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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

MIGRATION AND OMBUDSMAN LEGISLATION AMENDMENT BILL 2005

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Immigration and Multicultural and Indigenous Affairs,
Senator the Honourable Amanda Vanstone)
MIGRATION AND OMBUDSMAN LEGISLATION AMENDMENT BILL 2005

OUTLINE

1. The Migration and Ombudsman Legislation Amendment Bill 2005 (‘the Bill’) amends the Migration Act 1958 (‘the Migration Act’) to establish time limits for the making of protection visa decisions by the Minister for Immigration and Multicultural and Indigenous Affairs (‘the Minister’) and the review of those decisions by the Refugee Review Tribunal (‘the RRT’), and permit the disclosure of personal identifiers to individuals or the public to assist with identifying or locating a person in connection with the administration of the Migration Act. The Bill also amends the Ombudsman Act 1976 (the ‘Ombudsman Act’) and other legislation to introduce measures for the Commonwealth Ombudsman to support and facilitate the Ombudsman’s enhanced role in immigration and detention matters. Finally, the Bill includes amendments which are consequential to the commencement of the Legislative Instruments Act 2003 (‘the Legislative Instruments Act’).

2. Schedule 1 to the Bill amends the Migration Act to:
   - introduce a 90 day period during which the Minister is required to decide applications for protection visas, and the RRT to decide applications for review of protection visa decisions by the Minister;
   - require the Secretary of the Department of Immigration and Multicultural and Indigenous Affairs (‘the Department’) and the Principal Member of the RRT 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;
   - require the Minister to table such reports before each House of the Parliament; and
   - allow the Minister to request further reports to be provided by the Secretary and the Principal Member.

3. Schedule 2 to the Bill amends the Ombudsman Act and other legislation 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 Australian Capital Territory legislation;
   - enable an agency or person to provide information to the Ombudsman notwithstanding any law that would otherwise prevent doing so;
   - provide 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
• enable the Ombudsman to contact an immigration detainee where that person has not made a complaint to the Ombudsman.

4. Schedule 3 to the Bill further amends the Migration Act to authorise the disclosure of identifying and other necessary information to:
  • an individual – 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; or
  • the public – 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.

5. Schedule 4 to the Bill amends the Migration Act and the Migration Legislation Amendment Act (No. 1) 2001 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.

Protection Visa Decision Time Limit (Schedule 1)

6. On 17 June 2005, the Prime Minister announced the implementation of various measures to ensure that immigration policy is administered with greater flexibility and fairness, and in a timely manner. The protection visa decision time limit amendments provide for greater transparency and efficiency in the finalisation of protection visa applications, and complement measures introduced to the Migration Act by the Migration Amendment (Detention Arrangements) Act 2005 (‘the Detention Arrangements Act’).

7. New section 65A provides that the Department is required to decide protection visa applications within 90 days of the making of a valid application by a person. A similar requirement in new section 414A applies to the RRT with, the 90 day period commencing from when the RRT receives the record of the Department’s decision from the Department.

8. These time limits in no way affect the ability of the Department or the RRT to make a protection visa decision after the time limits have passed, nor do they affect the validity of decisions made where this occurs. There may be factors beyond the control of the Department, or the RRT, which result in a decision not being able to be made within the time limit, such as, co-operation by the applicant, security checking processes and the provision of information by other governments.

9. A fundamental element of the temporary protection arrangements is that applicants who hold temporary protection visas or certain temporary humanitarian visas and who subsequently apply for a protection visa are unable to satisfy the
criteria for the grant of a permanent protection visa until they have held their temporary visa for a specified period. Where such temporary visa holders apply for a further protection visa before this period has passed, their application is held by the Department until the period has passed before being decided. To maintain this key element of the temporary protection arrangements, it is necessary to include a mechanism to allow the 90 day time limit to commence from this later point in relation to such applications.

10. To this effect, the Bill inserts a provision which enables regulations to be made prescribing specific circumstances when the protection visa decision time limit for the Department commences at a time other than when a valid application is made.

11. The reporting requirement in the Bill ensures that the Secretary, or the Principal Member, must explain why the time limit has not been met for each protection visa application and review application decided after 90 days, within the reporting period, or which remain undecided after 90 days at the end of the reporting period. To preserve the confidentiality and integrity of the protection visa process, such reports cannot include information which may identify individual applicants or third parties, but will provide the reasons why applications have not been decided within the time limit.

12. The Secretary and the Principal Member will be required to report to the Minister on activity in periods of four months, with the first report covering the period between 1 July 2005 and 31 October 2005. The Minister will be required to table every report in each House of the Parliament within 15 sittings days of receipt by the Minister.

Amendments relating to the Commonwealth Ombudsman (Schedule 2)

13. The Bill provides that the Commonwealth Ombudsman, in performing functions in relation to immigration and detention, may use the title of “Immigration Ombudsman”. It is also made explicit that the Ombudsman can perform functions and exercise powers under other Commonwealth or Australian Capital Territory legislation.

14. The Bill provides that an agency or person may provide information to the Ombudsman notwithstanding any law that would otherwise preclude doing so, where requested by the Ombudsman (or where the agency or person reasonably considers the information would be relevant to the Ombudsman’s inquiries or investigation). The amendment will allow agencies to provide information to the Ombudsman without breaching privacy legislation and without the need for the Ombudsman to issue a formal notice requiring the information. One result will be that information relevant to deciding whether to investigate further will be provided at an early stage of the process.

15. A general provision is inserted by the Bill that deems the actions of Australian Government contractors and subcontractors, in exercising powers or performing functions for or on behalf of Australian Government agencies, to have been taken by the relevant agency, for the purposes of the Ombudsman Act. This will confirm the Ombudsman’s jurisdiction over the actions of government contractors providing
goods and services to the public (as opposed to goods and services provided to the agency such as personnel, cleaning and other “internal” services). The proposed amendment will ensure that the Ombudsman is able to look at the actions of government contractors, and their subcontractors, including in relation to immigration matters.

Disclosure of Personal Identifiers and Relevant Information (Schedule 3)

16. Schedule 3 to the Bill contains amendments relating to the disclosure of a person’s personal identifiers and other relevant information where it is necessary to either identify or locate a person in connection with the administration of the Migration Act.

17. Officers under the Migration Act are regularly required to determine the identity of persons seeking to enter or remain in Australia. Establishing and authenticating identity is central to the exercise of various powers and duties under the Migration Act - particularly when the person in question is an unlawful non-citizen.

18. The Migration Act allows personal identifiers to be obtained for these purposes in a wide range of circumstances and at various points in the immigration process, including the making a valid visa application, prior to grant of a visa, on immigration clearance and in immigration detention.

19. Part 4A of the Migration Act provides a scheme with robust protections for personal identifiers collected in this 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.

20. In its report of June 2005, the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau identified as a significant issue the reluctance of officers under the Migration Act to publicly release personal information about persons in immigration detention in order to obtain assistance in identifying the person.
21. The Inquiry recommended, among other things, that the Department of Immigration and Multicultural and Indigenous Affairs reassess 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 principals and provisions of the Privacy Act 1988 (‘Privacy Act’). Importantly, the Inquiry recommended that the Department revise and strengthen procedures relating to identifying persons in immigration detention to ensure that wider options are considered.

22. Taking into consideration the Inquiry’s recommendations, the proposed amendments contained in Schedule 3 to the Bill strike a balance between a person’s right to privacy and the need to determine a person’s identity or location to enable the Department to carry out its obligations under the Migration Act, particularly where the person may be subject to, or is in, immigration detention.

23. The proposed amendments make it clear under what circumstances certain personal identifiers and other relevant information can be disclosed to individuals and the public when undertaking the important task of ascertaining a person’s identity or location. Safeguards have been built in to ensure that public disclosure of personal information is done in a considered and careful way under the authority of the Secretary of the Department.

24. In particular, the proposed amendments expand what constitutes a permitted disclosure to include the disclosure of certain personal identifiers. The proposed measures in Schedule 3 will permit disclosures to either an individual (or group of individuals) or the public. Such a disclosure may, for example, be critical to the process of identifying a person who is in immigration detention.

25. The types of personal identifiers which are proposed to be able to be disclosed 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. The disclosure of other kinds of identifiers that may be collected under the Migration Act, for example fingerprints or iris scans, will not be permitted under these amendments.

26. The disclosure of certain personal identifiers to an individual may be made under new section 336FA for the purpose of seeking the individual’s help to either identify (or authenticate the identity of) or locate a person, where an officer believes the individual may be able to assist. Disclosure may also be made to an individual if he or she may be in a position to refer the officer to another person who may be able to directly identify or locate the person in question. The disclosure of an Australian citizen’s personal identifiers to an individual will be permitted if it is in connection with the administration of the Migration Act.

27. The disclosure of certain personal identifiers to the public will be permitted by new section 336FC where a person needs to be identified (or have his or her identity authenticated) or located. For such a disclosure to occur, the Secretary must authorise the disclosure in writing. The Secretary may only give that authority where he or she is satisfied that other steps to identify the person have been taken, the affected person (if their whereabouts are known) has been informed of the proposed disclosure and his
or her views (if any) have been considered, the sensitivity of the personal identifier to be disclosed has been considered, and it is reasonably necessary in the circumstances to authorise the disclosure. The disclosure of an Australian citizen’s personal identifiers to the public will be permitted if it is in connection with the administration of the Migration Act.

28. Disclosure of personal identifiers relating to minors (being persons aged under 18 years) to the public will not be permitted by these amendments under any circumstance.

29. New sections 336FB and 336FD will also allow the disclosure to individuals or the public respectively, of any other relevant personal information with the personal identifiers to aid the identification or location process. These new sections provide statutory authority to disclose relevant information about a person which may otherwise be not able to be disclosed under the Privacy Act.

30. Detailed guidelines for how the proposed provisions are to be used in practice to complement the legislation will be prepared in consultation with the Office of the Privacy Commissioner and will ensure that these personal information disclosure provisions are used in an appropriate manner.

Legislative Instrument Amendments (Schedule 4)

31. These amendments are consequential to the commencement of the Legislative Instruments Act and amendments by that Act to the Acts Interpretation Act 1901 (‘the Acts Interpretation Act’). Section 14 of the Legislative Instruments Act generally prohibits instruments incorporated into the regulations from being renewed from time to time.

32. As an interim measure, transitional regulations were made under the Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003 to allow instruments incorporated into the Migration Regulations to be renewed from time to time. This maintained an existing contrary intention to a similar prohibition previously contained in the Acts Interpretation Act 1901. These transitional regulations cease to have effect on 31 December 2005. The amendments made by the Bill provide express contrary intentions to section 14 of the Legislative Instruments Act to allow the Department to maintain its ongoing practice of using instruments, updated from time to time, under the Migration Act and Migration Regulations.

33. Technical amendments are made to change expressions in certain provisions in the Migration Act to ensure that instruments made under these provisions are subject to the framework created by the Legislative Instruments Act, and to remove provisions made redundant, following the commencement of that Act.

FINANCIAL IMPACT STATEMENT

34. The financial impact of the amendments made by Schedule 1 to the Bill is low to medium.
35. In order for the Department to implement the 90 day time limit for the making of protection visa decisions, additional resources will be required to strengthen case management. Additional resources will also be required to facilitate a more frequent and detailed reporting regime within the Department, including data quality assurance, analysis of trends and liaison with external agencies. This will enable protection visa application processing to be more rigorously overseen at all stages of decision making to identify and minimise the impacts of any factors which could delay finalisation of applications. It will also ensure rapid follow up and delivery of information for expedited completion of security checks and similar external agency checks.

36. In order for the Refugee Review Tribunal to implement the 90 day time limit for the review of protection visa decisions, additional resources will be required to strengthen member and staff capacity and case management. Additional resources will also be required to facilitate a more frequent and detailed reporting regime within the Tribunal.

37. Schedules 2, 3 and 4 to the Bill have no financial impact.
MIGRATION AND OMBUDSMAN LEGISLATION AMENDMENT BILL 2005

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short title

1. The short title by which this Act may be cited is the Migration and Ombudsman Legislation Amendment Act 2005.

Clause 2 Commencement

2. This clause provides a table that sets out the commencement provisions of the Act. Under this table:

   (a) sections 1 to 3 of the Act will commence on Royal Assent;

   (b) Schedule 1, concerning protection visa time limits, will commence on Royal Assent;

   (c) Schedule 2, concerning the Commonwealth Ombudsman, largely commences on Royal Assent, but some provisions have conditional commencements as explained below;

   (d) Schedule 3, concerning identifying information, will commence on the day after Royal Assent (so that it can be known from the start of the relevant day that these amendments are in force); and

   (e) Schedule 4, concerning legislative instruments, will commence on Royal Assent.

3. Part 2 of Schedule 2 has special commencement provisions as follows, to cover its interactions with the Postal Industry Ombudsman Bill 2005 (‘the PIO Bill’), which is still before the Parliament at the time of introduction of this bill.

4. Items 26, 27 and 32 of Schedule 2 commence, or do not commence, as follows. If item 16 of Schedule 1 to the PIO Bill, which concerns communications from the Postal Industry Ombudsman to immigration detainees, commences before, or at the start of the same day as, Royal Assent to this Bill, then item 26 will commence upon Assent, or immediately after the commencement of the item of the PIO Bill, and items 27 and 32 will not commence at all. If, however, this Bill receives Royal Assent before that provision of the PIO Bill, then item 27 will commence upon Assent, item 32 will commence immediately before the commencement of the item of the PIO Bill, and item 26 will not commence at all.

5. Items 28 to 31 of Schedule 2 commence on the later of Royal Assent to this Bill and the commencement of item 11 of Schedule 1 to the PIO Bill, which inserts into the Ombudsman Act a new Part to establish the Postal Industry Ombudsman. If that provision of the PIO Bill does not occur, items 28 to 31 will not commence at all.
Clause 3  Schedules

3.  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 – Amendments relating to time limits for processing protection visas

Migration Act 1958

Item 1 After section 65

1. This item inserts a new section after section 65 of the Act.

Section 65A Period within which Minister must make decision on protection visas

2. Section 65A introduces time limits for the making of decisions on protection visa applications by the Minister.

3. The purpose of this new section is to reflect the Government’s policy that decisions on protection visa applications should be made in a timely and efficient manner so as to provide greater transparency and certainty for protection visa applicants. Timeliness in the decision-making process will be enhanced by these provisions as the Minister will be required to make all decisions within a set time frame.

4. Subsection 65A(1) provides that the Minister must make a decision under section 65 on protection visa applications and remittals within 90 days starting on the day:
   • the application was made;
   • the application was remitted to the Minister by any Court or Tribunal; or
   • in circumstances prescribed by the regulations – the day prescribed by the regulations.

5. Paragraph 65A(1)(a) provides that time limits created under new section 65A for the Minister to make decisions on applications for protection visas apply if the application was validly made under section 46. This includes valid applications that are made after the Minister has exercised the discretion under section 48B to allow a non-citizen to apply for a protection visa despite the refusal of an earlier application. The purpose of this paragraph is to ensure that the decision-making time limits do not apply to invalid applications.

6. Paragraph 65A(1)(b) provides that time limits created under new section 65A for the Minister to make decisions on applications for protection visas apply if the application was remitted from any Court or Tribunal for reconsideration by the Minister. The purpose of this paragraph is to ensure that when a Court or Tribunal remits an application to the Minister for reconsideration, the Minister will consider the remitted application in a timely manner.
7. Paragraph 65A(1)(c) provides that the Minister must make a decision under section 65 on a protection visa application covered by paragraphs 65A(1)(a) and (b) within 90 days of the day on which the application was made or remitted.

8. Where certain temporary visa holders apply for further protection before the specified period has passed, their application is held by the Department until that period is reached before being decided. For example, Subclass 785 (Temporary Protection) visas are granted for a period of 36 months. The permanent Subclass 866 (Protection) visa makes it a criterion to be satisfied at the time of decision that the applicant has held a Temporary Protection visa for a continuous period of 30 months or such shorter period specified by the Minister. In this circumstance, the applicant may apply for the permanent Protection visa at any time, but cannot be granted the visa until after the 30 months or specified period has passed.

9. To cover these circumstances, paragraph 65A(1)(d) provides that if circumstances prescribed by the Migration Regulations apply, the Minister must make a decision under section 65 on a protection visa application covered by paragraphs 65A(1)(a) and (b) within 90 days of the day prescribed by the Regulations. Regulations made under this subsection will ensure that where applicants cannot be granted a permanent protection visa because they have not held their temporary visa for a specified period of time, the 90 day period will commence when that specified time period has passed or the from date of application, whichever is the later.

10. Subsection 65A(2) makes it clear that in the event that the Minister does not make a decision within the 90 day time limit provided for by subsection 65A(1), the validity of the decision under section 65 on an application for a protection visa is in no way affected. A decision made outside the time limit will therefore not be invalidated due to the decision not being made within the time limit. In addition, the making of a decision outside the time limit created by section 65A does not create grounds for appeal, in the event that such a decision is reviewed by a Court or Tribunal.

Item 2 At the end of Subdivision AL of Division 3 of Part 2

11. This item inserts new section 91Y at the end of Subdivision AL of Division 3 of Part 2 of the Act.

Section 91Y Secretary’s obligation to report to Minister

12. Section 91Y provides for periodic reporting by the Secretary to the Minister on decisions on protection visa applications and remittals that have not been made within the time limits provided for by section 65A.

13. The purpose of this section is to reflect the Government’s policy that decisions on protection visa applications should be made in a timely and efficient manner so as to provide greater transparency and certainty for protection visa applicants.
Transparency in the decision-making process will be enhanced by the Minister tabling reports before both Houses of Parliament. These reports will provide information on applications that are not decided within the required time limits and the reasons why any such applications were not decided within those time limits.

14. Subsection 91Y(1) provides that the Secretary must give periodic reports under section 91Y to the Minister after the end of each reporting period and defines ‘reporting period’ for the purposes of section 91Y. Subsection 91Y(1) also provides that the report generated under section 91Y must be given to the Minister within 45 days after the end of a reporting period. The purpose of this provision is to allow the Secretary sufficient time to create reports that are to be given to the Minister.

15. Paragraph 91Y(1)(a) defines the first reporting period for a report created under section 91Y as the period that started on 1 July 2005 and ending on 31 October 2005.

16. Paragraph 91Y(1)(b) provides that further reports are to cover each subsequent period of 4 months after 31 October 2005.

17. Subsection 91Y(2) provides a discretion for the Minister to give a notice to the Secretary to provide a report under section 91Y. This discretion is in addition to the reporting obligation created by subsection 91Y(1). This provision will give the Minister greater flexibility to request that reports be made more frequently than the 4 monthly reports required by subsection 91Y(1).

18. Subsection 91Y(3) provides for when the Secretary must give to the Minister a report requested under subsection 91Y(2). It provides that the report must be given by the later of the times set out in paragraphs 91Y(3)(a) and (b).

19. Paragraph 91Y(3)(a) provides that the report must be given within 45 days of the day on which the reporting period ends. Paragraph 91Y(3)(b) provides that the report must be given within 45 days after the day on which the Minister gives the notice to the Secretary. This is to allow for situations in which the Minister requests a report for a historical period which expired before the Minister made the request. In this situation, the Secretary has 45 days from the date of the notice under subsection 91Y(2) in which to provide the report.

20. Subsection 91Y(4) makes it clear that a notice given to the Secretary by the Minister is not a “legislative instrument” within the meaning of section 5 of the Legislative Instruments Act 2003.

21. Subsection 91Y(5) sets out what information the report must include. Subject to paragraph 91Y(5)(b):

- subparagraph 91Y(5)(a)(i) provides that a report made under section 91Y must include information about each application for a protection visa that has been validly made under section 46; and
• subparagraph 91Y(5)(a)(ii) provides that a report made under section 91Y must include information about each application for a protection visa that has been remitted to the Minister by any Court or Tribunal.

22. In addition to these requirements, paragraph 91Y(5)(b) sets out further requirements. Subparagraph 91Y(5)(b)(i) provides a report made under section 91Y must include information about all such applications or remittals for which the Minister has made a decision under section 65 during the reporting period, but has not made the decision within the decision period. For example, the report for 1 November 2005 to 28 February 2006 must include information about valid applications or remittals decided during that period (whenever they were received) which were not decided within the 90 day time limit.

23. Subparagraph 91Y(5)(b)(ii) provides a report made under section 91Y must also include information about all valid applications or remittals for which the Minister has not made a decision under section 65, before or during the reporting period, and the decision period has ended (whether before or during the reporting period). This allows for the reporting of applications that remain undecided at the end of the reporting period after the 90 days has elapsed. For example, the report for 1 November 2005 to 28 February 2006 must include information about all valid applications or remittals on foot on 28 February 2006 where the 90 day period has elapsed. This may include cases where the 90 day period elapsed before 1 November 2005, but the application or remittal remains undecided on 28 February 2006.

24. Subsection 91Y(6) provides that additional information must also be included in a report made under section 91Y for all applications which are required to be included in the report.

25. Paragraph 91Y(6)(a) provides that for all such applications, the report must include the date upon which the application was made.

26. Paragraph 91Y(6)(b) provides that a report made under section 91Y must also include the reasons why a decision was not made within a decision period. For the purposes of section 91Y, “decision period” is defined in subsection 91Y(10).

27. The note at the end of subsection 91Y(6) explains that if decisions are not made within a decision period, the reasons why may relate to aspects of processing applications that are beyond the Department’s control.

28. The purpose of subsection 91Y(6) is to allow the Minister to explain the reasons why any decisions were not made within the time limits stipulated in section 65A, for which reporting is required in section 91Y. Such reasons may include aspects of processing such as cooperation by the applicant, security checking processes, and the provision of information from other Governments.

29. Subsection 91Y(6) also allows for greater transparency in the decision-making process by requiring the Minister to state when each application was made, so that it
can be determined from the report how long it took for the application to be decided, or how long the application has been outstanding.

30. Subsection 91Y(7) provides the types of information that must not be included in a report created under section 91Y. The purpose of this subsection is to protect the identities of individuals who are the subject of, or otherwise connected to, an application for a protection visa.

31. Paragraph 91Y(7)(a) provides that a report made under section 91Y must not include the name of any current or former applicant for a protection visa.

32. Paragraph 91Y(7)(b) provides that a report made under section 91Y must not include any information that may identify any current or former applicant for a protection visa.

33. Paragraph 91Y(7)(c) provides that a report made under section 91Y must not include the name of any person connected with an application for a protection visa referred to in paragraph 91Y(7)(a).

34. Paragraph 91Y(7)(d) provides that a report made under section 91Y must not include any other information that may identify a person connected in any way with an application for a protection visa referred to in paragraph 91Y(7)(a).

35. Subsection 91Y(8) provides that the Secretary may include in a report created under section 91Y, any other details that the Secretary thinks appropriate.

36. Subsection 91Y(9) provides that the Minister must table a copy of a report received under section 91Y in each House of Parliament, within 15 sitting days of that House after the day on which the Minister receives the report from the Secretary.

37. Subsection 91Y(10) defines “decision period” for the purposes of new section 91Y to mean 90 days starting on the day set out in either paragraph 91Y(10)(a) or (b).

38. Paragraph 91Y(10)(a) provides that the 90 days begins on the day on which the application for the protection visa is made or remitted as mentioned in subsection 91Y(5).

39. Where certain temporary visa holders apply for further protection before the specified period has passed, their application is held by the Department until that period is reached before being decided. For example, Subclass 785 (Temporary Protection) visas are granted for a period of 36 months. The permanent Subclass 866 (Protection) visa makes it a criterion to be satisfied at the time of decision that the applicant has held a Temporary Protection visa for a continuous period of 30 months or such shorter period specified by the Minister. In this circumstance, the applicant may apply for the permanent Protection visa at any time, but cannot be granted the visa until after the 30 months or specified period has passed.
40. To cover these circumstances, paragraph 91Y(10)(b) provides that in circumstances prescribed by the Regulations, the 90 days begins on the day prescribed by the Regulations. The Regulations will be amended to ensure that where applicants cannot be granted a permanent protection visa because they have not held their temporary visa for a specified period of time, the 90 day period will commence when that specified time period has passed or from date of application, whichever is the later.

Item 3 After section 414

41. This item inserts a new section after section 414 of the Act.

Section 414A Period within which Refugee Review Tribunal must review decision on certain protection visas

42. Section 414A introduces time limits for the review of decisions on protection visa applications by the Refugee Review Tribunal.

43. The purpose of this new section is to reflect the Government’s policy that the review of decisions on protection visa applications should be made in a timely and efficient manner so as to provide greater transparency and certainty for protection visa applicants. Timeliness in the decision-making process will be enhanced by these provisions as the Refugee Review Tribunal will be required to make all decisions within a set time frame.

44. Subsection 414A(1) provides that the Refugee Review Tribunal must review a decision under section 414 and record its decision under section 430 within 90 days starting on the day the Secretary gave the Refugee Review Tribunal’s Registrar the statement setting out the findings of fact, the reasons for the decision and the evidence on which those findings were based as required by subsection 418(2).

45. Paragraph 414A(1)(a) provides that time limits created under new section 414A for the Refugee Review Tribunal to make a decision on an application for review of a protection visa decision apply if the application was validly made under section 412. The purpose of this paragraph is to ensure that the decision-making time limits do not apply to invalid applications for review.

46. Paragraph 414A(1)(b) provides that time limits created under new section 414A for the Refugee Review Tribunal to make a decision on an application for review of a protection visa decision also apply if the matter was remitted by any Court for reconsideration by the Refugee Review Tribunal. The purpose of this paragraph is to ensure that when a Court remits a matter to the Refugee Review Tribunal for reconsideration, the Refugee Review Tribunal will make the reconsideration in a timely manner.
47. Subsection 414A(2) makes it clear that in the event that the Refugee Review Tribunal does not make a decision within 90 days of a time provided for by subsection 414A(1), the validity of a decision under section 415 on a review of an RRT-reviewable protection visa decision is in no way affected. A decision on an application for review made outside the time limit will therefore not be invalidated due to it not being made within the time limit. In addition, the making or recording of a decision outside the time limit created by section 414A does not create grounds for appeal, in the event that such a decision is reviewed by a Court.

Item 4 After section 440

48. This item inserts new section 440A after section 440 of the Act.

Section 440A Principal Member’s obligation to report to Refugee Review Tribunal

49. Section 440A provides for periodic reporting by the Principal Member of the Refugee Review Tribunal to the Minister on reviews of protection visa decisions and remittals that have not been made within the time limits provided for by section 414A.

50. The purpose of this new section is to reflect the Government’s policy that the review of decisions on protection visa applications should be made in a timely and efficient manner so as to provide greater transparency and certainty for protection visa applicants. Transparency in the decision-making process will be enhanced by the Minister tabling reports before both Houses of Parliament. These reports will provide information on the numbers of applications for review that are not decided within the prescribed time limits and the reasons why any such applications were not decided within those time limits.

51. Subsection 440A(1) provides that the Principal Member must give periodic reports under section 440A to the Refugee Review Tribunal after the end of each “reporting period” and defines “reporting period” for the purposes of section 440A. Subsection 440A(1) also provides that the report generated under section 440A must be given to the Minister within 45 days after the end of a “reporting period”. The purpose of this provision is to allow the Principal Member sufficient time to create reports that are to be given to Minister.

52. Paragraph 440A(1)(a) defines the first “reporting period” for a report created under section 440A as the period that started on 1 July 2005 and ending on 31 October 2005.

53. Paragraph 440A(1)(b) provides that further reports are to be provided every 4 months after 31 October 2005.

54. Subsection 440A(2) provides a discretion for the Minister to give a notice to the Principal Member to provide a report under section 440A. This discretion is in
addition to the reporting obligation created under subsection 440A(1). This provision will give the Minister greater flexibility for requesting reports as reports may be made more frequently than the 4 monthly reports required by subsection 440A(1).

55. Subsection 440A(3) provides for when the Principal Member must give to the Minister a report requested under subsection 440A(2). It provides that the report must be given by the later of the times set out in paragraphs 440A(3)(a) and (b).

56. Paragraph 440A(3)(a) provides that the report must be given within 45 days of the day on which the reporting period ends. Paragraph 440A(3)(b) provides that the report must be given within 45 days after the day on which the Minister gives the notice to the Principal Member. This is to allow for situations in which the Minister requests a report for a historical period which expired before the Minister made the request. In this situation, the Principal Member has 45 days from the date of the notice under subsection 440A(2) in which to provide the report.

57. Subsection 440A(4) makes it clear that a notice given to the Minister by the Principal Member is not a “legislative instrument” within the meaning of section 5 of the Legislative Instruments Act 2003.

58. Subsection 440A(5) sets out what information the report must include. Subject to paragraph 440A(5)(b):

- Subparagraph 440A(5)(a)(i) provides that a report made under section 440A must include information about all applications for review of protection visa decisions that have been validly made under section 412.

- Paragraph 440A(5)(a)(ii) provides that a report made under section 440A must include information about all applications for review of protection visa decisions that have been remitted to the Tribunal by any Court.

59. In addition to these requirements, paragraph 440A(5)(b) sets out further requirements. Subparagraph 440A(5)(b)(i) provides a report made under section 440A must include information about all such applications for which the Tribunal has made a decision under section 430 during the reporting period, but has not made the decision within the decision period. For example, the report for 1 November 2005 to 28 February 2006 must include information about review applications decided during that period (whenever they were received) which were not decided within the 90 day time limit.

60. Subparagraph 440A(5)(b)(ii) provides a report made under section 440A must also include information about all valid applications for review for which the Tribunal has not made a decision under section 430, before or during the reporting period, and the decision period has passed (whether before or during the reporting period). This allows for the reporting for applications for review that remain undecided at the end of the reporting period after the 90 days has elapsed. For example, the report for 1 November 2005 to 28 February 2006 must include information about all applications on foot on 28 February 2006 where the 90 day period has elapsed. This may include cases where the 90 day period elapsed before 1 November 2005, but the application remains undecided on 28 February 2006.
61. Subsection 440A(6) provides that additional information must also be included in a report made under section 440A for all applications for review which are required to be included in the report.

62. Paragraph 440A(6)(a) provides that for all such applications for review, the report must include the date upon which the application was made.

63. Paragraph 440A(6)(b) provides that a report made under section 440A must also include the reasons why a decision was not made within a decision period. For the purposes of section 440A, “decision period” is defined in subsection 440A(10).

64. The note at the end of subsection 440A(6) explains that if decisions are not made within a decision period, the reasons why may relate to aspects of processing applications that are beyond the RRT’s control.

65. The purpose of subsection 440A(6) is to allow the Principal Member to explain the reasons why any decisions were not made within the time limits stipulated in section 414A, for which reporting is required in section 440A. Such reasons may include aspects of processing such as co-operation by the applicant and the provision of information from other Governments.

66. Subsection 440A(6) also allows for greater transparency in the review process by requiring the Principal Member to state when each application was made, so that it can be determined from the report how long it took for the application to be decided, or how long the application has been outstanding.

67. Subsection 440A(7) provides the types of information that must not be included in a report created under section 440A. The purpose of this subsection is to protect the identities of individuals who are the subject of, or otherwise connected to an application for a protection visa.

68. Paragraph 440A(7)(a) provides that a report made under section 440A must not include the name of any current or former applicant for a protection visa.

69. Paragraph 440A(7)(b) provides that a report made under section 440A must not include any information that may identify any current or former applicant for a protection visa.

70. Paragraph 440A(7)(c) provides that a report made under section 440A must not include the name of any person connected with the application for review.

71. Paragraph 440A(7)(d) provides that a report made under section 440A must not include any information that may identify any person connected with the application for review.
72. Subsection 440A(8) provides that the Principal Member may include in a report created under section 440A, any other details that the Principal Member thinks appropriate.

73. Subsection 440A(9) provides that the Minister must table a copy of a report received under section 440A in each House of Parliament, within 15 sitting days of that House after the day on which the Minister receives a report from the Principal Member.

74. Subsection 440A(10) defines “decision period” for the purposes of new section 440A. It provides that “decision period” for a application for review of a protection visa decision means the period of 90 days starting on the day which the Secretary has given to the Registrar of the Tribunal the documents required to be given by subsections 418(2) and 418(3).

Item 5 Application of Amendments

75. This item provides for the application of the amendments in Schedule 1.

76. Subitem 5(1) provides that amendments made by items 1 and 3 of Schedule 1 apply only to applications for protection visas made on or after the commencement of those items. Items 1 and 3 impose the decision-making and review time limits on the Minister and the Refugee Review Tribunal respectively. The commencement date is the day this Bill receives Royal Assent.

77. Subitem 5(2) provides for the application of the provisions contained in items 2 and 4 of Schedule 1. Items 2 and 4 require the Secretary of the Department or the Principal Member of the Refugee Review Tribunal to periodically report to the Minister about protection visa applications or review applications which take longer than 90 days to decide.

78. Paragraph 5(2)(a) provides that amendments made by items 2 and 4 of Schedule 1 apply to applications for protection visas made on or after the commencement of Schedule 1.

79. Paragraph 5(2)(b) provides that amendments made by items 2 and 4 also apply to applications for protection visas made before the commencement of Schedule 1, that have not been decided at the time of commencement.
SCHEDULE 2 – Amendments relating to the Commonwealth Ombudsman

Part 1 – Main amendments

Complaints (Australian Federal Police) Act 1981

Item 1 Subsection 38(2)

1. This item amends subsection 38(2) of the Act by replacing “paragraph 19(1)(a)” with “subsection 19(1)”.

2. Subsection 38(2) of the Act provides that the Ombudsman shall include in each report made by him or her under paragraph 19(1)(a) of the Ombudsman Act 1976, the prescribed particulars with respect to complaints that were made to him or her or through the Australian Federal Police.

3. This amendment is consequential upon the amendment in item 17 which repeals subsection 19(1) of the Ombudsman Act and substitutes a new subsection 19(1).

Ombudsman Act 1976

Item 2 Subsection 3(1)

4. This item inserts a definition of “Commonwealth service provider” in section 3 of the Act.

5. The purpose of the item is to provide that “Commonwealth service provider” has the meaning given by new section 3BA which is to be inserted by item 6. Amendments are made throughout the Ombudsman Act referring to “Commonwealth service provider” which makes it necessary to include a definition.

Item 3 After subsection 3(4A)

6. This item inserts a new subsection 3(4B) after subsection 3(4A) of the Act. Subsection 3(4B) deems the actions of Commonwealth service providers, in exercising powers or performing functions for or on behalf of Departments or prescribed authorities (both defined in the Act), to have been taken by the relevant agency, for the purposes of the Ombudsman Act.

7. The purpose of the new subsection is to remove any doubt that the Ombudsman is able to investigate the actions of Commonwealth service providers in providing goods or services for or on behalf of Departments or prescribed authorities.
8. This subsection and related section 3BA (see item 6) implement the government’s response to the recommendation in the Joint Committee of Public Accounts and Audit Report no. 379, *Contract Management in the Australian Public Service*, that the Ombudsman Act be amended to extend the jurisdiction of the Ombudsman to include all government contractors. The response agreed that the Ombudsman should have jurisdiction to investigate the actions of private sector organisations that are contracted by Commonwealth agencies to provide goods and/or services to the public. The government considers, however, as indicated in the response, that government contractors who provide goods and/or services to agencies, rather than to the public, should not be subject to the Ombudsman’s jurisdiction.

9. The intention is to cover those services that would otherwise be provided by agencies themselves but which are now outsourced (contracted “out”). It is not intended to cover services which are contracted “in”, such as information technology, cleaning, or other such corporate services. (See item 6 concerning new subsection 3BA).

10. The combined effect of paragraphs 3(4B)(a), (b) and (c) is to deem the actions of Commonwealth service providers (see item 6) and other employees who are exercising a power or performing a function for or on behalf of a Department or prescribed authority (as both defined in the Act) to be the actions of the Department or prescribed authority, for the purposes of the Ombudsman Act. The effect will be that where a Commonwealth service provider is performing a contract for or on behalf of a Department or prescribed authority, the Department or prescribed authority will be answerable for their actions as if taken by the Department or prescribed authority itself.

11. Exceptions are provided for in paragraph 3(4B)(d). This paragraph provides that a person performing duties of an office established by or in accordance with the provisions of an enactment or where a Judge or magistrate of a court of a State or Territory, the action taken will not be taken to be action taken by the Department or prescribed authority.

12. Paragraph 3(4B)(e) provides that an action by a Commonwealth service provider or employee will not be taken to be action by the Department or prescribed authority where the regulations so provide.

**Item 4 Subsection 3(7A)**

13. This item removes the words “under Part II” from subsection 3(7A).

14. Subsection 3(7A) provides that a reference to the Ombudsman of a State shall be read as a reference to a person performing, under a law of a State, functions similar to the functions performed by the Ombudsman under Part II.

15. The purpose of the item is to refer to the functions performed by the Ombudsman as not only those performed under the Ombudsman Act but also those
performed under other Commonwealth legislation and Australian Capital Territory legislation which confer functions on the Ombudsman.

Item 5 Subparagraph 3(17)(a)(v)

16. This item repeals existing subparagraph 3(17)(a)(v) and replaces it with a new subparagraph 3(17)(a)(v). This is consequential upon the amendment in item 23.

Item 6 After section 3B

17. This item inserts a new section 3BA which provides a definition of “Commonwealth service provider” (see discussion on item 3 above). The definition covers both contractors and subcontractors.

New section 3BA Commonwealth service providers

18. Section 3BA defines a person as a Commonwealth service provider of a Department or prescribed authority under a contract (known as the Commonwealth contract), if either paragraph 3BA(a) or 3BA(b) apply.

19. Paragraph 3BA(a) defines a person as a Commonwealth service provider of a Department or prescribed authority if the person and the Department or prescribed authority are parties to a Commonwealth contract for the provision of goods and services for or on behalf of the Department or prescribed authority to another person who is not a Department or prescribed authority or the Commonwealth.

20. Paragraph 3BA(b) provides for subcontractors. A person is also a Commonwealth service provider if the person and a Commonwealth service provider, as defined in paragraph 3BA(a), are parties to another contract (the subcontract) and, under that subcontract and for the purposes of the Commonwealth contract, the person is responsible for providing goods or services, for or on behalf of the Department or prescribed authority, to another person who is not a Department or prescribed authority or the Commonwealth.

Item 7 Subsection 4(2)

21. This item repeals existing subsection 4(2) and replaces it with a new subsection 4(2).

22. The purpose of the item is to make it explicit that the Ombudsman can perform functions and exercise powers under other Commonwealth or Australian Capital Territory legislation as well as under the Ombudsman Act.
Item 8 At the end of section 4

23. This item adds a new subsection to the end of section 4. New subsection 4(4) provides that the Ombudsman, in performing his or her functions in relation to immigration, may choose to call him or herself the “Immigration Ombudsman”.

24. On 14 July 2005, the Minister for Immigration and Multicultural and Indigenous Affairs announced that the Government would strengthen the role of the Ombudsman in relation to immigration and detention matters and that he would be designated as the “Immigration Ombudsman” in the same way as he performs the role of the Taxation Ombudsman (see subsection 4(3) of the Ombudsman Act).

Item 9 After subsection 7A(1)

25. This item inserts new subsections 7A(1A), (1B), (1C), (1D) and (1E) after subsection 7A(1).

26. Section 7A provides that the Ombudsman may make preliminary inquiries in order to determine whether or not the Ombudsman is authorised to investigate a complaint, and, if authorised, whether in his or her discretion, to decide not to investigate.

27. New subsections 7A(1A), (1B), (1C), (1D) and (1E) provide for disclosure of information. The purpose of these subsections is to enable an agency to provide information to the Ombudsman notwithstanding any law that would otherwise preclude, inhibit or provide conditions on doing so, where requested by the Ombudsman or where the agency reasonably considers the information would be relevant to the Ombudsman’s inquiries.

28. The new subsections will allow agencies to provide information to the Ombudsman without breaching privacy legislation or other legislation and without the need for the Ombudsman to issue a formal notice (under section 9 of the Act) requiring the information. One result is expected to be that information relevant to deciding whether to investigate or to investigate further will be provided at an early stage of the process.

29. The disclosure of information under these provisions would be entirely discretionary. If an agency does not wish to provide the information for any reason, it will be entitled not to do so. In those circumstances, the Ombudsman might consider issuing a notice under section 9 of the Act requiring the information.

30. Subsection (1A) provides that subsections (1B), (1C), (1D) and (1E) apply if the Ombudsman requests the principal officer (of the Department or prescribed authority the action of which is the subject of a complaint) or an officer (where an arrangement has been made between the Ombudsman and the principal officer that an officer may answer inquiries) or if the principal officer or officer (referred to in the
arrangement) reasonably believes that information or a document or record would assist the Ombudsman to make a determination whether to investigate a matter.

31. Subsection (1B) provides that if the officer gives information to the Ombudsman or produces a document or record to the Ombudsman and by doing so, contravenes another enactment, might tend to incriminate the officer or make the officer liable to a penalty, discloses a legal advice given to a Minister or a Department or a prescribed authority, discloses a communication between an officer of a Department or of a prescribed authority and another person or body that would be protected by legal professional privilege, or otherwise acts contrary to the public interest, then the information or production of the document or record is not admissible in evidence against the officer in proceedings, other than proceedings for an offence under section 137.1 (providing false or misleading information), 137.2 (providing false or misleading documents), or 149.1 (obstructions of Commonwealth officials) of the Criminal Code.

32. Subsection (1C) provides that an officer is not liable to any penalty under the provisions of any other enactment by reason of his or her giving the information to the Ombudsman or producing the document or record to the Ombudsman.

33. Subsection (1D) provides that the giving of information or the production of a document or record to the Ombudsman is, for the purposes of the Privacy Act 1988, taken to be authorised by law, which is one of the exceptions to the use or disclosure provisions in the Information Privacy Principles and National Privacy Principles in the Privacy Act.

34. Subsection (1E) provides that despite subsection (1B), which provides that an officer may provide material to the Ombudsman which may be subject to legal professional privilege, a claim for legal professional privilege in relation to the information, document or record is not affected.

Item 10 After subsection 8(2)

35. This item inserts new subsections 8(2A), (2B), (2C), (2D) and (2E) into section 8 which sets out matters relating to investigations.

36. The purpose of these new subsections is to provide that an agency or person may provide information to the Ombudsman notwithstanding any law that would otherwise preclude, inhibit or provide conditions on doing so, where requested by the Ombudsman or where the agency or person reasonably considers the information would be relevant to the Ombudsman’s investigation.

37. Subsection (2A) provides that (2B), (2C), (2D) and (2E) apply if either the Ombudsman requests a person to give information to the Ombudsman or to produce a document or other record, or if a person reasonably believes that information or a document or other record is relevant to an investigation. However, the person must have either obtained the information, document or record:
(i) in the course of their duties as the principal officer and is still the principal officer; or

(ii) in the course of their duties as the principal officer but they are no longer the principal officer and the principal officer has authorised the person to give the information; or

(iii) in the course of their duties as an officer and the principal officer has authorised the person to give the information; or

(iv) lawfully but not in the course of the person’s duties as an officer. This subparagraph would cover all persons – they would not necessarily be an officer or former officer of a Department or prescribed authority.

38. Subsection (2B) provides that if the person gives information to the Ombudsman or produces a document or record to the Ombudsman, and by so doing contravenes another enactment, might tend to incriminate the officer or make the officer liable to a penalty, discloses a legal advice given to a Minister or a Department or a prescribed authority, discloses a communication between an officer of a Department or of a prescribed authority and another person or body that would be protected by legal professional privilege, or otherwise acts contrary to the public interest, then the information or production of the document or record is not admissible in evidence against the officer in proceedings, other than proceedings for an offence under section 137.1 (providing false or misleading information), 137.2 (providing false or misleading documents), or 149.1 (obstructions of Commonwealth officials) of the Criminal Code.

39. Subsection (2C) provides that a person is not liable to any penalty under the provisions of any other enactment by reason of his or her giving the information to the Ombudsman or producing the document or record to the Ombudsman.

40. Subsection (2D) provides that the giving of information or the production of a document or record to the Ombudsman is, for the purposes of the Privacy Act 1988, taken to be authorised by law, which is one of the exceptions to the use or disclosure provisions in the Information Privacy Principles and National Privacy Principles in the Privacy Act.

41. Subsection (2E) provides that despite subsection (2B), which provides that an officer may provide material to the Ombudsman which may be subject to legal professional privilege, a claim for legal professional privilege in relation to the information, document or material is not affected.

Item 11  At the end of section 8

42. This item adds a new subsection (11). The purpose of subsection 8(11) is to ensure that the Ombudsman will report conduct by the Commonwealth service provider that, were the conduct that of an officer of the contracting agency, would be a breach of duty or misconduct, and any other conduct that the Ombudsman considers
should be brought to the agency’s attention, just as he or she must report evidence concerning an officer of a Department or prescribed authority under subsection (10).

43. Subsection (11) provides that the Ombudsman has a duty to bring evidence of conduct on the part of a person who is, or is an employee of, a Commonwealth service provider of a Department or prescribed authority under a contract to the notice of the principal officer of the Department or prescribed authority where there is, in the opinion of the Ombudsman, evidence that the conduct:

(i) would amount to a breach of duty or misconduct if the person were an officer of the Department or prescribed authority; or

(ii) should be brought to the attention of the principal officer of the Department or prescribed authority.

The Ombudsman would have to be satisfied that the evidence is of sufficient force to justify the Ombudsman doing so.

**Item 12 Subsection 9(1AA)**

44. This item amends subsection 9(1AA). Subsection 9(1AA) provides that where the Ombudsman believes that an officer of a Department or prescribed authority has information, documents or records relevant to an investigation but the Ombudsman does not know his or her identity, the Ombudsman may serve a notice on the principal officer of the Department or the authority requiring the principal officer or their nominee to answer questions or produce documents or records.

45. This item extends the operation of subsection 9(1AA) to cover not just an officer of a Department or a prescribed authority but also a Commonwealth service provider of a Department or prescribed authority under a contract and an employee of a Commonwealth service provider.

46. The purpose of the item is to enable the Ombudsman to require the principal officer of an agency or their nominee to attend or produce where the Ombudsman believes that the agency’s Commonwealth service provider or employee is capable of furnishing information or producing documents or other records but their identity is not known to the Ombudsman.

**Item 13 Subsection 9(1AA)**

47. Item 13 is consequential upon item 12. It omits “identity of the officer” and substitutes “identity of the person” as the provision will now cover a range of persons, not just officers of a Department or prescribed authority.

**Item 14 Subsection 11A(1)**
48. Item 14 removes the words “by or under this Act or any other Act”. It is consequential upon the amendment in item 7 and consistent with the amendments in items 18 and 19.

**Item 15 ** **Subsection 14(1)**

49. This item repeals subsection 14(1) and replaces it with a new subsection. Subsection 14(1) provides that in conducting an investigation an authorised person may enter any place occupied by a Department or prescribed authority and may carry on the investigation at the place.

50. The new subsection 14(1) expands the operation of the provision to include premises occupied by a Commonwealth service provider of a Department or prescribed authority under a contract. This provision enables the Ombudsman to enter premises of a Commonwealth service provider for the purposes of an investigation but only premises predominately occupied for the purposes of the contract. For example, the Ombudsman would have the power to enter a detention centre but not necessarily the premises where administrative tasks of the contractor not specifically related to the particular contract were carried out.

**Item 16 ** **Subsection 14(4)**

51. This item makes a minor amendment to subsection 14(4) which provides that an authorized person is entitled to inspect any documents relevant to an investigation kept at premises that the authorized person has entered under the section (power to enter premises) at a reasonable time of the day arranged with the principal officer of the agency concerned. The purpose of the item is to ensure that premises include those occupied by a Commonwealth service provider.

**Item 17 ** **Subsection 19(1)**

52. This item repeals subsection 19(1) and replaces it with a new subsection 19(1). Paragraph 19(1)(a) is an “orphaned” paragraph (one where, due to an amendment to the section, only a single paragraph is left) created by Schedule 5 to the *A.C.T. Self-Government (Consequential Provisions) Act 1988*. Item 17 restructures the provision so that there is no paragraph. The meaning and effect of the subsection is not altered.

**Item 18 ** **Paragraph 19(2)(b)**

53. This item is consequential upon item 7. Paragraph 19(2)(b) provides that the Ombudsman may submit to the Minister for presentation to Parliament a report in respect of a matter relating to the Ombudsman’s exercise of powers or performance of functions. At present, this refers to powers and functions of the Ombudsman under the Ombudsman Act. As reflected in item 7, the Ombudsman has functions and
powers under not just the Ombudsman Act but under other Acts or regulations as well. Therefore this amendment removes the words “under this Act”.

Item 19   Subsection 19C(1)

54. Item 19 is consequential upon item 7. Subsection 19C(1) provides that the functions of the Defence Force Ombudsman are to investigate complaints made to him or her under the Ombudsman Act and to perform such other functions as are conferred on him or her under the Ombudsman Act. As reflected in item 7, the Ombudsman has functions and powers under not just the Ombudsman Act but under other Acts or regulations as well.

55. Item 19 restructures the provision and provides that the functions conferred may be by the Ombudsman Act or the regulations or another Act or regulations made under another Act.

Item 20   Subsection 29(8)

56. Section 29 concerns acting arrangements for the offices of the Commonwealth Ombudsman and Deputy Commonwealth Ombudsmen. Subsection 29(8) provides that where a person is acting in an office pursuant to an appointment under the section, he or she has, and may exercise powers under the Ombudsman Act or any other law.

57. Item 20 removes the words “under this Act or any other law” to make it consistent with amendments such as those in items 18 and 19 which are consequential upon item 7.

Item 21   Paragraph 35(3)(a)

58. This item is consequential upon item 7. As the Ombudsman may have functions and powers under not just the Ombudsman Act but under other Acts or regulations as well, this paragraph removes the restriction to just the Ombudsman Act. The reference to the functions of the Ombudsman in this paragraph includes the Ombudsman’s functions under all Commonwealth Acts and regulations, and Australian Capital Territory Acts and regulations.

Item 22   Subparagraph 35(3)(b)(i)

59. This item substitutes the word “given” for “furnished”. The purpose of the amendment is to use plain English and to be consistent with the wording used in sections 7A and 8 as amended by items 9 and 10, and subparagraph 35(3)(b)(ia) – see item 23.
Item 23  After subparagraph 35(3)(b)(i)

60. This item inserts a new subparagraph 35(3)(b)(ia) after subparagraph 35(3)(b)(i). Subparagraph 35(3)(b)(i) provides that an officer may pass information to a person with the consent of the principal officer of the Department or authority or the relevant Minister when the information was given by an officer of the Department or authority in the performance of his or her duties as such an officer.

61. New subparagraph 35(3)(b)(ia) includes Commonwealth service providers – that is, the consent of the principal officer of the Department or prescribed authority or the responsible Minister is required where the information is given to the officer by a person who is, or is an employee of, a Commonwealth service provider of the Department or prescribed authority.

Item 24  Subparagraph 35(3)(b)(ii)

62. Item 24 is consequential upon item 23. It includes a reference to new subparagraph 35(3)(b)(ia).

Item 25  Subsections 35(7) and 35A(1) and (2)

63. Item 25 makes minor amendments to subsection 35(7), 35A(1) and (2) which are consequential upon item 7.

Part 2 – Other amendments

Migration Act 1958

Item 26  Paragraph 193(3)(b)

64. This item repeals paragraph 193(3)(b) of the Migration Act. The paragraph presently excludes an unlawful non-citizen in immigration detention to which subsection 193(1) applies, and who has not made a complaint to the Commonwealth Ombudsman, from the entitlement which would otherwise apply under the Ombudsman Act to have delivered to him or her mail from the Commonwealth Ombudsman. The purpose of the repeal is to assist the Ombudsman in making all relevant inquiries, particularly for the purposes of Part 8C of the Migration Act, by ensuring that he or she can communicate with a person in immigration detention without the prerequisite of a complaint having been made.

65. The commencement provisions provide that this item will commence on the later of the day on which this Act receives Royal Assent, and immediately after the commencement of item 16 of Schedule 1 to the Postal Industry Ombudsman Act 2005. However, if item 16 of Schedule 1 to the Postal Industry Ombudsman Act
2005 does not commence at or before the start of the day on which this Act receives Royal Assent, item 26 does not commence at all and item 27 will commence instead.

**Item 27 Subsection 193(3)**

66. This item will commence in place of item 26 if item 26 does not commence (see the note on item 26); if item 26 does commence, item 27 will not commence.

67. This item repeals subsection 193(3) and replaces it with a new subsection 193(3).

68. Subsection 193(3) presently excludes an unlawful non-citizen in immigration detention to which subsection 193(1) applies, who has not made a complaint in writing to the Human Rights and Equal Opportunity Commission or a complaint to the Commonwealth Ombudsman, from the entitlements which would otherwise apply to have delivered to him or her mail from the Human Rights and Equal Opportunity Commission or the Commonwealth Ombudsman, respectively.

69. The new subsection 193(3) will not have the restriction on an unlawful non-citizen in immigration detention receiving mail from the Commonwealth Ombudsman but will retain the restriction on an unlawful non-citizen in immigration detention receiving mail from the Human Rights and Equal Opportunity Commission. The purpose of the amendment is as set out in the note on item 26.

*Ombudsman Act 1976*

**Item 28 Subsection 19M(1)**

70. The commencement provisions provide that items 28 to 31 commence on the later of the start of the day on which this Act receives the Royal Assent, and immediately after the commencement of item 11 of Schedule 1 of the *Postal Industry Ombudsman Act 2005*, but if that item 11 does not commence, then none of the provisions in items 28 to 31 commence.

71. Subsection 19M(1) provides for the functions of the Postal Industry Ombudsman which are to investigate complaints made to him or her under the Act and to perform such other functions as are conferred on him or her by the Act. This amendment is consequential upon item 7. It makes plain that functions may be conferred on the Postal Industry Ombudsman not only by the Ombudsman Act but also by the regulations or another Act or regulations made under another Act. Unlike the amendment by item 7, it is not necessary to refer to Australian Capital Territory enactments as it is not envisaged that such enactments would confer jurisdiction on the Postal Industry Ombudsman.
Item 29  **Subparagraph 19R(3)(b)(vii)**

72. This item is consequential upon item 11 which inserts a subsection 8(11).

Item 30  **After subparagraph 19R(3)(b)(viii)**

73. This item is consequential upon item 12.

Item 31  **After subparagraph 19R(3)(d)(i)**

74. This item is consequential upon item 23.

*Postal Industry Ombudsman Act 2005*

**Item 32  Items 15 and 16 of Schedule 1**

75. This item repeals items 15 and 16 of Schedule 1 to the *Postal Industry Ombudsman Act 1995*, which amend subsection 193 of the *Migration Act 1958*, and substitutes a new item 15 which repeals subsection 193(3) and substitutes a new subsection 193(3).

76. This item will commence immediately before the commencement of item 16 of Schedule 1 to the *Postal Industry Ombudsman Act 1995*. However, if item 16 of Schedule 1 to the *Postal Industry Ombudsman Act 1995* commences at or before the start of the day on which this Act receives the Royal Assent, item 32 does not commence at all – the intended effect will be achieved by item 26 of Schedule 1.
SCHEDULE 3 – Amendments relating to identifying information

Migration Act 1958

Item 1 At the end of subsection 336E(2)

1. This item inserts new paragraphs 336E(2)(j) and (k) after paragraph 336E(2)(i) in Division 3 of Part 4A of the Migration Act.

2. Subsection 336E(1) provides that a person commits an offence if that person's conduct causes identifying information, within the meaning of section 336A, to be disclosed and that disclosure is not a permitted disclosure under subsection 336E(2). Subsection 336E(2) provides an exhaustive list of permitted disclosures.

3. New paragraph 336E(2)(j) provides that a permitted disclosure is a disclosure that is authorised by new section 336FA.

4. The purpose of new paragraph 336E(2)(j) is to add to the list of permitted disclosures in subsection 336E(2), a disclosure that has been authorised by new section 336FA. In broad terms, new section 336FA authorises the disclosure of identifying information relating to a person (‘the subject’) to an individual where that disclosure is done for the purpose of obtaining the individual’s help to identify, authenticate the identity of, or locate the subject; or refer the officer to another person who might be able to help identify, authenticate the identity of, or locate, the subject.

5. New paragraph 336E(2)(k) provides that a permitted disclosure is a disclosure that is authorised by new section 336FC.

6. The purpose of new paragraph 336E(2)(k) is to add to the list of permitted disclosures in subsection 336E(2), a disclosure that has been authorised by new section 336FC. In broad terms, new section 336FC authorises the disclosure of identifying information to the public where that disclosure is done for the purpose of obtaining the public’s help to identify, authenticate the identity of, or locate the subject in connection with the administration of the Act.

Item 2 After section 336F

7. This item inserts new sections 336FA, 336FB, 336FC, and 336FD after section 336F in Division 3 of Part 4A of the Migration Act.

Section 336FA Disclosure of certain personal identifiers to selected individuals

8. Subsection 336E(1) provides that a person commits an offence if that person's conduct causes identifying information, within the meaning of section 336A, to be
disclosed and that disclosure is not a permitted disclosure under subsection 336E(2). Subsection 336E(2) provides an exhaustive list of permitted disclosures.

9. New paragraph 336E(2)(j) provides that a permitted disclosure is a disclosure that is authorised by new section 336FA.

10. New subsection 336FA(1) provides that a permitted disclosure of identifying information relating to a person (‘the subject’), for the purposes of subsection 336E(2), is a disclosure by an officer to an individual where that disclosure is done for the purpose of obtaining that individual’s help to identify, or authenticate the identity of, the subject, or locate the subject, in connection with the administration of the Migration Act.

11. ‘Individual’ is defined in paragraph 22(1)(aa) of the Acts Interpretation Act 1901 (‘the Acts Interpretation Act’) to mean a natural person.

12. ‘Identifying information’ is defined in section 336A to mean, among other things, a personal identifier. New paragraph 336FA(1)(a) provides that the information that is authorised by new section 336FA to be disclosed is limited to a personal identifier within the meaning of paragraphs (b), (c), (d) or (f) of the definition of personal identifier in subsection 5A(1) of the Migration Act. That is, a measurement of a person's height and weight, a photograph or other image of a person's face and shoulders, an audio or a video recording of a person (other than a video recording under section 261AJ), or a person's signature. Disclosure of other kinds of personal identifiers, such as fingerprints or iris scans, is not authorised by new section 336FA.

13. New paragraph 336FA(1)(b) provides that, for the disclosure to be authorised by new section 336FA, the disclosure must be made to an individual. That is, new section 336FA does not authorise the disclosure of such information otherwise than to a natural person. Note that, new subsection 336FA(2), described below, permits disclosure to more than one individual at the same time.

14. New paragraph 336FA(1)(c) provides that new section 336FA authorises the disclosure, by an officer, of identifying information that relates to the subject where that disclosure is for the purpose of obtaining the individual’s help, in connection with the administration of the Migration Act, to:
   - identify, or authenticate the identity of, or locate, the subject;
   - refer the officer to another person who might be able to help identify, authenticate the identity of, or locate, the subject.

15. New paragraph 336FA(1)(d) provides that, for the disclosure to be authorised by new section 336FA, prior to the disclosure occurring, the officer must have reasonable grounds to believe that the individual might be able to provide the help that is the purpose of the officer’s disclosure. That is, help identify, or authenticate the identity of, the subject, locate the subject, or refer the officer to another person who might be able to help identify, authenticate the identity of, or locate, the subject.
16. New paragraph 336FA(1)(e) provides that, for the disclosure to be authorised by new section 336FA, prior to the disclosure occurring, the officer must be satisfied that it is reasonably necessary in the circumstances to make the disclosure to the individual in order to obtain that assistance.

17. New subsection 336FA(2) provides that nothing in new subsection 336FA(1) precludes an officer from disclosing the relevant personal identifier to more than one individual at the same time, provided that the requirements of new subsection 336FA(1) are met in relation to each of those individuals.

18. The purpose of new section 336FA is to strengthen the ability of officers under the Migration Act to identify or locate a non-citizen, or a citizen, whose identity or location needs to be determined in connection with the administration of the Migration Act, as soon as possible after he or she comes to notice. An example of where new section 336FA may be used is where an officer is attempting to locate a person, and that officer shows a photograph of the subject to an individual whom the officer believes (on reasonable grounds) may have worked with the subject, for the purposes of locating and authenticating the identity of the subject.

Section 336FB Disclosure of other relevant information to selected individuals

19. New section 336FB provides that, in certain circumstances, an officer is authorised to disclose, to an individual, personal information within the meaning of the Privacy Act 1988 (‘the Privacy Act’), about a subject.

20. ‘Individual’ is defined in paragraph 22(1)(aa) of the Acts Interpretation Act to mean a natural person.

21. Personal information is defined in subsection 6(1) of the Privacy Act to mean information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. Following this definition, personal identifiers and identifying information, as defined in section 5A and section 336A of the Migration Act respectively, are personal information for the purposes of the Privacy Act.

22. New paragraphs 336FB(1)(a) and (b) provide that, for the disclosure of the personal information to be authorised by new 336FB, that disclosure must be done in conjunction with, and to the same individual, as the authorised disclosure of a personal identifier by new 336FA.

23. New paragraph 336FB(1)(c) provides that an officer is precluded from disclosing personal information under new section 336FB other than when new paragraphs 336FA(1)(b), (c), (d) and (e) are met in relation to the personal information as well as the personal identifier.
24. New subsection 336FB(2) provides that new section 336FB does not authorise an officer to disclose personal information to an individual where that information is considered to be identifying information within the meaning of section 336A of the Migration Act.

25. New subsection 336FB(3) provides that nothing in new subsection 336FB(1) prevents the officer from disclosing the relevant information to more than one individual at the same time, provided that the requirements of new paragraphs 336FA(1)(b), (c), (d) and (e) are met in relation to each one of those individuals.

26. The purpose of new section 336FB is to authorise the disclosure of personal information that is reasonably necessary and incidental to the disclosure of identifying information authorised by new section 336FA. An example of where new section 336FB may be used is where an officer is attempting to locate a person, and that officer shows a photograph of the subject, for the purpose of locating the subject, to a person who the officer thinks might have recently been in contact with or seen the subject, together with personal information such as what clothing the subject last seen wearing or where he or she was last seen.

Section 336FC Disclosure of certain personal identifiers to the general public

27. New section 336FC provides that the Secretary may authorise the disclosure of certain identifying information to the general public, where that information relates to a subject who is not a minor for the purposes of the Migration Act.

28. A ‘minor’ is defined in subsection 5(1) in Part 1 of the Migration Act to mean a person who is less than 18 years old. The Migration Act contains specific protections for minors, with regard to the personal identifiers. An example of this is section 192A in Part 2. In keeping with these protections and general community standards, it is not considered appropriate for the Secretary to be able to authorise such a disclosure.

29. Identifying information is defined in section 336A to mean, among other things, a personal identifier. New paragraph 336FC(1)(a) provides that the identifying information that is authorised by new section 336FC to be disclosed is limited to a personal identifier within the meaning of paragraph (b), (c), (d) or (f) of the definition of personal identifier in subsection 5A(1) of the Migration Act. That is, a measurement of a person's height and weight, a photograph or other image of a person's face and shoulders, an audio or a video recording of a person (other than a video recording under section 261AJ), or a person’s signature. Disclosure of other kinds of personal identifiers, such as fingerprints or iris scans, is not authorised by new section 336FC.

30. New paragraph 336FC(1)(b) provides that the authority to disclose this identifying information is contingent upon the requirement that the purpose of the public disclosure is to obtain the public’s help to identify, authenticate the identity of, or locate, the subject, in connection with the administration of the Migration Act.
31. New paragraph 336FC(1)(c) provides that the authority to disclose this identifying information is contingent upon the requirement that the Secretary has authorised, in writing, the disclosure of that personal identifier.

32. New subsection 336FC(2) provides a number of further restrictions on the Secretary authorising the discloser of personal identifiers to the public. The steps which are required to be satisfied prior to disclosure were determined following consultation with the Office of the Privacy Commissioner.

33. New paragraph 336FC(2)(a) requires the Secretary to be satisfied that other reasonable steps have been taken to identify, or authenticate the identity of, or locate, the subject. In practice, these requisite reasonable steps will be determined by the specific circumstances of the subject. For example, where the subject is being detained in immigration detention, it may be impractical to pursue options to identify the subject where those options may be particularly time consuming and may result in the person remaining in immigration detention longer than they otherwise would have.

34. New paragraph 336FC(2)(b) further qualifies the Secretary’s ability to authorise the disclosure of identifying information by providing that he or she must, prior to authorising the disclosure, be satisfied that, in instances where the location of the subject is known, the subject has been informed of the proposed disclosure (including the personal identifier that is to be disclosed and the manner in which the disclosure is to be made) and the Secretary has either considered the subject’s views in relation to the proposed disclosure or been satisfied that the subject has no views in relation to it.

35. New paragraph 336FC(2)(c) further qualifies the Secretary’s authority to disclose identifying information by new section 336FC by providing that he or she must, prior to authorising the disclosure, consider the sensitivity of the personal identifier that is to be disclosed.

36. New paragraph 336FC(2)(d) provides that, prior to authorising the disclosure of the personal identifier, the Secretary must be satisfied that it is reasonably necessary in the circumstances to disclose that information in order to identify, authenticate the identity of, or locate, the subject. In practice, what constitutes ‘reasonably necessary’ will be determined by the specific circumstances of the subject and the context of the proposed disclosure.

37. New paragraph 336FC(2)(e) provides that where personal information (within the meaning of the Privacy Act) that is not identifying information, is to be disclosed in conjunction with the relevant personal identifier, prior to authorising that disclosure, the Secretary must be satisfied that it is reasonably necessary in the circumstances for the personal information to be disclosed in conjunction with the personal identifier in order to identify, authenticate the identity of, or locate, the subject.
38. New subsection 336FC(3) provides that if the subject chooses not to express a view in relation to the proposed disclosure within a reasonable time of being informed of it, the Secretary is entitled to be satisfied that the subject has no views in relation to it.

39. New subsection 336FC(4) provides that, where the Secretary has authorised, in writing, the disclosure of the personal identifier under new paragraph 336FC(1)(c), this written authority covers all necessary disclosures of the relevant identifier carried out for the purposes of obtaining the public’s help to identify, authenticate the identity of, or locate the subject.

40. New subsection 336FC(5) provides that the Secretary’s written authorisation to disclose a particular personal identifier is not a legislative instrument within the meaning of section 5 of the **Legislative Instruments Act 2003**.

41. The purpose of new section 336FC is to strengthen officer’s ability under the Migration Act to identify or locate a non-citizen, or a citizen, whose identity or location needs to be determined in connection with the administration of the Migration Act, as soon as possible after he or she comes to notice. This is to avoid adverse consequences such as prolonged detention. An example of where new section 336FC may be used is where a subject, who is reasonably suspected to be an unlawful non-citizen, is being detained in immigration detention and the Department has been unable to ascertain or authenticate the identity of the subject by pursuing the usual means. Following consideration of the circumstances (which may include the fact that the subject is confined to immigration detention), and generally as an option of ‘last resort’, the Secretary may choose to publish a photograph of the person in a national newspaper, together with a request for assistance from the Australian public to identify, or authenticate the identity of, the subject.

Section 336FD Disclosure of other relevant information to the general public

42. New section 336FD provides that, subject to a number of requirements, a person is authorised to disclose, to the general public, personal information within the meaning of the Privacy Act, about another person (‘the subject’).

43. Personal information is defined in subsection 6(1) of the Privacy Act to mean information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

44. New paragraph 336FD(1)(a) provides that an authorised disclosure of personal information by new section 336FD is one which is required or authorised by or under law, for the purposes of paragraph (1)(d) of Information Privacy Principal 11 in section 14 of the Privacy Act.
45. New paragraph 336FD(1)(b) provides that an authorised disclosure of personal information by new section 336FD is one which is required or authorised by or under law, for the purposes of paragraph 2.1(g) of National Privacy Principal 2 in Schedule 3 to the Privacy Act.

46. New paragraphs 336FD(1)(c) and (d) provide that this authority to disclose personal information relating to the subject is contingent upon it being released in conjunction the disclosure of a personal identifier which is authorised by new section 336FC.

47. New paragraph 336FD(1)(e) provides that the disclosure of personal information must be for the purpose mentioned in new paragraph 336FC(1)(b), that is, the purpose of obtaining the public’s help to identify, or authenticate the identity of, the subject.

48. New subsection 336FD(2) provides that new section 336FD does not authorise a person to disclose personal information where that information is considered to be identifying information within the meaning of section 336A of the Migration Act.

49. The purpose of new section 336FD is to authorise the disclosure of personal information that is reasonably necessary and incidental to the disclosure of identifying information by new section 336FC, where that disclosure might otherwise constitute a breach of the Privacy Act. An example of where new section 336FD may be used is where the Secretary authorises the publication of a subject’s photograph (identifying information) in a national newspaper by new section 336FC and the person publishing the photograph publishes additional information such as where the subject was found, for the purpose of identifying the subject.
SCHEDULE 4 – Technical amendments relating to legislative instruments

Migration Act 1958

Item 1 Subsection 39(1)

1. This item makes a technical amendment to subsection 39(1) in Division 3 of Part 2 of the Migration Act consequential to the commencement of the Legislative Instruments Act 2003 (‘the Legislative Instruments Act’). This amendment replaces the reference to “49A of the Acts Interpretation Act 1901” with “14 of the Legislative Instruments Act 2003”.

2. Prior to its repeal on 1 January 2005 by the Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003 (‘the Legislative Instruments Transitional Act’), former section 49A of the Acts Interpretation Act 1901 (‘the Acts Interpretation Act’) provided that, unless the contrary intention appears, regulations shall not make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

3. Subsection 39(1) provided that in spite of section 49A of the Acts Interpretation Act, a prescribed criterion for visas of a class, other than protection visas, may be the criterion that the grant of the visa would not cause the number of visas of that class granted in a particular financial year to exceed whatever number is fixed by the Minister, by notice published in the Gazette, as the maximum number of such visas that may be granted in that year (however the criterion is expressed).

4. That is, this provision existed to provide an express contrary intention to the operation of section 49A of the Acts Interpretation Act. This contrary intention allowed the Minister to specify, from time to time, by notice published in the Gazette, the maximum number of visas in a class which may be granted in a financial year.

5. On the repeal of section 49A of the Acts Interpretation Act, section 14 of the Legislative Instruments Act commenced to impose a similar condition on the amendment of instruments in writing made under regulations. Section 14, inter alia, provides that unless contrary intention is shown, legislative instruments (including regulations) shall not make provision for matters by applying, adopting or incorporating (with or without modification) the provisions of any instrument or writing which is in force or existing from time to time, unless the instrument being applied, adopted or incorporated, is a disallowable legislative instrument. Instruments made under Part 2 of the Act, and under various Parts of the Migration Regulations, are not disallowable instruments, as they are exempt from the requirement for disallowance by section 44 (item 26 of subsection 44(2)).

6. This item replaces the reference to section 49A of the Acts Interpretation Act with section 14 of the Legislative Instruments Act to preserve the relevant contrary
intention to allow the Minister to continue to vary and amend instruments made under the Act and Regulations, and incorporated into, the Migration Regulations, from time to time.

**Item 2  Subsection 39(1)**

7. This item also makes a technical amendment to subsection 39(1) in Division 3 of Part 2 of the Migration Act consequential to the commencement of the LI Act. This item replaces the reference to “a notice published in the Gazette” with “legislative instrument”.

8. Subsection 39(1) provided an express contrary intention to the operation of section 49A of the Acts Interpretation Act. This contrary intention allowed the Minister to specify, from time to time, by notice published in the Gazette, the maximum number of visas in a class which may be granted in a financial year.

9. In conjunction with Item 1, new subsection 39(1) provides that the Minister may specify, from time to time, by legislative instrument, the maximum number of visas in a class which may be granted in a financial year.

10. The purpose of this amendment is to provide that the relevant instruments made under this provision are legislative for the purposes of the Legislative Instruments Act, and consequentially subject to the provisions contained in the Legislative Instruments Act.

**Item 3  Subsection 245J(1)**

11. This item makes a technical amendment to subsection 245J(1) in Division 12B of Part 2 of the Migration Act consequential to the commencement of the Legislative Instruments Act. This amendment replaces the reference to “approve in writing” with “by legislative instrument, approve”.

12. Subsection 245J(1) provided that the Secretary of the Department must approve, in writing, a system for the purposes of reporting for each kind of aircraft or ship for the purposes of Division 12B of Part 2 of the Migration Act.

13. New subsection 245J(1) provides that the instrument used by the Secretary to approve these reporting systems is a legislative instrument.

14. The purpose of this amendment is to provide that the relevant instruments made under this provision are legislative for the purposes of the Legislative Instruments Act, and consequentially subject to the provisions contained in the Legislative Instruments Act.
Item 4  Subsection 245J(4)

15. This item repeals subsection 245J(4) in Division 12B of Part 2 of the Migration Act consequential to the commencement of the Legislative Instruments Act.

16. Subsection 245J(1) provides that the Secretary of the Department must approve, in writing, those systems which are used for the purposes of reporting for each kind of aircraft or ship under Division 12B of Part 2 of the Migration Act. Subsection 245J(4) provided that those instruments of approval made under subsection 245J(1) are deemed to be ‘disallowable instruments’ for the purposes of 46A of the Acts Interpretation Act.

17. On 1 January 2005 the Legislative Instruments Act exempted from disallowance any instruments made under Part 2 of the Act (subsection 44(2) item 26). In addition, the Legislative Instruments Transitional Act repealed section 46A of the Acts Interpretation Act. Subsection 245J(4) is therefore obsolete.

Item 5  Subsection 245K(1)

18. This item makes a technical amendment to subsection 245K(1) in Division 12B of Part 2 of the Migration Act consequential to the commencement of the Legislative Instruments Act.

19. Subsection 245K(1) provided that the Secretary of the Department must approve, in writing, those systems which are used as fall-back reporting systems for those approved under subsection 245J(1). New subsection 245K(1) provides that the Secretary must approve these fall-back systems by means of legislative instrument, as opposed to instrument in writing generally.

20. The purpose of this amendment is to provide that the relevant instruments made under this provision are legislative for the purposes of the Legislative Instruments Act, and consequentially subject to the provisions contained in the Legislative Instruments Act.

Item 6  Subsection 245K(3)

21. This item repeals subsection 245K(3) in Division 12B of Part 2 of the Migration Act consequential to the commencement of the Legislative Instruments Act.

22. Subsection 245K(1) provides that the Secretary of the Department must approve, in writing, those systems which are used as fall-back reporting systems for those approved under subsection 245J(1). Subsection 245K(3) provided that those
instruments of approval made under subsection 245K(1) are deemed to be ‘disallowable instruments’ for the purposes of 46A of the Acts Interpretation Act.

23. On 1 January 2005 the Legislative Instruments Act exempted from disallowance any instruments made under Part 2 of the Act (subsection 44(2) item 26). In addition, the Legislative Instruments Transitional Act repealed section 46A of the Acts Interpretation Act. Subsection 245K(3) is therefore obsolete.

Item 7 Subsection 258(1)

24. This item makes a technical amendment to subsection 258(1) in Division 13 of Part 2 of the Migration Act.

25. This amendment is consequential to the amendment made by Item 8 and removes an obsolete reference to ensure the numerical nomenclature of the provision is consistent with the rest of the Migration Act.

Item 8 Subsection 258(1)

26. This item makes a technical amendment to subsection 258(1) in Division 13 of Part 2 of the Migration Act consequential to the commencement of the Legislative Instruments Act. This amendment replaces the reference to “approve in writing” with “by legislative instrument, approve”.

27. Subsection 258(1) provided that the Minister may determine in writing, for the purposes of section 40, 46, 166, 170, 175, 188 or 192 or for the purposes of more than one of those sections, circumstances in which personal identifying information is not required to be provided by a person.

28. The purpose of this amendment is to provide that the relevant instruments made under this provision are legislative for the purposes of the Legislative Instruments Act, and consequentially subject to the provisions contained in the Legislative Instruments Act.

Item 9 Subsection 258(2)

29. This item repeals subsection 258(2) in Division 13 of Part 2 of the Migration Act consequential to the commencement of the Legislative Instruments Act.

30. Subsection 258(1) provides that the Minister may determine in writing, for the purposes of section 40, 46, 166, 170, 175, 188 or 192 or for the purposes of more than one of those sections, circumstances in which personal identifying information is not required to be provided by a person. Subsection 258(2) provided that those
instruments made under subsection 258(1) are deemed to be ‘disallowable
instruments’ for the purposes of 46A of the Acts Interpretation Act.

31. On 1 January 2005 the Legislative Instruments Act exempted from
disallowance any instruments made under Part 2 of the Act (subsection 44(2) item
26). In addition, the Legislative Instruments Transitional Act repealed section 46A of
the Acts Interpretation Act. Subsection 258(2) is therefore obsolete.

**Item 10 Subsections 306AD(1), (2) and (3)**

32. This item makes a technical amendment to subsections 306AD(1), (2) and (3)
in Division 3AA of Part 3 of the Migration Act consequential to the commencement
of the Legislative Instruments Act. The amendments replace the references to
“writing” with “legislative instrument”.

33. Migration agents who regularly lodge an unacceptably high number of
vexatious, or incomplete, applications, which have no chance of success, are
considered to be engaged in vexatious activity under Division 3AA of Part 3 of the
Migration Act. Subsection 306AC(1) provides that the Minister has a discretion to
refer a registered migration agent to the Migration Agents Registration Authority
(‘MARA’) for disciplinary action if the agent has a high visa refusal rate in relation to
a visa of a particular class. Subsection 306AC(2) describes how it is established that a
registered migration agent has a ‘high refusal rate’ in relation to a particular visa class.

34. Subsection 306AD(1) provides that the Minister may, by writing, determine
the period in which the number of valid visa applications and applications for review,
for a particular visa class, is assessed for the purposes of determining whether a
migration agent has a ‘high refusal rate’ (for example 6 months).

35. Subsection 306AD(2) provides that the Minister may, by writing, determine
the minimum number of valid visa applications and applications for review, of a
particular visa class, for the purposes of determining whether a migration agent has a
‘high refusal rate’.

36. Subsection 306AD(3) in Division 3AA provides that the Minister may, by
writing, determine a percentage for a specified class of visa for the purposes of
assessing whether a migration agent has a ‘high refusal rate’ in relation to a particular
visa of a particular class (for example 90% for protection visas applications and 75%
for all other visa applications).

37. The purpose of this amendment is to provide that the relevant instruments
made under this provision are legislative for the purposes of the Legislative
Instruments Act, and consequentially subject to the provisions contained in the
Legislative Instruments Act.
**Item 11  Subsection 306AD(4)**

38. This item repeals subsection 306AD(4) Subdivision B of Division 3AA of Part 3 of the Migration Act consequential to the commencement of the Legislative Instruments Act.

39. Subsection 306AD(4) provided that those instruments made by the Minister under subsections 306AD(1), (2) and (3) are disallowable instruments for the purposes of section 46A of the Acts Interpretation Act.

40. Section 46A of the Acts Interpretation Act was repealed by LI Transitional Act. Further, section 42 of the Legislative Instruments Act operates to provide that instruments made under subsections 306AD(1), (2) and (3) are disallowable as a consequence of them being legislative instruments.

41. Consequentially, subsection 306AD(4) is obsolete.

**Item 12  Subsection 332A(1)**

42. This item makes a technical amendment to subsection 332A(1) in Division 6A of Part 3 of the Migration Act consequential to the commencement of the Legislative Instruments Act. This amendment replaces the reference to “written determination made” with “determination made, by legislative instrument”.

43. Section 290B in Part 2 of the Migration Act provides that a person applying to become a registered migration agent must not be registered if any of the registration status charge is still outstanding. ‘Registration status charge’ is defined in section 275 in Division 1 of Part 3 of the Migration Act to be a charge imposed by section 10 of the *Migration Agents Registration Application Charge Act 1997*.

44. Subsection 332A(1) in Division 6A of Part 3 of the Migration Act provides that this ‘registration status charge’ is due and payable at the time worked out in accordance with a written determination.

45. New subsection 332A(1) provides that the ‘registration status charge’ is due and payable at the time worked out in accordance with a determination made, by legislative instrument.

46. The purpose of this amendment is to provide that the relevant instruments made under this provision are legislative for the purposes of the Legislative Instruments Act, and consequentially subject to the provisions contained in the Legislative Instruments Act.
Item 13 Subsection 332A(2)

47. This item repeals subsection 332A(2) in Division 6A of Part 3 of the Migration Act consequential to the commencement of the Legislative Instruments Act.

48. Subsection 332A(2) provided that those written determination made by the Minister under section 332A(1) are disallowable instruments for the purposes of section 46A of the Acts Interpretation Act.

49. Section 46A of the Acts Interpretation Act was repealed by the Legislative Instruments Transitional Act. Further, section 42 of the Legislative Instruments Act operates to provide that instruments made under subsection 332A(2) are disallowable as a consequence of them being legislative instruments.

50. Consequentially, subsection 332A(2) is obsolete.

Item 14 Subsection 495A(3)(b)

51. This item makes a technical amendment to subsection 495A(3)(b) in Part 9 of the Migration Act consequential to the commencement of the Legislative Instruments Act. This amendment replaces the reference to “determines, in writing” with “by legislative instrument, determines”.

52. Subsection 495A(1) in Part 9 of the Migration Act provides that the Minister may arrange for the use, under the Minister’s control, of computer programs for any purposes for which the Minister may, or must, under the ‘designated migration law’ make a decision; or exercise any power, or comply with any obligation; or do anything else related to making a decision, exercising a power, or complying with an obligation.

53. Paragraph 495A(3)(b) provided that, for the purposes of section 495A, ‘designated migration law’ includes any provision of the Migration Act or of the Migration Regulations that the Minister determines, in writing, to be part of the designated migration law.

54. New paragraph 495A(3)(b) provides that, for the purposes of section 495A, ‘designated migration law’ includes any provision of the Migration Act or of the Migration Regulations that the Minister, by legislative instrument, determines to be part of the designated migration law.

55. The purpose of this amendment is to provide that the relevant instruments made under this provision are legislative for the purposes of the Legislative Instruments Act, and consequentially subject to the provisions contained in the Legislative Instruments Act.
**Item 15 Subsection 495A(4)**

56. This item repeals subsection 495A(4) in Part 9 of the Migration Act consequential to the commencement of the Legislative Instruments Act.

57. Subsection 495A(4) provided that those written determination made by the Minister under section 495A(3)(b) are disallowable instruments for the purposes of section 46A of the Acts Interpretation Act.

58. On 1 January 2005 the Legislative Instruments Act exempted from disallowance any instruments made under Part 9 of the Act (subsection 44(2) item 26). In addition, the Legislative Instruments Transitional Act repealed section 46A of the Acts Interpretation Act. Subsection 495A(4) is therefore obsolete.

**Item 16 Subsection 503A(9) (note at the end of the definition of gazetted agency)**

59. This item makes a technical amendment to the note following the definition of gazetted agency at the end of subsection 503A(9) in Part 9 of the Migration Act, consequential to the commencement of the Legislative Instruments Act. This amendment replaces the reference to “section 46” with “subsection 13(3) of the Legislative Instruments Act 2003 or subsection 46(3)”.

60. Section 503A operates to protect information obtained when a ‘gazetted agency’ communicated the information to an ‘authorised migration officer’ on the condition that it be treated as confidential information and the information is relevant to the exercise of a power under s 501, 501A, 501B or 501C.

61. Subsection 46(2) of the Acts Interpretation Act provided, inter alia, that where an Act confers upon an authority power to make an instrument (both legislative and non-legislative) specifying a matter or thing, then the authority may in exercising, identify the matter or thing by referring to a class or classes of matters or things. Section 46A of the Acts Interpretation Act was repealed on and by the commencement of the Legislative Instruments Act.

62. The Legislative Instruments Act repealed subsection 46(2) of the Acts Interpretation Act and inserted identical provisions at subsection 46(3) of the Acts Interpretation Act and subsection 13(3) of the Legislative Instruments Act, in relation to non-legislative instruments and legislative instruments respectively.

**Item 17 Subsection 504(2)**

63. This item makes a technical amendment to subsection 504(2) in Part 9 of the Migration Act consequential to the commencement of the Legislative Instruments
Act. This amendment replaces the reference to “49A of the Acts Interpretation Act 1901” with “14 of the Legislative Instruments Act 2003”.

64. Prior to its repeal by the Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003, former section 49A of the Acts Interpretation Act provided that, unless the contrary intention appears, regulations shall not make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

65. Subsection 504(2) provided that in spite of section 49A of the Acts Interpretation Act, notices published in the Gazette specifying or certifying countries or other matters of which regulations made under the Migration Act are dependent upon, may be amended and remade from time to time (after the taking effect of the regulations). That is, subsection 504(2) existed to provide an express contrary intention to the operation of section 49A of the Acts Interpretation Act. This allowed the Minister to specify, from time to time, by notice published in the Gazette, those counties and other matters of which the regulations are dependent upon.

66. On the repeal of section 49A of the Acts Interpretation Act, section 14 of the Legislative Instruments Act commenced to impose a similar condition on amendment of instruments in writing incorporated into regulations. Section 14, inter alia, provides that unless contrary intention is shown, legislative instruments (including regulations) shall not make provision for matters by applying, adopting or incorporating (with or without modification) the provisions of any instrument or writing which is in force or existing from time to time, unless the instrument being applied, adopted or incorporated, is a disallowable legislative instrument.

67. Most instruments made under the Migration Regulations are exempt from the requirement for disallowance under item 26 of subsection 44 of the Legislative Instruments Act. They are therefore not disallowable legislative instruments, and, unless there is a contrary intention in the Act, the regulations cannot incorporate them as amended from time to time. This item replaces the reference to section 49A of the Acts Interpretation Act with section 14 of the Legislative Instruments Act to preserve the relevant contrary intention and allow the Minister to continue to amend and renew those instruments made under the Migration Regulations, from time to time.

Item 18 Subsection 504(2)

68. This item makes a technical amendment to subsection 504(2) in Part 9 of the Migration Act consequential to the commencement of the Legislative Instruments Act. This amendment replaces the reference to “notice published in the Gazette” with “an instrument in writing made under the regulations”.

69. Subsection 504(2) provided that in spite of section 49A of the Acts Interpretation Act, notices published in the Gazette specifying or certifying countries or other matters of which regulations made under the Migration Act are dependent
upon, may be amended and remade from time to time (after the taking effect of the regulations).

70. The new subsection operates in relation to all instruments in writing made under the regulations, which specify or certify matters of which the regulations are dependent upon.

71. The purpose of this amendment is to extend the scope of the relevant legislative contrary intention to allow the Department to vary and renew all instruments in writing, as opposed to just Gazette Notices, made under the regulations from time to time.

Migration Legislation Amendment Act (No. 1) 2001

Item 19 Item 11 of Schedule 1

72. This item makes a technical amendment to Item 11 of Schedule 1 to the Migration Legislation Amendment Act (No. 1) 2001 (‘the Amendment Act 2001’) consequential to the commencement of the Legislative Instruments Act.

73. This amendment replaces the reference to “section 48 of the Acts Interpretation Act 1901” with “subsection 12(2) of the Legislative Instruments Act 2003”.

74. Item 11 of Schedule 1 to the Amendment Act 2001 provided that, contrary to what was provided for in section 48 of the Acts Interpretation Act, a regulation made for the purposes of paragraph 486B(7)(a) or (d) or subparagraph 486C(2)(c)(iv) of the Migration Act, as amended by the Amendment Act 2001, may provide that the regulation is taken to have had [retrospective] effect from 14 March 2000.

75. Subsection 48(2) of the Acts Interpretation Act provided that a regulation, or a provision of regulations, has no effect if, apart from subsection 48(2), it would have taken effect before the date of notification and as a result the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of notification would be affected so as to disadvantage that person; or liabilities would be imposed on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification.

76. Section 48 of the Acts Interpretation Act was repealed by the Legislative Instruments Transitional Act on 1 January 2005. On the repeal of section 48 of the Acts Interpretation Act, subsection 12(2) of the Legislative Instruments Act commenced to impose a similar restriction on the retrospective commencement of regulations. Subsection 12(2) of the Legislative Instruments Act provides that a legislative instrument, or a provision of a legislative instrument, has no effect if, apart from this subsection, it would take effect before the date it is registered and as a result the rights of a person (other than the Commonwealth or an authority of the
Commonwealth) as at the date of registration would be affected so as to disadvantage that person; or liabilities would be imposed on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of registration.

77. New Item 11 of Schedule 1 to the Amendment Act 2001 provides that, contrary to what is provided for in section 12(2) of the Legislative Instruments Act, a regulation made for the purposes of paragraph 486B(7)(a) or (d) or subparagraph 486C(2)(c)(iv) of the Migration Act, as amended by the Amendment Act 2001, may provide that the regulation is taken to have had [retrospective] effect from 14 March 2000.

78. The purpose of this amendment is to preserve the express contrary intention to the legislative prohibition on the retrospective commencement of regulations and allow regulations made for the purposes of paragraph 486B(7)(a) or (d) or subparagraph 486C(2)(c)(iv) of the Migration Act to commence retrospectively on and from 14 March 2000.

**Item 20 Application**

50. This item provides that the amendments made by this Schedule apply in relation to instruments made on or after the commencement of this Schedule.