

## **Minister's residence determination power**

PAM3: Act - **Compliance and Case Resolution** - Case resolution - Case management - Minister's residence determination power

### **ABOUT THIS INSTRUCTION**

Contents

This instruction encloses: Minister's residence determination power under [s197AB](#) and [s197AD](#) of the *Migration Act 1958*.

#### **Related instructions**

None

#### **Latest changes**

Legislative

None

Policy

This instruction, which is part of the centralised departmental instructions system (CDIS), was issued on 15 August 2011, replacing PAM3: Act - Ministerial powers - Ministerial guidelines - Residence determination powers. (The content has not changed.)

For background to the restructuring of compliance-related policy instructions (the CCR PAMs), see [PAM3: Act - CCR - CCR Guide](#).

#### **Owner**

Case Management Implementation and Support Section, Case Management and Review Branch, Compliance and Case Resolution Division, National Office.

## **MINISTER'S RESIDENCE DETERMINATION POWER UNDER S. 197AB AND S. 197AD OF THE MIGRATION ACT 1958**

### **1 PURPOSE OF THESE GUIDELINES**

#### **1.1 The purpose of these guidelines is to:**

- 1.1.1 explain the circumstances in which I may wish to consider exercising my public interest powers under [s197AB](#) of the Migration Act 1958 (the Act) to make a [residence determination](#);
- 1.1.2 explain the circumstances in which I may wish to consider exercising my public interest powers under [s197AD](#) of the Act to vary or revoke a residence determination;

- 1.1.3 explain how a person will be considered for the exercise of these public interest powers; and
- 1.1.4 inform officers of the Department of Immigration and Citizenship (the Department) when to refer a case to me for the consideration of exercising these powers in the public interest and in what format.

## **2 THE RESIDENCE DETERMINATION POWER**

### **2.1 Residence Determination Power**

- 2.1.1 Under s.[197AB](#) of the Act, I have the power to make a residence determination should I consider it is in the public interest to do so. This determination allows a person detained under s.[189](#) of the Act to reside at a specified place in the community, without being accompanied and restrained by an officer.
- 2.1.2 The recipients of a residence determination remain in immigration detention, but are required to reside at the address that I designate and are required to comply with conditions I may set.
- 2.1.3 I will consider granting a residence determination, where I consider continued placement in an immigration detention facility is inappropriate but where the grant of a visa or removal is not currently appropriate. I do this on the basis that the person will comply with the conditions I may set.
- 2.1.4 Under s.[197AD](#) of the Act I have the power to vary or revoke a residence determination, should I consider it is in the public interest to do so.

### **2.2 Powers are Non Compellable and Non-Delegable**

- 2.2.1 The residence determination powers under s. [197AB](#) and s. [197AD](#) of the Act are non compellable. I do not have a duty to consider whether to exercise the power to make, vary or revoke a residence determination whether requested to do so by any person or in any other circumstance.
- 2.2.2 The residence determination powers under s. [197AB](#) and s. [197AD](#) of the Act are non delegable. I must make decisions under these powers personally.

### **2.3 Interaction between the Minister's Residence Determination Powers and Other Intervention Powers**

- 2.3.1 The making of a residence determination is a decision about an immigration detention placement while the immigration status of the person is resolved. It does not necessarily indicate my views on any other aspect of the case. Where a decision is made to place a person in residence determination, it is my expectation that the Department shall continue to use all its endeavour to progress the substantive issues to an immigration outcome.

2.3.2 My powers under s. [197AB](#) are distinct from my ministerial intervention powers under s. [195A](#), s. [351](#), s. [391](#), s. [417](#), s. [454](#) and s. [501J](#) of the Act. The referral of a case under s. 197AB does not preclude any referral of a case or pre-empt any decision under the provisions of my other ministerial intervention powers.

2.3.3 Where a person is in [immigration detention](#) and the Department has no power to grant a visa or bridging visa, but considers that it is in the public interest for a person to be granted a visa or a bridging visa, it should also consider referring the case to me under my s. [195A](#) or other intervention powers so I can consider granting a visa to the person. If in doubt, the Department should provide me a submission covering the full range of possible intervention options.

## 2.4 Not Allowed to Work

2.4.1 Persons in residence determination arrangements remain in [immigration detention](#) and are precluded under s. [235](#) of the Act from working for reward.

## 2.5 Release from Detention

2.5.1 If a person in residence determination is released from [immigration detention](#) by provision of the Act or is no longer required to be [detained](#), then at the time when the provision of the Act requires the person to be released from immigration detention, the residence determination is revoked by operation of s. [197AC](#) of the Act.

# 3 PURPOSE OF RESIDENCE DETERMINATION

## 3.1 Consideration of Residence Determination

3.1.1 I will make a residence determination when I consider it to be in the public interest to do so, having regard to the Government's Key Immigration Detention Values, the circumstances of the individual person and any risks associated with an immigration [detainee](#) living in the community.

3.1.2 When considering whether to exercise this power, I will take into account the particular circumstances of each case, including:

- 3.1.2.1 character, identity and security issues (see [Part 5](#));
- 3.1.2.2 their age and family composition (see [Part 6](#));
- 3.1.2.3 the health and well being of the person (see [Part 7](#));
- 3.1.2.4 Australian citizen or permanent resident family members;
- 3.1.2.5 other unique or exceptional characteristics and/or circumstances; and
- 3.1.2.6 their cooperation with immigration processes and the likelihood of compliance with residence determination conditions (see [Part 8](#)).

3.1.3 The referral of a case to me does not compel me to use my residence determination power to make or vary a residence determination placement.

## **3.2 Family Unity**

3.2.1 I regard it as important to maintain the principle of family unity and would only in rare circumstances involving significant risk to the community consider a residence determination which may split a family unit. All members of a family unit and/or any accompanying guardians for a minor are to be included in the residence determination plan for my consideration.

## **4 PROCESS FOR REFERRAL**

### **4.1 Department to Review Detention Placement and Refer**

4.1.1 The Department conducts regular reviews of detention placement. Those reviews determine whether the detention placement continues to be appropriate. Where the Department decides that ongoing detention is appropriate, but on a risk based assessment considers the person could be appropriately detained in the community, the Department should consider referring the matter to me in the form of a residence determination submission.

4.1.2 If the Department considers a residence determination may be appropriate, it should provide me with a submission detailing the circumstances of the case, the reasons a residence determination is considered appropriate and a risk assessment balancing the factors listed in paragraph [3.1.2](#). The submission should also detail the conditions to be applied to the residence determination, and the proposed accommodation and support arrangements.

4.1.3 I will not consider a request for a residence determination directly from a person or any other agency. If a person wishes to be considered for a residence determination this should be considered by the Department and only referred to me for consideration if the request is supported by the Department as an appropriate way to manage a person in detention.

4.1.4 In referring cases to me for residence determination, the Department is to note that I will give priority to:

- children and their accompanying family members;
- persons who may have experienced torture or trauma;
- persons with significant physical or mental health problems;
- cases which will take a considerable period to substantively resolve;
- and
- other cases with unique or exceptional characteristics.

4.1.5 Priority cases are to be assessed and a submission with a residence determination recommendation as detailed in paragraph 4.1.2 is to be provided to me as soon as practicable. The proposed arrangements should be able to be implemented as soon as reasonably practicable after I make a decision.

## **4.2 Notification of Cases being Considered**

4.2.1 The Department is to provide me with a fortnightly schedule of cases being considered for referral. This schedule will give the person's details, the reasons for consideration of referral and the steps being taken to develop the accommodation and support plan.

4.2.2 Where a person has requested to be considered for a residence determination, but the Department considers that such placement would not be appropriate, they should advise me by noting the reasons for the decision not to refer on the fortnightly schedule described at paragraph [4.2.1](#).

## **4.3 Notification of the Person**

4.3.1 The person is to be notified, in writing, of my decision as soon as practicable after I make it.

## **4.4 Tabling of Information Relating to the Making of Residence Determination**

4.4.1 Under s.[197AG](#) of the Act, the Department will provide me with a statement for each House of Parliament including that I have made a residence determination and why I determined that each residence determination was in the public interest.

4.4.2 These statements must not provide information that could reasonably be used to identify these persons as persons to whom the residential determination applies.

4.4.3 The Department must provide these statements bi-annually and with sufficient notice to meet the legislative requirements of s.[197AG](#) i.e. within 15 days of the houses sitting from 1 July and 1 January of any year.

# **5 RISK TO THE COMMUNITY**

## **5.1 Mitigation of Risk to the Community**

5.1.1 The identification of health, identity, character and security risks to the community and the development of strategies to mitigate those risks are very important processes in the development of a residence determination plan.

5.1.2 My preference is that persons satisfy the normal requirements for health, identity, character and security checking before being referred for my consideration. However where significant risks associated with ongoing detention in an immigration detention facility are identified, I am prepared to consider persons where an assessment of the risks and placement has been completed.

5.1.3 Where the Department refers cases to me as in paragraph 5.1.2, the Department is to consider how any potential risk can be mitigated through the use of conditions I may place on the residence determination. Such conditions must be appropriate to the needs of the individual and normally be agreed by them before I approve the residence determination.

5.1.4 If the Department forms the view that risks to the community cannot be mitigated, and that a residence determination is therefore inappropriate, this should be included in the schedule described at [4.2.1](#). Where the issues are complex, the Department may consider it appropriate to refer them to me in an information brief.

## **5.2 The Risk Associated with Ongoing Detention**

5.2.1 Persons in detention who are not included in the priorities at [4.1.4](#) in these guidelines may be referred to me for a residence determination where the Department considers it appropriate to do so. In considering referral of these cases, the Department should have regard to the Key Immigration Detention Values, particularly noting that detention which is arbitrary or indefinite is not acceptable.

5.2.2 Where a person is in an immigration detention facility, but their removal is likely to occur within 3 months, I would not consider granting a residence determination unless other significant and compelling risks justify referral.

5.2.3 Where a person is in detention and a visa grant is likely to be determined within 2 months, the Department, if appropriate, should consider the grant of a Bridging visa rather than referring these cases for a residence determination.

## **5.3 The Views of the Person are to be Considered**

5.3.1 The person's views are important in the development of appropriate residence determination arrangements, and must be consulted by the Department in the development of the residence determination plan, including the development of conditions that I may place on the arrangement to mitigate any identified risks.

5.3.2 It is very important to note that I do not wish to grant a residence determination if there is a real chance the person may abscond or otherwise cause harm to the Australian community.

# **6 MINORS AND THEIR FAMILIES**

## **6.1 Detention of Minors**

6.1.1 The detention of a minor (a person who is less than 18 years old) or a person who is reasonably suspected of being a minor is undesirable.

6.1.1.1 Where visa or bridging visa options are available, these should be used.

- 6.1.1.2 Where minors are detained, this will be as a measure of last resort.
- 6.1.1.3 A minor will not be detained in an immigration detention centre.
- 6.1.1.4 A minor should only be detained for the shortest practicable time and in the least restrictive form of detention available, for example, in Immigration Transit Accommodation or in Immigration Residential Housing.

6.1.2 I expect all minors to be identified for a residence determination as soon as they are detained. The Department should notify my office that a minor is in detention and that a residence determination submission is being prepared. The submission covering the development of the accommodation and care plan is to be completed as soon as practicable.

6.1.3 I consider the principle of family unity particularly important in the case of minors. Residence determination plans are to have high regard to keeping the family together and the provision of appropriate community support.

## **7 HEALTH AND WELL BEING**

### **7.1 Physical and Mental Well Being**

7.1.1 Where persons are physically or mentally unwell, the impact of their continued detention on the management of their condition should be considered. I will consider such cases for a residence determination where there is medical advice that suggests that it would be more appropriate to maintain detention other than in an immigration detention facility.

### **7.2 Cases of Torture and/or Trauma**

7.2.1 I regard the detention of persons who may have experienced torture and/or trauma as undesirable, and regard the early identification of these cases and their referral to appropriate community based arrangements to be a high priority. Where the grant of an appropriate [visa](#) or [bridging visa](#) is not possible, these cases with an appropriate accommodation and care plan are to be referred to me as soon as practicable.

7.2.2 The establishment of facts and the impact of torture and/or trauma can be very difficult. The risks associated with the detention of a person who has experienced torture and/or trauma are significant and must be treated with sensitivity. My preference is that where claims are plausible, such as past evidence of torture in their former country of residence, and supported by medical opinion, these cases should be referred to me, in accordance with departmental policy, for consideration of a residence determination.

7.2.3 Any such case referred to me must be subject to the normal health, character and security checks. Submissions must include a plan to mitigate any

risks identified together with a plan covering the support and any treatment of the person.

- 7.2.4 Where a person who has suffered torture and/or trauma is accompanied by family members or other persons who are providing support to them, my preference is for the family and/or group to be referred together.

## **8 PERSON'S DISPOSITION**

### **8.1 Compliance with Residence Determination Conditions**

- 8.1.1 In developing a residence determination plan, the Department is to have regard to the person's past level of cooperation with immigration processes and the likelihood they would comply with the conditions I may place on a residence determination.
- 8.1.2 Past immigration non-compliance will be a significant factor; however the Department should note that I intend to take a forward looking approach to this consideration. Where there has been a material change in the person's circumstances which indicate they are more likely to comply now than in the past (such as a change in their family circumstances), this factor should be given greater weight than their previous non-compliance.
- 8.1.3 I expect that persons in residence determination are being actively case managed by the Department and that any change in their circumstances which affects their compliance with residence determination conditions should trigger a reconsideration of whether a residence determination arrangement, or variation to an existing arrangement is appropriate.

## **9 VARIATION OR REVOCATION**

### **9.1 Variation or Revocation of Residence Determination**

- 9.1.1 Under s.[197AD\(1\)](#) of the Act I may, at any time, vary or revoke a residence determination if I believe it is appropriate to do so. I may consider varying or revoking a residence determination in a range of circumstances including, but not limited to, the following:
- 9.1.1.1 where a change of designated address is required, the Department will provide me with instruments to consider and approve the change as soon as reasonably practicable;
  - 9.1.1.2 where the person breaches conditions attached to an existing residence determination in a serious or repeated manner, the Department is to refer a submission to me with proposed amendments to the conditions or revocation of the residence determination; and
  - 9.1.1.3 where there are material changes in the circumstances of the people under the residence determination that may affect their compliance with conditions, such as where removal is imminent and it is necessary to detain the person in an immigration detention facility to

ensure they are available for removal, the Department is to ensure this is planned in advance so I can revoke the residence determination in a timely manner.

## **9.2 Effect of Revocation of a Residence Determination**

- 9.2.1 If I revoke a residence determination that person continues to be in immigration detention under s.[189](#) of the Act. The Department will make an assessment of the appropriate detention placement of the person having regard to their individual needs.

CHRIS EVANS

Minister for Immigration and Citizenship

1/9/2009