

Immigration (Guardianship of Children) Regulations 2001 2001 No. 238

EXPLANATORY STATEMENT

STATUTORY RULES 2001 No. 238

Issued by the Authority of the Minister for Immigration and Multicultural Affairs

Immigration (Guardianship of children) Act 1946

Immigration (Guardianship of Children) Regulations 2001

Section 12 of the *Immigration (Guardianship of Children) Act 1946* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which are required, permitted, necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of these Regulations is to harmonise criminal offence provisions in the existing Immigration (Guardianship of Children) Regulations with Chapter 2 of the *Criminal Code* (as contained in the *Criminal Code Act 1995*).

These Regulations are based on the Immigration (Guardianship of Children) Regulations which first came into operation in 1946 (the 1946 Regulations). The opportunity has been taken to redraft the 1946 Regulations using plain English drafting principles.

These Regulations effect no substantive changes except those relating to application of the *Criminal Code*. The *Criminal Code* contains a standard approach to the formulation of criminal offences following commencement on 15 December 2001. The *Criminal Code* will apply to all offences found in legislation administered within the Immigration and Multicultural Affairs portfolio.

These Regulations ensure that, in applying the *Criminal Code*, the relevant offences continue to have the same meaning and operate in the same way as they do now.

Details of the Regulations are set out in the Attachment.

The Regulations commence on 1 November 2001.

Attachment

Regulation 1 - Name of Regulations

This regulation provides that these Regulations are *the Immigration (Guardianship of Children) Regulations 2001*.

Regulation 2 - Commencement

This regulation provides that these regulations commence on 1 November 2001.

Regulation 3 - Definitions

This regulation provides for a number of definitions:

Act - This definition is identical to that in the 1946 Regulations, and refers to the *Immigration (Guardianship of Children) Act 1946*.

authority - This definition refers to proposed regulation 4 which relates to the specification of authorities in a State. The Minister may, by way of Gazette Notice, specify an office, the holder of which performs functions in relation to the welfare of children, to be the "authority" for the State.

registered - This has the meaning of being registered as a custodian in a Register of Custodians kept under regulation 11. Regulation 11 makes it a requirement that a register of custodians of certain non-citizen children must be kept.

State - This definition is identical to that in the 1946 Regulations, and includes the Australian Capital Territory and the Northern Territory in the definition of State.

State ward - The formulation of this definition has largely been derived from Regulation 4 in the 1946 Regulations. It simplifies the language used in the successor to that regulation, by defining a State ward as a child whose welfare and care is the responsibility of a State, no matter how the child or the assumption of responsibility is described.

welfare and care - This definition is identical to that in the 1946 Regulations, where the term welfare and care includes custody, control, maintenance, education, training and employment.

Note: The definition of "child welfare laws" as it appeared in the 1946 Regulations is not used in these regulations following the application of plain English drafting principles.

Regulation 4 - Specification of Authorities

This regulation specifies that the Minister may, by notice published in the Gazette, specify an office, the holder of which performs functions in relation to the welfare of children in a state, to **be the authority** for the State.

This allows the Minister to identify particular State or Territory agencies in Australia that are to have responsibilities for various functions under the regulations - for example to give consent under Regulation 10 to a custodian placing a child in the care of another person.

Regulation 5 - Prescribed principles for section 4AA of the Act (Act paragraph 12(aa))

This regulation has the same effect as regulation 3AA in the 1946 Regulations, with minor changes arising from the adoption of plain English drafting.

This regulation specifies a number of principles to be observed in considering whether or not to give a direction under section 4AA of the Act. Section 4AA allows the Minister in certain circumstances to direct that a non-citizen child is a ward of the Minister.

This regulation sets out the principles that must be observed by the Minister before giving such a direction. These principles go to such matters as breakdown of relationships, protection from risk of injury and protection from moral danger.

Paragraph 12(aa) of the Act provides a specific head of power for the making of regulations prescribing principles to be observed in considering whether or not to give a direction under section 4AA.

Regulation 6 - Prescribed officers for section 4A of the Act

This regulation has the same effect as regulation 3A in the 1946 Regulations.

Under this regulation each officer of the Commonwealth or State who performs functions in relation to the welfare of children, and who holds a delegation from the Minister under section 5(1) of the Act, is prescribed for the purposes of section 4A of the Act.

Section 4A provides that a certificate from a prescribed officer about the non-citizen status of a child, is evidence of that fact.

Regulation 7 - Effect of State laws

This regulation has the same effect as regulation 4 in the 1946 Regulations except that it omits the reference to "Child Welfare laws". That reference is no longer required following the application of plain English drafting principles to the regulations.

The regulation itself is intended to ensure that State laws do not supervene in relation to non-citizen children whom the Minister is responsible for under the Act.

Regulation 8 - Acknowledgment by custodians

This regulation has the same effect as regulation 5 in the 1946 Regulations, with minor changes arising from the adoption of plain English drafting principles and the application of the *Criminal Code*.

The regulation itself requires the custodian of a non-citizen child to acknowledge in writing the acceptance of responsibility for the welfare and care of the child.

This regulation also inserts a penalty of 1 penalty unit for an offence against this provision. This change reflects the *Criminal Code*, which requires that offences are clear on their face and that the applicable penalty should appear at the end of each specific offence.

The 1946 Regulations had a global offence provision specifying a penalty of \$40 for contravention or failure to comply with the regulations. The penalty of \$40 was however subject to section 4AB of the *Crimes Act 1914*, which provides in effect that it must be read as a reference to 1 penalty unit.

Regulation 9 - Duties of custodians

This regulation has the same effect as regulation 6 in the 1946 Regulations, again with minor changes arising from the adoption of plain English drafting principles and the application of the *Criminal Code*.

The regulation itself provides that a custodian has certain duties and obligations in relation to a non-citizen child.

This regulation also inserts a penalty of 1 penalty unit for an offence against subregulation 9(1). This change reflects the *Criminal Code*, which requires that offences are clear on their face and that the applicable penalty should appear at the end of each specific offence.

The 1946 Regulations had a global offence provision specifying a penalty of \$40 for contravention or failure to comply with the regulations. The penalty of \$40 was however subject to section 4AB of the *Crimes Act 1914*, which provides in effect that it must be read as a reference to 1 penalty unit.

Regulation 10 - Custodian to retain custody of children

This regulation has the same effect as regulation 6A in the 1946 Regulations, again with minor changes arising from the adoption of plain English drafting principles and the application of the *Criminal Code*.

The regulation itself provides that custodians cannot place their child in the care of another without consent of the authority of the State.

This regulation also inserts a penalty of 1 penalty unit for an offence against this provision. This change reflects the *Criminal Code*, which requires that offences are clear on their face and that the applicable penalty should appear at the end of each specific offence.

The 1946 Regulations had a global offence provision specifying a penalty of \$40 for contravention or failure to comply with the regulations. The penalty of \$40 was however subject to section 4AB of the *Crimes Act 1914*, which provides in effect that it must be read as a reference to 1 penalty unit.

Regulation 11 - Register of Custodians

This regulation has the same effect as regulation 7 in the 1946 Regulations with minor changes arising from the adoption of plain English drafting principles and application of the *Criminal Code*.

The regulation itself provides that it is a requirement that the authority of a State keep a register of custodians of their details.

This regulation also inserts a penalty of 1 penalty unit for an offence against this provision. This change reflects the *Criminal Code*, which requires that offences are clear on their face and that the applicable penalty should appear at the end of each specific offence.

The 1946 Regulations had a global offence provision specifying a penalty of \$40 for contravention or failure to comply with the regulations. The penalty of \$40 was however subject to section 4AB of the *Crimes Act 1914*, which provides in effect that it must be read as a reference to 1 penalty unit.

Regulation 12 - Notification of change of address of custodian

This regulation has the same effect as regulation 8 in the 1946 Regulations with minor changes arising from the adoption of plain English drafting principles and application of the *Criminal Code*.

The regulation itself provides that, if a custodian changes their address within a State, they must inform the authority for that State. The notification must take place within 7 days of the change occurring (sub-regulation 12(1)), or if that is not practicable, as soon as practicable (subregulation 12(2)).

This regulation also inserts a penalty of 1 penalty unit for offences against these provisions. These changes reflect the *Criminal Code*, which requires that offences are clear on their face and that the applicable penalty should appear at the end of each specific offence.

The 1946 Regulations had a global offence provision specifying a penalty of \$40 for contravention or failure to comply with the regulations. The penalty of \$40 was however subject to section 4AB of the *Crimes Act 1914*, which provides in effect that it must be read as a reference to 1 penalty unit.

Regulation 13 - Consent to taking child out of State

This regulation has the same effect as regulation 9 in the 1946 Regulations, again with minor changes arising from the adoption of plain English drafting principles and application of the *Criminal Code*.

The regulation itself provides that custodian cannot take the child out of the State without the consent of the authority of that State. Where the authority of the State does grant permission the details must be recorded on the Register of Custodians.

This regulation also inserts a penalty of 1 penalty unit for an offence against subregulation 13(1). This change reflects the *Criminal Code*, which requires that offences are clear on their face and that the applicable penalty should appear at the end of each specific offence.

The 1946 Regulations had a global offence provision specifying a penalty of \$40 for contravention or failure to comply with the regulations. The penalty of \$40 was however subject to section 4AB of the *Crimes Act 1914*, which provides in effect that it must be read as a reference to 1 penalty unit.

Regulation 14 - Notice to be given of certain events

This regulation has the same effect as regulation 10 in the 1946 Regulations, again with minor changes arising from the adoption of plain English drafting principles and the application of the *Criminal Code*.

The regulation itself provides that where certain events occur, for example a non-citizen child absconding from a custodian, becoming seriously ill or dying, the custodian must inform the authority of the State.

This regulation also inserts a penalty of 1 penalty unit for an offence against this provision. This change reflects the *Criminal Code*, which requires that offences are clear on their face and that the applicable penalty should appear at the end of each specific offence.

The 1946 Regulations had a global offence provision specifying a penalty of \$40 for contravention or failure to comply with the regulations. The penalty of \$40 was however subject to section 4AB of the *Crimes Act 1914*, which provides in effect that it must be read as a reference to 1 penalty unit.

Regulation 15 - Power to apprehend child absent without consent

This regulation has the same effect as regulation 11 in the 1946 Regulations, with minor changes arising from the adoption of plain English drafting principles.

The regulation itself provides a power for police or other authorised persons to apprehend a child, where the child absconds, has been unlawfully taken from the custody of a custodian or has left a State without the consent of the relevant authority. The police officer or other authorised person may then hold the child in custody and hand the child over to someone entitled to custody of the child.

Regulation 16 - Notice if child suspected to be leaving the Commonwealth without consent

This regulation has the same effect as regulation 11A in the 1946 Regulations, with minor changes arising from the adoption of plain English drafting principles and application of the *Criminal Code*.

The regulation itself provides that masters, owners or agents of ships or aircraft must inform an authority if they suspect a child to be leaving the Commonwealth without consent.

This regulation also inserts a penalty of 1 penalty unit for an offence against this provision. This change reflects the *Criminal Code*, which requires that offences are clear on their face and that the applicable penalty should appear at the end of each specific offence.

The 1946 Regulations had a global offence provision specifying a penalty of \$40 for contravention or failure to comply with the regulations. The penalty of \$40 was however subject to section 4AB of the *Crimes Act 1914*, which provides in effect that it must be read as a reference to 1 penalty unit.

Regulation 17 - Application of Criminal Code

This regulation provides that the *Criminal Code* applies to offences against these regulations.

Regulation 18 - Repeal

This regulation provides that the 1946 Regulations, and the various Statutory Rules that have amended them from time to time, are repealed.

Regulation 19 - Preservation of approvals of positions

This regulation is a savings provision that ensures that notices made by the Minister under the definition of "authority" in Regulation 3 of the 1946 Regulations and published in the *Gazette*, remain in force for the purpose of these regulations.

Regulation 20 Old Registers of Custodians

This regulation is a savings provision that ensures that existing Registers of Custodians remain in force for the purpose of these regulations.

