



**THE HON DAVID COLEMAN MP
MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**

Ref No: MS19-003320

Senator the Hon Concetta Fierravanti-Wells (Chair)
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Chair

I thank the Senate Standing Committee on Regulations and Ordinances (the committee) for making themselves available for a private briefing on 14 October 2019 with senior officers of the Department of Home Affairs in relation to the *Immigration (Guardianship of Children Regulations) 2018* (the IGOC Regulations).

During this private briefing, I understand that the Department undertook to provide the Committee with a response summarising the general matters discussed during the briefing and to respond to the following questions on notice by close of business Monday 21 October 2019.

In response to this request, a summary of the matters discussed is at Attachment A. Responses to the questions on notice are at Attachment B.

I look forward to hearing from you in relation to these matters.

Yours sincerely

David Coleman

21/10/2019



Senate Standing Committee on Regulations and Ordinances Questions on Notice to the Department of Home Affairs

Monday 14 October 2019

Questions on Notice

During a private briefing on Monday 14 October 2019, the Department of Home Affairs (the department) undertook to provide the Senate Standing Committee on Regulations and Ordinances (the committee) with a response to the following questions on notice by **close of business Monday 21 October 2019**.

Question on notice no. 1

What is the history of the regulations made under the *Immigration (Guardianship of Children) Act 1946* since section 4AA was inserted into the Act? Specifically:

- when were the principles governing the exercise of the power in section 4AA originally set out in regulations;
- when did each relevant set of regulations sunset; and
- when did each set of replacement regulations commence?

Question on notice no. 2

Why was no consultation undertaken in relation to the *Immigration (Guardianship of Children) Regulations 2018*, particularly given the addition of paragraph 6(b)(iv) to section 6 of the regulations?

Question on notice no. 3

Why was paragraph 6(b)(iv) added to section 6 of the *Immigration (Guardianship of Children) Regulations 2018*, given the explanatory statement notes that the 2001 regulations were 'still fit for purpose'?

Briefing summary

At the committee's request, the department also undertook to prepare a response from the minister summarising the general matters discussed during the briefing, by close of business **Monday 21 October 2019**. The committee noted that it may publish this correspondence or quote from it in a future report.

Attachment A – Briefing Summary from private hearing between Senate Standing Committee on Regulations and Ordinances and the Department of Home Affairs.

On Monday 14 October 2019, Craig Riviere, Assistant Secretary (AS), Child Wellbeing Branch and Heimura Ringi, AS Legislation Branch, provided evidence to the Senate Standing Committee on Regulations and Ordinances (the committee) on the IGOC Regulations during a private hearing. AS Riviere provided an opening statement and both officers fielded questions from the Committee.

AS Riviere and AS Ringi then highlighted the following key points about the operation of the *Immigration (Guardianship of Children) Act 1946* (IGOC Act) and the *Immigration (Guardianship of Children) Regulations 2018* (IGOC Regulations), in particular:

- The principal intent of the IGOC Act is to provide that the Minister is the guardian of certain non-citizen children in Australia ("IGOC Minors")
- The IGOC Regulations provide for a range of matters in relation to the custodianship of IGOC minors, the application of state/territory child welfare laws in relation to IGOC minors; and the principles for directions under s4AA of the Act
- The IGOC Act and IGOC Regulations are beneficial legislation; while they affect non-citizen children, they do not take any rights away. Instead, they promote the protection of human rights under the United Nations Convention on the Rights of the Child
- The 2018 IGOC Regulations were drafted in very similar terms to the 2001 IGOC Regulations because no significant problem had been identified with operation of the 2001 IGOC Regulations over its 17 years of application
- Section 4AA of the IGOC Act gives the Minister a discretionary power to give a written direction, in limited circumstances, that a non-citizen minor shall be the ward of the Minister
- A direction under section 4AA can only be given when a person under the age of 18 years (the non-citizen minor) enters Australia as a non-citizen in the charge of, or for the purpose of living in Australia under the care of, a relative of the person (other than a parent) not less than 21 years of age, where the non-citizen minor intends to become, or is intended to become, a permanent resident of Australia
- In giving a direction under section 4AA, the Minister must be satisfied that it is necessary in the interests of the non-citizen minor to do so and the non-citizen minor's relative must consent to the Minister doing so
- A direction under section 4AA is only used in exceptional circumstances (three times in the past five years), and only on the grounds that it would be in the interests of the non-citizen minor
- The exercise of this power is subject to the preconditions in s4AA and also subject to any principles that may be prescribed under paragraph 12(aa) of the Act. That is, paragraph 12(aa) of the Act provides the authority for the principles prescribed in section 6 of the IGOC Regulations
- In practice, paragraph 6(a) is treated as a precondition to applying paragraph 6(b), in part because the relative must consent to a direction being made to make the non-citizen minor a ward of the Minister, as dictated by subsection 4AA(2)
- While subparagraphs 6(b)(i) to (iii) are written in a way that could be considered prescriptive (noting the opening words of section 6 make clear that they are principles to be observed), subparagraph 6(b)(iv) is not; it facilitates a permissive approach that gives the Minister or his/her delegate wide discretion to consider a broad range of circumstances when considering whether to give a direction, noting the overarching requirements that the direction must be in the non-citizen minor's interests and the non-

citizen minor's relative must consent to the giving of the direction.

**Attachment B – Senate Standing Committee on Regulations and Ordinances
Questions on Notice to the Department of Home Affairs**

Question on notice no. 1

What is the history of the regulations made under the *Immigration (Guardianship of Children) Act 1946* since section 4AA was inserted into the Act? Specifically:

- **when were the principles governing the exercise of the power in section 4AA originally set out in regulations;**
- **when did each relevant set of regulations sunset; and**
- **when did each set of replacement regulations commence?**

Section 4AA and paragraph 12(aa) of the *Immigration (Guardianship of Children) Act 1946* (the IGOC Act) were inserted by the *Statute Law (Miscellaneous Provisions) Act (No. 1) 1985* on 1 July 1986. Section 11A ('reconsideration and review of certain decisions') was inserted at the same time.

Principles for the purposes of section 4AA of the IGOC Act were first prescribed in the *Immigration (Guardianship of Children) Regulations* (the 1946 Regulations) when regulation 3AA was inserted by the *Immigration (Guardianship of Children) Regulations (Amendment) 1986*, on 1 July 1986:

***IMMIGRATION (GUARDIANSHIP OF CHILDREN) REGULATIONS - REG 3AA
Prescribed principles for the purposes of section 4AA of the Act***

3AA. For the purposes of section 4AA of the Act the following principles are prescribed as principles to be observed in considering whether or not to give a direction under that section in relation to a person:

- (a) a direction shall not be given under the section unless the relationship between the person and the relative of the person referred to in the section has broken down irretrievably;*
- (b) a direction shall not be given under the section unless the direction is necessary to-*
 - (i) protect the person from risk of injury or danger of impairment of health;*
 - (ii) protect the person from moral danger; or*
 - (iii) enable the person to have the benefit of adequate direction and guidance;*
- (c) a direction shall not be given under the section for the principal purpose of creating, or improving, eligibility of the person, or the relative of the person referred to in the section, for financial assistance from the Commonwealth, a State or the Northern Territory.*

The *Immigration (Guardianship of Children) Regulations 2001* (the 2001 Regulations) commenced on 1 November 2001, and at the same time repealed both the 1946 Regulations and the various Statutory Rules that had amended those regulations between 1952 and 1988 (see the repeal provision at regulation 18 of the 2001 Regulations).

The purpose of the 2001 Regulations was to harmonise criminal offence provisions in the 1946 Regulations with Chapter 2 of the *Criminal Code*, as contained in the *Criminal Code Act 1995* (following commencement on 15 December 2001, the *Criminal Code* contains a standard approach to the formulation of criminal offences). The 2001 Regulations ensured that, in applying the *Criminal Code*, offences under the 1946 Regulations continued to have the same meaning and operated in the same way as they did previously.

In particular, the 2001 Regulations inserted a penalty of 1 penalty unit in regulations 8, 9, 10, 11, 12, 13, 14 and 16 to reflect the requirements of the *Criminal Code* that offences should be clear on their face and the applicable penalty should appear at the end of each specific offence. In contrast, the 1946 Regulations had a global offence provision specifying a penalty of \$40 for contravention of, or failure to comply with, the regulations. Regulation 17 of the 2001 Regulations also provided that the *Criminal Code* applied to offences against these regulations.

The 2001 Regulations were amended on 24 March 2012 to remove the offences in all provisions except regulation 14 (which required the custodian to immediately give notice to the Minister, and do anything else in relation to a non-citizen child that the Minister required, if the child absconded, was taken from the custody of the child's custodian, became seriously ill, met with a serious accident or died). Section 13 of the 2018 Regulations remakes regulation 14 of the 2001 Regulations, and is the same in substance.

The 2001 Regulations were based on the 1946 Regulations, and effected no substantive changes except those relating to the application of the *Criminal Code*. In addition, the opportunity was taken to redraft the 1946 Regulations using plain English drafting principles.

Principles for the purposes of section 4AA of the IGOC Act were prescribed under regulation 5 in the 2001 Regulations:

- 5 Prescribed principles for section 4AA of the Act (Act s 12 (aa))**
The following principles must be observed in considering whether or not to give a direction under section 4AA of the Act:
- (a) a direction must not be given unless the relationship between the person and the relative of the person mentioned in the section has broken down irretrievably;*
 - (b) a direction must not be given unless the direction is necessary to:
 - (i) protect the person from risk of injury or danger of impairment of health; or*
 - (ii) protect the person from moral danger; or*
 - (iii) enable the person to have the benefit of adequate direction and guidance;**
 - (c) a direction must not be given for the principal purpose of creating, or improving, eligibility of the person, or the relative of the person mentioned in the section, for financial assistance from the Commonwealth or a State.*

The 2001 Regulations were repealed and replaced by the *Immigration (Guardianship of Children) Regulations 2018* (the 2018 Regulations) on 1 October 2019. As set out below, the 2001 Regulations would have sunsetted on 1 October 2019 under the *Legislation Act 2003* (the Legislation Act).

Further information about sunseting

Part 4 of Chapter 3 of the Legislation Act provides for the automatic repeal ('sunseting') of legislative instruments. When a legislative instrument sunsets, it is automatically repealed under section 50 of the Legislation Act.

Subsection 50(2) of the Legislation Act sets out special sunset dates for the significant number of older instruments registered in bulk on 1 January 2005, based on the year those instruments were made.

50 Sunseting

- (1) This subsection repeals a legislative instrument on the first 1 April or 1 October falling on or*

after the tenth anniversary of registration of the instrument, unless the instrument was registered on 1 January 2005.

- (2) This subsection repeals a legislative instrument on the day worked out using the table if the instrument was registered on 1 January 2005.

Day of repeal of legislative instrument registered on 1 January 2005	
Year the instrument was made	Day of repeal
1 A year before 1930	1 April 2015
2 A year in the decade starting on 1 January 1930	1 October 2015
3 A year in the decade starting on 1 January 1940	1 April 2016
4 A year in the decade starting on 1 January 1950	1 October 2016
5 A year in the decade starting on 1 January 1960	1 April 2017
6 A year in the decade starting on 1 January 1970	1 October 2017
7 A year in the decade starting on 1 January 1980	1 April 2018
8 1990, 1991, 1992, 1993 or 1994	1 October 2018
9 1995, 1996, 1997, 1998 or 1999	1 April 2019
10 2000, 2001 or 2002	1 October 2019
11 2003 or 2004	1 April 2020

The 2001 Regulations were made under section 12 of the IGOC Act on 29 August 2001, commenced on 1 November 2001, and were registered on the Federal Register of Legislation (the FRL) on commencement of the Legislation Act on 1 January 2005. The effect of subsection 50(2) of the Legislation Act is that legislative instruments made in 2001, and registered on the FRL on 1 January 2005, sunset on 1 October 2019.

In light of subsection 50(2) of the Legislation Act, in 2018 the Department of Home Affairs reviewed the operation of the 2001 Regulations to determine whether they should be remade. The 2018 Regulations were made following this review and were registered on the Federal Register of Legislation on 10 December 2018, with a commencement date of 1 October 2019. On commencement, the 2018 Regulations repealed and replaced the 2001 Regulations, which would otherwise have been repealed on 1 October 2019 by subsection 50(2) of the Legislation Act.

Question on notice no. 2

Why was no consultation undertaken in relation to the *Immigration (Guardianship of Children) Regulations 2018* (the IGOC Regulations), particularly given the addition of paragraph 6(b)(iv) to section 6 of the regulations?

The IGOC Act and IGOC Regulations are beneficial legislation. While they affect non-citizen children, they do not take any rights away; instead, they promote the protection of human rights under the United Nations Convention on the Rights of the Child

A direction under Section 4AA is only used in exceptional circumstances (three times in the past five years), and only on the grounds that it would be in the interests of the non-citizen minor.

As outlined in the explanatory statement to the *Immigration (Guardianship of Children) Regulations 2018* (the 2018 Regulations), 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.

In particular, as outlined below, the inclusion of subparagraph 6(b)(iv) in section 6 of the 2018 Regulations is intended to facilitate a more permissive approach to the giving of directions (noting that the Minister must always be satisfied that this is in the interests of the person who is the subject of the direction), and to ensure consistency with the IGOC Act. In these circumstances, consultation was not considered necessary.

Question on notice no. 3

Why was paragraph 6(b)(iv) added to section 6 of the *Immigration (Guardianship of Children) Regulations 2018*, given the explanatory statement notes that the 2001 regulations were 'still fit for purpose'?

Section 4AA of the IGOC Act is enlivened when a person under the age of 18 years (the non-citizen minor) enters Australia as a non-citizen in the charge of, or for the purpose of living in Australia under the care of, a relative of the person (other than a parent) not less than 21 years of age, where the non-citizen minor intends to become, or is intended to become, a permanent resident of Australia. Section 4AA allows the Minister to direct, in writing, that the non-citizen minor shall be the Minister's ward. In doing so, the Minister must be satisfied that giving the direction is in the interests of the non-citizen minor, and that the non-citizen minor's relative consents to the Minister giving the direction.

Paragraph 12(aa) of the IGOC Act provides that the Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act, and in particular for prescribing principles to be observed in considering whether or not to give a direction under section 4AA of the Act.

Section 6 of the *Immigration (Guardianship of Children) Regulations 2018* remakes regulation 5 of the *Immigration (Guardianship of Children) Regulations 2001*, with the addition of subparagraph 6(b)(iv). This provision was added to the regulations to facilitate consideration of the broadest range of issues to inform the giving of directions (noting that the Minister must always be satisfied that this in the interests of the non-citizen minor and the non-citizen minor's relative must consent to the giving of the direction), and ensure consistency with the IGOC Act.

It is not considered that the inclusion of subparagraph 6(b)(iv), for these reasons, is inconsistent with the comment in the explanatory statement that the *Immigration (Guardianship of Children) Regulations 2001* were still fit-for-purpose.