

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Immigration (Guardianship of Children) Act 1946

Immigration (Guardianship of Children) Regulations 2018

The *Immigration (Guardianship of Children) Act 1946* (the Act) provides for the Minister (or Ministers) administering the Act to be the legal guardian of a non-citizen child under 18 who enters Australia with the intention of becoming a permanent resident but who is not under the care of a parent, an intending adoptive parent, or other adult relative. In addition, the Minister may direct that a non-citizen child entering Australia in the charge of, or under the care of, a relative other than a parent is to be a ward of the Minister, if the relative consents and the Minister is satisfied that it is necessary in the child's interests. The Act provides that where the Minister is the legal guardian of a non-citizen child, the Minister may place the child in the custody of another person.

Section 12 of the Act provides that the Governor-General may make regulations prescribing all matters required or permitted by the Act to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Immigration (Guardianship of Children) Regulations 2018* (the Regulations) remake the *Immigration (Guardianship of Children) Regulations 2001* (the 2001 Regulations) in accordance with regular sunset practice, where the regulations being replaced are still fit for purpose.

The *Legislation Act 2003* (the Legislation Act) provides that all legislative instruments, other than exempt instruments, progressively 'sunset' according to the timetable set out in the Legislation Act. When a legislative instrument sunsets, it is automatically repealed under section 50 of the Legislation Act.

The 2001 Regulations were made under section 12 of the Act on 29 August 2001, commenced on 1 November 2001, and were registered on the Federal Register of Legislation (the FRL) on 1 January 2005, the date the Legislation Act commenced. Subsection 50(2) of the Legislation Act provides that a legislative instrument that was registered on the FRL on 1 January 2005 will sunset on 1 October 2019.

The Regulations remake the 2001 Regulations following a review of their fitness for purpose. The Regulations are in substantially the same form as the 2001 Regulations. Provisions that are no longer required have been omitted, and minor changes have been made to update the drafting and clarify provision for delegation of the Minister's powers and functions.

The Regulations repeal and remake the 2001 Regulations to:

- prescribe the principles to be observed by the Minister or delegate when giving a direction that a non-citizen child under 18 entering Australia in the care of a relative other than a parent is to be a ward of the Minister, in particular clarifying the requirement that the direction must be in the interests of the child;

- prescribe provisions to be observed by custodians in relation to the custody, control, welfare, care, education, training and employment of non-citizen children;
- require the Minister to keep a Register of Custodians that contains details of the custodian and the name, date of birth and sex of each child in the custody of the custodian, and any other particulars that the Minister considers relevant;
- provide that provisions of State and Territory laws under which children may become State wards do not apply in relation to children coming under the Act, but that delegates of the Minister under the Act have the same rights and powers that they would have under the relevant State and Territory laws if the child was in the custody and care of the person or a State ward under those laws;
- require a master, owner or agent of an aircraft or ship travelling outside Australia who has reason to suspect that a passenger or intending passenger is a child to whom the Act applies, who is leaving the State or Territory without the Minister's consent, to notify the Minister in writing of the passenger's name and the reasons for the suspicion;
- prescribe officers of the Commonwealth or a State or Territory performing functions in relation to the welfare of children and who are delegates under the Act, as officers who may give a certificate for the purposes of the Act that a child named in the certificate is a child coming within the Act; and
- provide that the Minister may delegate all or any of the Minister's powers or functions under the regulations to: an APS employee who holds, or is acting in an Executive Level 1 or higher position in the Department of Home Affairs; or an officer or employee of a State or Territory who exercises power or performs functions in relation to the welfare of children and who holds, or is acting in, a position that is sufficiently senior to exercise the powers and perform the functions delegated.

The Office of Best Practice Regulation (the OBPR) has been consulted regarding the Regulations. The OBPR considers that the Regulations will not have a significant regulatory impact on business and no further analysis (in the form of a Regulation Impact Statement) is required. The OBPR consultation reference is 23972. This relates to the remaking of the 2001 Regulations in preparation for sunseting which occurs on 1 October 2019. It also relates to other minor changes to update policy settings.

No consultation was considered necessary because the amendments do not substantially alter existing arrangements. This accords with subsection 17(1) of the Legislation Act which requires consultations to be appropriate and reasonably practicable.

The Act specifies no conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

An overview of the Act and details of the Regulations are set out in Attachment B.

The Regulations are a legislative instrument for the purposes of the Legislation Act.

The Regulations commence on 1 October 2019.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Immigration (Guardianship of Children) Regulations 2018

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Immigration (Guardianship of Children) Act 1946* (the Act) provides that the Minister is the legal guardian of certain non-citizen minors in Australia (IGOC minors). The Act makes provision for those minors who come within the scope of the Minister's guardianship, including the obligations, liabilities, powers, functions, responsibilities and duties of the Minister in relation to those minors.

The *Immigration (Guardianship of Children) Regulations 2001* (the 2001 Regulations) provide for a range of matters in relation to the custodianship of IGOC minors, including: duties and obligations that apply to custodians, State governments, State authorities and other persons; placement and transfer of IGOC minors; and the application of State child welfare laws in relation to IGOC minors.

The *Immigration (Guardianship of Children) Regulations 2018* (the Regulations) remake the 2001 Regulations in accordance with regular sunseting practice, where the regulations being replaced are still fit for purpose.

The Regulations will introduce a power to make an Instrument of Delegation to ensure that powers delegated across the Home Affairs Portfolio and within State and Territory Child Welfare Agencies are delegated to positions that are sufficiently senior to exercise that power.

The Regulations will remove the requirement for the Register of Custodians to include information which is unnecessary or recorded elsewhere by the Department, including:

- the occupation and religion of each custodian
- the names, addresses and occupations of the parents or guardians of the IGOC minor in the country of origin
- the date of arrival and the name of the aircraft or ship on which the IGOC minor arrived.

This change will ensure compliance with Australian Privacy Principle 3, which provides that personal information must not be collected unless the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities.

The Regulations include an additional provision for a direction to be made under section 4AA of the Act for any reason that the Minister considers to be in the interests of the child. This is to ensure that a direction is able to be made when it is in the interests of the child to do so.

The Regulations also remove the power for a member of the police force or police service, or any person authorised by the Minister, to apprehend an IGOC minor who is absent without consent, this can include IGOC minors who abscond from their placement or are unlawfully removed from the custody of their custodian. This has been removed, as it was considered that, in practice, regulation 15 of the 2001 Regulations does not add to the powers that the State and Territory police already have under their own relevant laws.

Human rights implications

The Disallowable Legislative Instrument engages rights under the Convention on the Rights of the Child (CRC) and the International Covenant on Civil and Political Rights (ICCPR). Article 3(1) of the CRC provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Consistent with the CRC, this Disallowable Legislative Instrument gives primary consideration to the best interests of the child through the inclusion of the additional provision for when a direction under s4AA may be made. The amendment provides that an order for guardianship may be made in relation to non-citizen children for any reason that the Minister, or delegate of the Minister, considers to be in the interests of the children. This amendment engages and promotes the rights of the child under Article 3(1) of the CRC.

The amendment to introduce a power to make an Instrument of Delegation under the Regulations does not engage human rights as it is an administrative amendment, it is a mechanism to ensure that powers exercised under the Regulations are done so at the appropriate level.

The amendment to remove the power to apprehend an IGOC minor who is absent without consent engages Article 3(1) by ensuring that apprehensions are made lawfully by officers who are trained in apprehensions under existing state and territory laws rather than any person authorised by the Minister.

The amendment to remove certain information from the Register of Custodians positively engages the right to privacy under Article 17(1) of the ICCPR as it ensures that the Department does not collect personal information that is no longer required due to changes in Departmental records management and reporting. It also ensures compliance with the Australian Privacy Principles and streamlines departmental record keeping by removing duplication.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights under the CRC and reduces the scope of the limitation on the right under the ICCPR.

The Hon David Coleman MP
Minister for Immigration, Citizenship and Multicultural Affairs

ATTACHMENT B**Overview of the *Immigration (Guardianship of Children) Regulations 2018***

The *Immigration (Guardianship of Children) Act 1946* (the Act) provides for the Minister (or Ministers) administering the Act to be the legal guardian of a non-citizen child under 18 who enters Australia with the intention of becoming a permanent resident *but who is not under the care of a parent, an intending adoptive parent, or other adult relative*. On entry to Australia, these children automatically become ‘non-citizen children’ for the purposes of the Act, within the meaning of ‘non-citizen child’ in section 4AAA.

In addition, the Minister may direct that a child (who is not an Australian citizen) entering Australia *in the charge of or under the care of a relative other than a parent* is to be a ward of the Minister, if the relative consents and the Minister is satisfied that it is necessary in the child’s interests (see section 4AA of the Act). This is the trigger for the child to fall within the meaning of ‘non-citizen child’ in section 4AAA of the Act. A certificate in writing under section 4A of the Act, by an officer prescribed under section 17 of the Regulations, is prima facie evidence that a person named in the certificate is a non-citizen child.

Once a child is a ‘non-citizen child’, the Minister is the guardian of that child (see subsection 6(1) of the Act). The Act also provides that where the Minister is the legal guardian of a non-citizen child, the Minister may place the child in the custody of another person (see section 7 of the Act).

Section 12 of the Act provides that the Minister may make regulations, not inconsistent with the Act, prescribing all matters which are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for the carrying out or giving effect to the Act, including in relation to:

- regulating the placing of such children with custodians and the transfer of such children from one custodian to another;
- prescribing provisions to be observed by custodians in relation to the custody, control, welfare, care, education, training and employment of non-citizen children; and
- prescribing penalties not exceeding 1 penalty unit, for any offence against the regulations.

The *Immigration (Guardianship of Children) Regulations 2001* (the 2001 Regulations) were made under section 12 of the Act, and (if not repealed) would sunset on 1 October 2019 in accordance with the *Legislation Act 2003* (the Legislation Act), which provides that all legislative instruments, other than exempt instruments, progressively ‘sunset’ according to the timetable set out in the Legislation Act. When a legislative instrument sunsets, it is automatically repealed under section 50 of the Legislation Act.

The *Immigration (Guardianship of Children) Regulations 2018* (the Regulations) repeal and remake the 2001 Regulations, rather than allowing them to sunset. These Regulations are substantially the same as the 2001 Regulations, although there are some minor changes and omissions.

In particular, regulation 15 of the 2001 Regulations (Power to apprehend child absent without consent), which provides that a member of a State or Territory police force may apprehend a

non-citizen child that has absconded, been unlawfully removed from custody or has left the State or Territory without the Minister's consent, is not replicated in the Regulations. It was considered that, in practice, regulation 15 of the 2001 Regulations does not add to the powers that State and Territory police already have under their own relevant laws.

Other changes to the 2001 Regulations are outlined below.

By virtue of section 7 of the *Acts Interpretation Act 1901*, and section 13 of the *Legislation Act 2003* (the Legislation Act), the repeal of the 2001 Regulations will not affect the previous operation of those Regulations, or anything done under those Regulations, or any right, privilege, obligation or liability acquired, accrued or incurred under those Regulations.

Part 1 – Preliminary

Section 1 – Name of Regulations

This section provides that these Regulations are the *Immigration (Guardianship of Children) Regulations 2018*.

Section 2 – Commencement

This section is the formal enabling provision for the instrument (that is, for the whole of the Regulations). It provides that the instrument commences on 1 October 2019. This is the date on which the 2001 Regulations would have sunsetted, but for their repeal by the Regulations.

Section 3 – Authority

This section provides that the instrument is made under the *Immigration (Guardianship of Children) Act 1946*.

Section 4 – Schedules

The purpose of this section is to provide for how these Regulations operate.

Section 5 – Definitions

This section provides for a number of definitions:

Act – This definition is identical to that in the 2001 Regulations. 'Act' refers to the *Immigration (Guardianship of Children) Act 1946*.

State – This definition is identical to that in the 2001 Regulations, and includes the Australian Capital Territory (the ACT) and the Northern Territory (the NT) in the definition of 'State'. Consequently, any reference to 'State' in the Regulations, as in the 2001 Regulations, is also a reference to the ACT and the NT.

State ward – This definition is identical to that in the 2001 Regulations. Where a State has assumed responsibility for a child's welfare and care, the child is a State ward, no matter how the child or the assumption of responsibility is described.

welfare and care – This definition is identical to that in the 2001 Regulations, where the term welfare and care includes custody, control, maintenance, education, training and employment.

The definition of ‘Minister’ that was contained in regulation 3 of the 2001 Regulations has not been carried over to the Regulations. The definition in the 2001 Regulations specified that a Minister includes an officer or authority of the Commonwealth or of any State or Territory that is a delegate of the Minister under subsection 5(1) of the Act. The effect of this definition was that delegates under the Act automatically became delegates under the 2001 Regulations. Instead of replicating this provision, it was considered preferable to insert a new power to delegate powers and functions under the Regulations (see section 18 of the Regulations).

The definition of ‘registered’ in regulation 3 of the 2001 Regulations has not been carried over to the Regulations. There continues to be a requirement for the Minister to keep a Register of Custodians (see section 14 of the Regulations). However, the term ‘registered’ appears only once in the 2001 Regulations, in the definition at regulation 3, and is not used at all in the Regulations. The definition therefore has no purpose, and has been omitted.

Part 2 – Orders for guardianship

Section 6 – Prescribed principles for directions under section 4AA of the Act

This section prescribes principles that must be observed in considering whether or not to give a direction in respect of a child under section 4AA of the Act.

Section 4AA of the Act provides that the Minister may direct that a child entering Australia in the charge of or under the care of a relative other than a parent is to be a ward of the Minister, if the relative consents and the Minister is satisfied that it is necessary in the child’s interests. If a direction made under section 4AA in relation to a person is in force, and if that person has not turned 18, then that person is a ‘non-citizen child’ under section 4AAA of the Act. Once a child becomes a non-citizen child, the Minister becomes the guardian of that child under section 6 of the Act.

Paragraph 12(aa) of the Act provides that the regulations may prescribe principles to be observed in considering whether or not to give a direction under section 4AA. The principles prescribed in section 6 of the Regulations are that the relationship between the child and the relative must have broken down irretrievably, and that the direction must be necessary to protect the child from risk of injury or danger of impairment of health, to protect the child from moral danger, to enable the child to have the benefit of adequate direction and guidance, or for any other reason that the Minister or delegate considers to be in the interests of the child.

The principles prescribed by section 6 of these Regulations are substantially the same as the principles prescribed by regulation 5 of the 2001 Regulations. A new principle has been added at subparagraph 6(b)(iv) that a direction must not be given unless the direction is necessary for any other reason that the Minister, or a delegate of the Minister who is giving the direction, considers to be in the interests of the child.

Part 3 – Placement and transfer of non-citizen children

Division 1 – Purposes of this Part

Section 7 – Purposes of this Part

This section makes it clear that Part 3 of the Regulations is made for the purposes of paragraphs 12(b), (c) and (f) of the Act, which respectively provide that the regulations may:

- regulate the placing of such children with custodians and the transfer of such children from one custodian to another;
- prescribe provisions to be observed by custodians in relation to the custody, control, welfare, care, education, training and employment of non-citizen children; and
- prescribe penalties not exceeding 1 penalty unit, for any offence against the regulations.

Division 2 – Custodian requirements

Section 8 – Acknowledgement by custodians

This section requires the custodian of a non-citizen child to acknowledge to the Minister, in writing, the acceptance of responsibility for the welfare and care of the child.

This section remakes regulation 8 of the 2001 Regulations, and is the same in substance.

Section 9 – Duties and obligations of custodians

This section requires the custodian of a non-citizen child to provide for the welfare and care of that child. This duty arises as soon as the Minister places the non-citizen child in the custody of the custodian.

In addition, this section provides that the duties and obligations of the custodian of a non-citizen child are, as far as practicable, the same as the duties and obligations that, under the laws of the State in which the custodian lives, a person has in relation to a child in the person's care, or a child of whom the person is the guardian or foster parent.

Section 9 remakes regulation 9 of the 2001 Regulations, with a minor change to clarify that the State laws which apply are the laws "as in force on the day this instrument commences".

Section 10 – Custodian to retain custody of children

This section remakes regulation 10 of the 2001 Regulations without any changes, and provides that the custodian of a child cannot place the child in the care of another person without the consent of the Minister.

If the custodian places the child in another person's care, that other person must give the Minister, or a person authorised by the Minister (typically the State Child Welfare Authority), all reasonable help to inspect the conditions under which the child is living and find out if the duties and obligations of the custodian are being carried out.

Section 11 – Consent required for non-citizen child to leave State

Section 11 provides that the custodian of a non-citizen child, or another person in whose care the custodian has placed the child, cannot take the child out of the State without the consent of the Minister.

This section has a similar effect to regulation 13 of the 2001 Regulations, but clarifies that where the custodian of a non-citizen child places the child in the care of another person, section 11 applies to that other person.

Section 12 – Notification of change of address or telephone number

This section provides for the custodian to notify the Minister of a proposed change of the custodian's address or telephone number at least 7 days before the change occurs. Where this is not practicable, the custodian must notify the Minister of the proposed change (or the change if it has already occurred) as soon as practicable.

Section 12 remakes regulation 12 of the 2001 Regulations, but adds a requirement that a custodian must notify the Minister of a change to the custodian's address **or** telephone number. The 2001 Regulations required only that the custodian notify the Minister of a change of address.

Section 13 – Notification of other events

This section provides for the custodian of a non-citizen child to notify the Minister in respect of certain 'notifiable' events.

Where a notifiable event occurs in respect of a non-citizen child, subsection 13(1) makes it an offence for the custodian of the child to fail to immediately notify the Minister of the event, or to fail to do anything else in relation to the child that the Minister requires. For the purposes of this section, the following statement by Cockburn CJ in *R v. The Justices of Berkshire* (1879) 4 QBD 469 at 471 is relevant:

'immediately' is stronger than expressions such as 'within a reasonable time' and 'as soon as practicable', and implies prompt, vigorous action, without any delay ... having regard to the circumstances of the case'.

The penalty for committing an offence under subsection (1) is 1 penalty unit.

Subsection (2) provides that, for the purposes of subsection (1), a notifiable event occurs if a non-citizen child absconds, is taken from the custody of the child's custodian, becomes seriously ill, is involved in a serious accident or dies.

The use of the term 'immediately' in subsection 13(1) reflects the seriousness of the 'notifiable' events prescribed by subsection (2), and the fact that these events have significant implications for the welfare of a non-citizen child.

Section 13 remakes regulation 14 of the 2001 Regulations, and is the same in substance.

Division 3 – Register of Custodians

Section 14 – Register of Custodians

This section provides that the Minister must keep a Register of Custodians, and stipulates what information must be contained in the Register, namely:

- the name, address, telephone number and date of birth of each custodian;
- the name, date of birth and sex of each non-citizen child in their custody; and
- any other particulars that the Minister considers relevant.

This section differs from the equivalent provision in the 2001 Regulations (regulation 11). Regulation 11 does not require a non-citizen child's date of birth to be included on the register (but rather requires inclusion of the child's "age"). The 2001 Regulations also require additional details to be maintained in the Register. Specifically, regulation 11 additionally requires that the following details are included in the register:

- the custodian's occupation and religion;
- the age and religion of the child;
- the names, addresses and occupations of the parents or guardians of the child in the child's country of origin; and
- the date of arrival of the child in Australia, and the name of the aircraft or ship in which the child arrived.

The requirement to include a custodian's occupation and religion has been omitted, as this information is not needed in order to identify and contact a custodian. The requirement to include the information listed above in relation to a non-citizen child has been omitted, as the Department of Home Affairs would already hold this information in another form, if appropriate.

Part 4 – Application of child welfare laws

Section 15 – Effect of State laws

This section is made for the purposes of paragraph 12(d) of the Act, which permits the Governor-General to make regulations providing that any provision of the laws of any State relating to child welfare shall not apply in relation to non-citizen children, and making provision in lieu of any such provision.

Subsection 15(2) of the Regulations provides that, subject to subsection (3), the laws of a State under which children may become State wards do not apply in relation to a non-citizen child.

Subsection 15(3) provides that where the Minister has delegated the Minister's powers and functions under the Act to an officer or authority of a State or Territory, then the Minister of the State, and an officer or authority of the State, have the rights and powers in relation to the child that the Minister and the officer or authority would have if the child were, under the laws of the State as in force on the day these Regulations commence:

- in the custody and care of any person or authority; or

- a State ward.

The relevant powers are generally delegated to the Secretary, Director General or Chief Executive Officer of the relevant department or agency, as well as to officers in Deputy Secretary, Executive Director, Director, and Manager positions.

As a consequence of the definition of ‘State’ in section 5, a reference to State, above (and throughout the Regulations), can also mean the ACT or the NT.

Section 15 is the same in substance as regulation 7 of the 2001 Regulations, but clarifies that the applicable laws of the State are those in force on the day the Regulations commence. This clarification provides certainty about which State laws apply in the event that State laws are changed after the Regulations commence.

This provision is relevant, for example, to ensure that the powers and functions that State or Territory welfare authorities have under a State or Territory’s child protection legislation are applicable to the non-citizen child, so that if a person makes a child protection report, the child protection unit can investigate the matter as they would for children who are not under the jurisdiction of the Act.

Part 5 – Preventing non-citizen children from leaving Australia

Section 16 – Notification by masters, owners and agents of aircraft and ships

This section is made pursuant to paragraph 12(db) of the Act. That head of power provides that the Governor-General may make regulations, in particular to make provision for preventing non-citizen children from leaving Australia without the consent in writing of the Minister.

Section 16 requires a master, owner or agent of an aircraft or ship travelling outside Australia who has reason to suspect that a passenger or intending passenger is a child to whom the Act applies who is leaving the State or Territory without the Minister’s consent, to notify the Minister in writing of the passengers name and the reasons for the suspicion.

Section 16 remakes regulation 16 of the 2001 Regulations, and is the same in substance.

Part 6 – Miscellaneous

Section 17 – Prescribed officers for the purposes of section 4A of the Act

This section prescribes officers of the Commonwealth or a State (or the ACT or the NT) performing functions in relation to the welfare of children, and who are delegates under the Act, as officers who may give a certificate under section 4A of the Act that a child named in the certificate is (or was at a date specified in the certificate) a non-citizen child for the purposes of the Act. Such a certificate is prima facie evidence that a person named in the certificate is a non-citizen child.

This section is the same as regulation 6 of the 2001 Regulations, with a minor stylistic change that reflects current drafting practice.

Section 18 – Delegation

This section provides that the Minister may delegate all or any of the Minister’s powers or functions under the regulations to:

- an APS employee who holds, or is acting in an Executive Level 1 or higher position in the Department of Home Affairs; or
- an officer or employee of a State or Territory exercises power or performs functions in relation to the welfare of children and who holds, or is acting in, a position that is sufficiently senior to exercise the powers and perform the functions delegated.

The 2001 Regulations provide that delegates under the Act automatically became delegates under those Regulations. Instead of replicating this provision, it was considered preferable to insert a new power to delegate powers and functions under the Regulations.

Powers and functions under the Regulations will only be delegated to appropriate officers, as required to ensure the effective operation of the Regulations.

Schedule 1 – Repeals

Immigration (Guardianship of Children) Regulations 2001

Item 1 – The whole of the instrument

Schedule 1 to the Regulation repeals the 2001 Regulations from 1 October 2019. These Regulations are otherwise due to sunset on 1 October 2019 in accordance with section 50 of the Legislation Act.