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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**MIGRATION AMENDMENT (FREE THE CHILDREN) BILL 2016**

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator Hanson-Young)

# MIGRATION AMENDMENT (FREE THE CHILDREN) 2016

## OUTLINE

The Migration Amendment (Free the Children) Bill 2016 seeks to end the cruel and inhumane detention of children in immigration detention in Australia and Australia's regional processing centres.

This Bill seeks to provide that children detained under the *Migration Act 1958* (the Act) not be held in immigration detention facilities but instead be placed, along with their immediate family members or guardians, in community residential housing for any requisite period of detention.

By including explicit reference to Articles 3 and 37 of the United Nations Convention on the Rights of the Child, the Bill seeks to strengthen and codify international law within the Act by ensuring the primacy of the consideration of the child's best interests: that minors must only be detained as a matter of last resort and for the shortest appropriate time possible, not as a matter of first and only resort as is the current practice.

The Bill also seeks to expand the residence determination process, to ensure that the Minister for Immigration and Border Protection (the Minister), must, within 30 days, determine that a minor is to reside at a specified place within the community rather than being held in detention.

Importantly, the Bill also expands the scope of protection afforded to minors held in regional processing countries, by ensuring that the Minister cannot affect the transfer of minors to any other country that intends to detain them, and by requiring the immediate return to Australia of any minor currently held in immigration detention offshore.

As a signatory to the United Nations Convention on the Rights of the Child, Australia has a responsibility in upholding and ensuring the dignity, development and protection of all children. By cementing our international obligations in legislation and expanding the residence determination process, the Bill provides a clear framework of human rights standards to ensure minors seeking Australia's protection are afforded with the protection they deserve.

## NOTES ON CLAUSES

### Clause 1: Short Title

1. Clause 1 is a formal provision specifying the short title of the Act, when the Bill is enacted.

### Clause 2: Commencement

2. The Bill will commence days the day it receives royal assent.

### **Clause 3: Objects**

3. This clause identifies that the objective of this Bill is to ensure that children detained under the *Migration Act 1958* not be held in immigration detention facilities but instead be placed, along with their immediate family members or guardians, in community residential housing for any requisite period of detention.

A further objective of this Bill is to expand the scope of protection afforded to minors held in regional processing countries, by ensuring that the Minister cannot affect the transfer of minors to any other country that intends to detain them, and by requiring the immediate return to Australia of any minor currently held in immigration detention offshore.

### **Clause 4 – Schedules**

4. Each Act specified in a Schedule to this Act is amended or repealed as is set out in the applicable items in the Schedule. Any other item in a Schedule to this Act has effect according to its terms.

### **Schedule 1—Amendments**

#### **Part 1 – Amendments to the *Migration Act 1958***

##### **Item 1 –Section 4AA:**

5. This item replaces the existing section 4AA of the Act with principles to protect the rights of minors. This new section specifically draws on Article 37 of the United Nations convention on the Rights of the Child.

##### **Item 2 – Subsection 5(1):**

6. This item inserts a formal definition of the Convention on the Rights of the Child.

##### **Item 3 –Subsection 5(1) (definition of *residence determination*):**

7. This item amends the formal definition of *residence determination* in existing subsection 5(1) to reflect the changes made by this Bill.

##### **Item 4 –Subsection 197AAA**

8. This item inserts new subsection 197AAA which seeks to strengthen and clearly define the residence determination powers currently held by the Minister.

9. Subsection 197AAA(1) requires that the Minister ‘must’ make a determination within 30 days after a minor arrives in Australia (either initially or in transit from a regional processing centre).

10. Subsection 197AAA(2) ensures that where a minor has been identified as being a member of a family unit, the Minister must make a determination that the minor and their family are to reside together in the community.

11. Subsection 197AAA(3) provides that, where a minor has not been identified as being a member of a family unit, and is in the care of another person the Minister must make a determination that the minor resides with that person in the community.

12. Subsection 197AAA(4) provides that the Minister must have regard to the public interest when making a determination under subsections 197AAA(2) and (3).

13. Subsection 197AAA(5) articulates that the best interests of the child are paramount and that the Minister must be satisfied that the living conditions at the specified place are of a higher standard than a place covered by the definition of immigration detention contained in subsection 5(1) of the Act.

14. Subsection 197AAA(6) limits the Minister's ability to refuse to make a residence determination to cases in which he / she does not believe it would be in the minor's best interest to do so, or it would be contrary to the public interest to do so. This subsection also ensures that family unity is paramount and minors do not have to be separated from their family members in situations in which an adverse security assessment has been made in respect of a member of the family unit.

15. Subsection 197AAA(7) provides that a residence determination must specify the person or persons covered by the determination by name and specify the conditions to be complied with.

16. Subsection 197AAA(8) provides that a determination must be made by notice in writing to the person or persons covered by the determination.

17. Subsection 197AAA(9) stipulates that regulations made for the purposes of this section must prescribe a method for a person to apply for recognition of his / her relationship to the minor and that the application must be determined within 30 days of the application being made.

18. Subsection 197AAA(10) provides that decisions regarding determinations are reviewable before the Administrative Appeals Tribunal. The aim of this section is to safeguard a minor's right to appeal the refusal of a determination, or that of a member of their family unit.

19. Subsection 197AAA(11) provides definitions for the terms *adverse security assessment* and *Organisation* as used in this section.

#### **Item 5 – Subsections 197AB(1) and (2):**

20. This item inserts subsections 197AAA(1), (2) and (3) into the existing subsection 197AD(2) of the Act, ensuring that any variation in a residence determination complies with the provisions of those sections.

#### **Item 6 – Section 197AD:**

21. This item adds a provision to the existing section 197AD to provide that an application may be made to the Administrative Appeals Tribunal for a review of a decision revoking or varying a residence determination. The aim of this is to safeguard a minor's right to appeal the refusal of a determination, or that of a member of their family unit.

### **Item 7 – Section 197AF :**

22. This item repeals existing section 197AF and substitutes it with a new section 197AF that expands the category of persons who can make residence determinations to include the Minister, Secretary and an authorised officer (section 197AF(1)). By expanding the category of persons who can make a determination, this new sections aims to expedite and streamline the residence determination process while also ensuring that those persons who work directly with the minor and are therefore best placed to assess their individual needs (such as an authorised officer who is an SES employee, an acting SES employee or equivalent in the Department) are empowered to make the determination.

23. Subsection 197AF(3) and (4) provide that the power to revoke a residence determination can only be made by the Secretary or Minister personally. This ensures that any cancellation of a residence determination is subject to proper consideration and scrutiny.

### **Item 8 –Section 198AB**

24. This item repeals existing section 198AB of the Act and substitutes it with a new section 198AB that ensures that the Minister can only designate a country as a regional processing country where the Minister is satisfied that the country complies with relevant international laws, meets relevant human rights standards and is a safe and appropriate place for minors to reside. The Minister must further be satisfied that the country will release any minor from immigration detention as soon as is reasonably practicable. The aim of this section is to ensure that minors are not sent to regional processing countries that intend to keep them in immigration detention. Minors should be in a safe and appropriate environment in which they can thrive.

25. In making this decision the Minister must have regard as to whether the country has given Australia assurances to the effect that if a minor is taken to that country, all reasonable steps will be taken to release them from detention as soon as practicable.

26. Subsection 198AB(9) provides that if the Minister has designated a country as a regional processing country and the Minister becomes aware that one or more minors have been taken to that country and detained, and the country has not taken all reasonable steps to release the minors from detention as soon as practicable, the Minister must revoke the designation.

### **Item 9 – Subparagraph 198AB(3)(a)**

27. This item is a consequential amendment resulting from the amendments in item 8.

### **Item 10 –Paragraph 198AC(2)(b)**

28. This item inserts a new paragraph, 198AC(2)(b) which requires a statement of the Minister’s reasons for being satisfied that the country will, as soon as practicable, release any detained person who is subsequently identified as a minor, to be tabled in both houses of Parliament.

### **Item 11 –Section 198AE**

29. This item is a technical amendment ensuring that new section 198ADA is considered in determining whether someone is taken to a regional processing country.

### **Item 12 –Section 198ADA**

30. This item inserts a new subdivision 198ADA to ensure that minors, their family members or guardian will not be taken from Australia to a regional processing country.

### **Item 13 – Subsection 198AH**

31. This item is a technical amendment to add new section 198ADA to the provisions relating to transitory people.

### **Item 14 – Application of section 197AAA of the *Migration Act 1958***

32. This item seeks to make clear how those who will be affected by the commencement of the amendments to the *Migration Act 1958* made by this Act will be treated. It provides that the Minister must make a determination for minors detained within 14 days of commencement. The determination must include their family unit, carer or guardian.

### **Item 15 – Application of section 198AB of the Act**

33. This item ensures that any designation of a regional processing country made prior to the commencement of this item ceases to be in effect. Any designations of regional processing countries must satisfy sections 197AF and 198AB. The Minister must therefore be satisfied that the country will release any minor from immigration detention as soon as is reasonably practicable. The aim of this section is to ensure that minors are not sent to regional processing countries that intend to keep them in immigration detention and that they provide a safe and appropriate environment in which the minor may thrive.

## **Statement of Compatibility with Human Rights**

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

### **Migration Amendment (Free the Children) Bill 2016**

This Bill 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 Bill**

The Migration Amendment (Free the Children) Bill 2016 seeks to end the cruel and inhumane detention of children in immigration detention in Australia and Australia's regional processing centres.

#### **Human rights implications**

This Bill focuses on the rights of the child and specifically inserts Article 37 of the UN Convention on the Rights of the Child into the proposed legislation.

The requirement that the Minister make a residence determination for all minors is consistent with Australia's obligations under the International Covenant on Civil and Political, in particular Article 7 which prohibits torture and cruel, inhuman or degrading punishment, Article 9 which recognises the right to liberty and Article 10 which requires that anyone deprived of liberty (including those detained for immigration purposes) be treated with dignity and humanity.

The requirement that the Minister make a residence determination for all minors and members of their family unit is also consistent with Australia's obligations under the International Covenant on Economic, Social and Cultural Rights, in particular Article 10 that states that the widest possible protection should be accorded to the family.

#### **Conclusion**

The Bill is compatible with human rights because it advances the protection of human rights.

**Senator Hanson-Young**