of a sanction to compel adherence to this time limit.

Endnotes

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- 1 J. Howard (Prime Minister), *Immigration detention*, media release, Parliament House, Canberra, 17 June 2005, http://www.pm.gov.au/news/media_releases/media_Release1427.html accessed 18 September 2005.
 - 2 A. Vanstone (Minister for Immigration and Multicultural and Indigenous Affairs), *Report of Palmer Inquiry into Cornelia Rau Matter*, media release, 14 July 2005, http://www.minister.immi.gov.au/media_releases/media05/v05087.htm, accessed 18 September 2005. See also http://www.comb.gov.au/news_current_issues/media_releases/Media_Release-140705-Immigration%20detention.pdf, accessed 18 September 2005.

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- 3 Commonwealth Ombudsman, [Commonwealth Ombudsman takes on immigration detention investigations](#), media release, Canberra, 14 July 2005.
- 4 Note that there have been media reports that three DIMIA officials have been criticised in the draft Ombudsman report into the Vivian Solon deportation, and that they have sought legal advice. The proposed amendment would allow such people to provide the information without fear of self-incrimination. See further J. Topsfield, 'Immigration staff may face sack over Alvarez Solon deportation', *The Age*, 2 September 2005, p.5. J. Kerr, 'Ombudsman points finger at Alvarez officials', *Sydney Morning Herald*, 12 September 2005, p. 7.
- 5 M. Palmer, *Report of Palmer Inquiry into Cornelia Rau Matter*, 14 July 2005, http://www.minister.immi.gov.au/media_releases/media05/v05087.htm, accessed 18 September 2005, at p. 115.
- 6 Senate Foreign Affairs, Defence and Trade Committee, *The removal, search for and discovery of Ms Vivian Solon Interim report*, 15 September 2005.

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