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The Parliament of the
Commonwealth of Australia

THE SENATE

Presented and read a first time

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

No. , 2016

(Senator Hanson-Young)

**A Bill for an Act to amend the *Migration Act 1958*,
and for related purposes**

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A Bill for an Act to amend the *Migration Act 1958*, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Migration Amendment (Free the Children) Act 2016*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1	The day this Act receives the Royal Assent.	

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Objects

The objects of this Act are:

- (a) to provide that children detained under the *Migration Act 1958* must not be held in immigration detention facilities but instead be placed, along with their immediate family members or guardians, in community residential facilities; and
- (b) to uphold Australia's international obligations under the Convention on the Rights of the Child done at New York on 20 November 1989, particularly as they relate to:
 - (i) the primacy of the consideration of the child's best interests (Article 3); and
 - (ii) the principle that children must only be detained as a measure of last resort and for the shortest appropriate time (Article 37).

Note: In 2016, the Convention on the Rights of the Child could be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

4 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Migration Act 1958

1 Section 4AA

Repeal the section, substitute:

4AA Principles protecting the rights of minors under this Act

- (1) The principles set out in this section, drawn from Article 37 of the Convention on the Rights of the Child, must in every relevant case be applied by each person exercising a power or performing a function under this Act.

Note: In 2016, the Convention on the Rights of the Child could be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

- (2) No minor is to be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a minor must be in conformity with the law and must only be used as a measure of last resort and for the shortest appropriate period of time.
- (3) Every minor deprived of liberty must be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.
- (4) Every minor deprived of his or her liberty has the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

2 Subsection 5(1)

Insert:

Convention on the Rights of the Child means the Convention on the Rights of the Child done at New York on 20 November 1989.

Note: In 2016, the Convention on the Rights of the Child could be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

3 Subsection 5(1) (definition of *residence determination*)

Omit “subsection 197AB(1)”, substitute “subsections 197AAA(1), (2), (3) and 197AB(1)”.

4 After section 197AA

Insert:

197AAA Minister must determine that minor is to reside at a specified place rather than being held in detention facility*Residence determination for minor*

- (1) If a person to whom this Subdivision applies is identified as a minor, the Minister must:
 - (a) make a determination (a ***residence determination***) to the effect that the person is to reside at a specified place, instead of being detained at a place covered by the definition of ***immigration detention*** in subsection 5(1); and
 - (b) do so as soon as practicable, but in any case within 30 days, after the person is identified as a minor.

Residence determination for member of minor’s family unit

- (2) If:
 - (a) a determination under subsection (1) is in force requiring a minor to reside at a specified place; and
 - (b) a person to whom this Subdivision applies is a member of the family unit of the minor;the Minister must, as soon as practicable, make a determination (a ***residence determination***) to the effect that the person is to reside with the minor at the specified place, instead of being detained at a place covered by the definition of ***immigration detention*** in subsection 5(1).

Residence determination for minor’s guardian or carer

- (3) If:
 - (a) a determination under subsection (1) is in force requiring a minor to reside at a specified place; and

- (b) a person to whom this Subdivision applies has not been identified as a member of the family unity of the minor; and
- (c) the minor is, or has been, in the care of another person to whom this Subdivision applies;

the Minister must, as soon as practicable, make a determination (a **residence determination**) to the effect that the other person is to reside with the minor at the specified place, instead of being detained at a place covered by the definition of **immigration detention** in subsection 5(1).

Minister must have regard to matters of public interest

- (4) When making a residence determination under subsection (1), (2) or (3) the Minister must have regard to the public interest.

Minister must not make a residence determination in certain circumstances

- (5) Despite subsections (1), (2) and (3), the Minister must not make a residence determination under any of those subsections that a person reside at a specified place unless the Minister is satisfied, on reasonable grounds, that the living conditions at that place are of a higher standard than a place covered by the definition of **immigration detention** in subsection 5(1) where the person would otherwise be detained.

Minister may refuse to make determination in certain circumstances

- (6) Despite subsections (1), (2) and (3), the Minister may refuse to make a determination under one or more of those subsections if:
 - (a) the Minister is satisfied that it is in the best interests of the minor to do so; or
 - (b) the Minister is satisfied that it is in the public interest to do so; or
 - (c) if subsection (2) applies—both:
 - (i) the Minister has been given an adverse security assessment in respect of a member of the family unit of the minor mentioned in paragraph (2)(b) by the Organisation; and

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- (ii) the family unit notifies the Minister that the family unit does not want to be separated; or
 - (d) if subsection (3) applies—both:
 - (i) the Minister has been given an adverse security assessment in respect of the guardian mentioned in paragraph (3)(c) by the Organisation; and
 - (ii) the guardian notifies the Minister that the guardian and minor do not want to be separated.

Residence determination must specify names and conditions

- (7) A residence determination must:
 - (a) specify the person or persons covered by the determination by name, not by description of a class of persons; and
 - (b) specify the conditions to be complied with by the person or persons covered by the determination.

Residence determination must be in writing

- (8) A residence determination under subsection (1), (2) or (3) must be made by notice in writing to the person or persons covered by the determination.

Regulations

- (9) Regulations made for the purposes of this section must prescribe:
 - (a) a method for a person to whom this Subdivision applies to apply for recognition of:
 - (i) his or her relationship to a minor for the purposes of subsection (2); or
 - (ii) his or her care of a minor for the purposes of subsection (3); and
 - (b) that the application must be determined within 30 days of the application being made.

Review

- (10) Application may be made to the Administrative Appeals Tribunal for review of a decision under this section.

Definitions

(11) In this section:

adverse security assessment has the same meaning as in Part IV of the *Australian Security Intelligence Organisation Act 1979*.

Organisation means the Australian Security Intelligence Organisation.

5 Subsection 197AD(2)

Omit “subsections 197AB(1) and (2)”, insert “subsections 197AAA(1), (2) and (3) and 197AB(1) and (2)”.

6 At the end of section 197AD

Add:

(4) Application may be made to the Administrative Appeals Tribunal for review of a decision under this section.

7 Section 197AF

Repeal the section, substitute:

197AF Power to make etc. residence determination

Who can make residence determinations

- (1) The power to make a residence determination under subsection 197AAA(1), (2) or (3) may only be exercised by:
 - (a) the Minister personally; or
 - (b) the Secretary; or
 - (c) an authorised officer who is an SES employee, an acting SES employee, or equivalent, in the Department.
- (2) The power to make a residence determination under subsection 197AB(1) may only be exercised by the Minister personally.

Who can vary or revoke residence determinations

- (3) The power to vary or revoke a residence determination made under subsection 197AAA(1), (2) or (3) may only be exercised by:

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- (a) the Minister personally; or
 - (b) the Secretary.
- (4) The power to vary or revoke a residence determination made under subsection 197AB(1) may only be exercised by the Minister personally.

8 Section 198AB

Repeal the section, substitute:

198AB *Regional processing country*

- (1) The Minister may, by legislative instrument, designate that a country is a ***regional processing country***.
- (2) A legislative instrument under subsection (1):
 - (a) may designate only one country; and
 - (b) must not provide that the designation ceases to have effect.
- (3) Despite subsection 12(1) of the *Legislative Instruments Act 2003*, a legislative instrument under subsection (1) of this section commences at the earlier of the following times:
 - (a) immediately after both Houses of the Parliament have passed a resolution approving the designation;
 - (b) immediately after both of the following apply:
 - (i) a copy of the designation has been laid before each House of the Parliament under section 198AC;
 - (ii) 5 sitting days of each House have passed since the copy was laid before that House without it passing a resolution disapproving the designation.
- (4) The Minister must not designate a country under subsection (1) unless:
 - (a) the Minister thinks that it is in the national interest to designate the country to be a regional processing country; and
 - (b) 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;

- (c) the Minister is satisfied that the country will, as soon as practicable, release any detained person taken to the country under section 198AD who is subsequently identified as a minor.
- (5) In considering the national interest for the purposes of paragraph (4)(a), the Minister:
 - (a) must have regard to whether or not the country has given Australia any assurances to the effect that:
 - (i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and
 - (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol; and
 - (b) may have regard to any other matter which, in the opinion of the Minister, relates to the national interest.
- (6) For the purposes of paragraph (4)(c), the Minister must have regard to whether or not the country has given Australia assurances to the effect that, if:
 - (a) a person is taken to the country under section 198AD; and
 - (b) the person is detained in that country; and
 - (c) the person is subsequently identified as a minor;the country will take all reasonable steps to release the person from detention as soon as practicable.
- (7) The assurances referred to in paragraph (5)(a) or subsection (6) need not be legally binding.
- (8) The power under subsection (1) may only be exercised by the Minister personally.
- (9) If:
 - (a) the Minister designates a country under subsection (1); and

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- (b) the Minister becomes aware that one or more minors have been taken to the country under section 198AD and detained; and
 - (c) the country has not taken all reasonable steps to release the minors from detention as soon as practicable;
- the Minister must, by legislative instrument, revoke the designation.
- (10) If the Minister designates a country under subsection (1), the Minister may, by legislative instrument, revoke the designation.
 - (11) The rules of natural justice do not apply to the exercise of the power under subsection (1) or (10).
 - (12) In this section, **country** includes:
 - (a) a colony, overseas territory or protectorate of a foreign country; and
 - (b) an overseas territory for the international relations of which a foreign country is responsible.

9 Paragraph 198AC(2)(b)

Omit “paragraph 198AB(3)(a)”, substitute “paragraph 198AB(5)(a)”.

10 After paragraph 198AC(2)(b)

Insert:

- (ba) a statement of the Minister’s reasons for being satisfied that the country will, as soon as practicable, release any detained person taken to the country under section 198AD who is subsequently identified as a minor, referring in particular to any assurances of a kind referred to in subsection 198AB(6); and

11 Subsection 198AD(1)

Omit “sections 198AE”, substitute “sections 198ADA, 198AE”.

12 After section 198AD

Insert:

198ADA Minors and their families or guardians not to be taken to regional processing country

Section 198AD does not apply to an unauthorised maritime arrival who:

- (a) is identified as a minor; or
- (b) if another unauthorised maritime arrival is identified as a member of the family unit, or the guardian, of the minor—that other unauthorised maritime arrival; or
- (c) if another unauthorised maritime arrival is identified as a guardian of the minor—that other unauthorised maritime arrival; or

13 Subsection 198AH(1)

Omit sections 198AE”, substitute “sections 198ADA, 198AE”.

14 Application—section 197AAA of the *Migration Act 1958*

- (1) This item applies if:
 - (a) a person is in detention under section 189 of the *Migration Act* on or after the commencement of this item; and
 - (b) the person is a person to whom Subdivision B of Division 7 of Part 2 of that Act applies; and
 - (c) before the commencement of this item the person was identified as a minor.

Residence determination for minor

- (2) The Minister must, as soon as practicable, but in any case within 14 days of commencement make a determination under subsection 197AAA(1) of the *Migration Act 1958*, as inserted by this Part, in relation to the minor.

Residence determination for member of minor's family unit

- (3) If:
 - (a) the Minister makes a determination in accordance with subitem (2) in relation to the minor; and
 - (b) another person to whom Subdivision B of Division 7 of Part 2 of the *Migration Act 1958* applies is a member of the family unit of the minor;

the Minister must make a determination under subsection 197AAA(2) of that Act in relation to the other person as soon as practicable, but in any case within 14 days of making the determination in accordance with subitem (2).

Residence determination for minor's carer or guardian

- (4) If:
- (a) the Minister makes a determination in accordance with subitem (2) in relation to the minor; and
 - (b) another person to whom Subdivision B of Division 7 of Part 2 of the *Migration Act 1958* applies has not been identified as a member of the family unit of the minor; and
 - (c) the minor, at commencement, is, or has been, in the care of another person (a **guardian**) to whom that Subdivision applies;

the Minister must make a determination under subsection 197AAA(3) in relation to the guardian as soon as practicable, but in any case within 14 days of making the determination in accordance with subitem (2).

15 Application—section 198AB of the *Migration Act 1958*

To avoid doubt, if:

- (a) before the commencement of this item a country had been designated as a regional processing country under subsection 198AB(1) of the *Migration Act 1958*; and
- (b) immediately before the commencement of this item that designation was in effect;

then, immediately upon the commencement of this item, the designation ceases to be in effect.