



# **Immigration (Guardianship of Children) Act 1946**

## **Act No. 45 of 1946 as amended**

This compilation was prepared on 21 August 2012  
taking into account amendments up to Act No. 113 of 2012

The text of any of those amendments not in force  
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be  
affected by application provisions that are set out in the Notes section

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# An Act to make provision for and in connexion with the Guardianship of certain alien children

## 1 Short title [see Note 1]

This Act may be cited as the *Immigration (Guardianship of Children) Act 1946*.

## 2 Commencement [see Note 1]

This Act shall come into operation on a date to be fixed by Proclamation.

## 3 Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

## 4 Definitions

In this Act, unless the contrary intention appears:

***custodian*** means a person who, by or under this Act, is the custodian of a non-citizen child.

***declared State or Territory*** means a State or Territory in respect of which a declaration under section 4AAB is in force.

***intending adoptive parent***, in relation to a person (the ***child***), means a person who intends to:

- (a) adopt the child under the laws in force in a declared State or Territory; or
- (b) secure the recognition, under the laws in force in a declared State or Territory, of an adoption of the child by the person under the laws of a foreign country.

***migration law*** means any of the following:

- (a) the *Migration Act 1958*;
- (b) regulations made under that Act;
- (c) any instrument made under that Act or those regulations.

***non-citizen*** means a person who is not an Australian citizen.

***non-citizen child*** means a person who is a non-citizen child under subsection 4AAA(1) or (4).

***parent***: without limiting who is a parent of anyone for the purposes of this Act, a person is the ***parent*** of another person if the other person is a child of the person within the meaning of the *Family Law Act 1975*.

***prescribed adoption class visa*** means a visa under the *Migration Act 1958* that is declared by the regulations to be an adoption class visa for the purposes of this Act.

***regional processing country*** has the same meaning as in the *Migration Act 1958*.

***relative*** of a person includes:

- (a) a parent of the person; and
- (b) anyone who is a step-parent of the person or would be except that he or she is not legally married to his or her de facto partner (within the meaning of the *Acts Interpretation Act 1901*); and
- (c) anyone else who would be a relative of the person if someone mentioned in paragraph (a) or (b) were a relative of the person.

#### **4AAA Non-citizen child**

- (1) Subject to subsections (2) and (3), a person (the ***child***) is a non-citizen child if the child:
  - (a) has not turned 18; and
  - (b) enters Australia as a non-citizen; and
  - (c) intends, or is intended, to become a permanent resident of Australia.
- (2) Subsection (1) does not apply if the child enters Australia in the charge of, or for the purposes of living in Australia under the care of:
  - (a) a parent of the child; or
  - (b) a relative of the child who has turned 21; or
  - (c) an intending adoptive parent of the child.

- (3) Subsection (1) does not apply if:
  - (a) the child enters Australia in the charge of, or for the purposes of living in Australia under the care of, a person who is not less than 21 years of age (the *adult*); and
  - (b) a prescribed adoption class visa is in force in relation to the child when the child enters Australia; and
  - (c) the adult intends to reside with the child in a declared State or Territory.
- (4) A person is a non-citizen child if:
  - (a) the person has not turned 18; and
  - (b) a direction under section 4AA is in force in relation to the person.

#### **4AAB Declared States and Territories**

- (1) The Minister may declare a State or Territory to be a declared State or Territory for the purposes of this Act.
- (2) A declaration under subsection (1) is to be:
  - (a) made in writing; and
  - (b) published in the *Gazette*.

#### **4AA Orders for guardianship of certain children**

- (1) Subject to subsection (2), where:
  - (a) a person under the age of 18 years 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; and
  - (b) the person intends to become, or is intended to become, a permanent resident of Australia;the Minister may, if the Minister is satisfied that it is necessary in the interests of the person to do so, direct, in writing, that the person shall be the Minister's ward.
- (2) The Minister shall not give a direction under subsection (1) unless the relative consents to the Minister doing so.

#### **4A Evidence**

For the purposes of this Act (including proceedings arising under this Act or in which a question arises as to the application of this Act to a person), a certificate in writing by a prescribed officer of the Commonwealth or of a State or Territory that a person named in the certificate is a non-citizen child, or was, at a date specified in the certificate, a non-citizen child, is evidence of the fact so certified.

#### **5 Delegation**

- (1) The Minister may, in relation to any matters or class of matters, or in relation to any non-citizen child or class of non-citizen children, by writing under his or her hand, delegate to any officer or authority of the Commonwealth or of any State or Territory all or any of his or her powers and functions under this Act (except this power of delegation) so that the delegated powers and functions may be exercised by the delegate with respect to the matters or class of matters, or the child or class of children, specified in the instrument of delegation.
- (2) Where under this Act the exercise of any power or function by the Minister or the operation of any provision of this Act is dependent upon the opinion or state of mind of the Minister in relation to any matter, that power or function may be exercised by the delegate or that provision may operate (as the case may be) upon the opinion or state of mind of the delegate in relation to that matter.
- (3) A delegation under this section shall be revocable at will, and no delegation shall prevent the exercise of any power or function by the Minister.

#### **6 Guardianship of non-citizen children**

- (1) The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the

provisions of this Act cease to apply to and in relation to the child, whichever first happens.

- (2) Without limiting the meaning of the expression *leaves Australia permanently* in subsection (1), a non-citizen child *leaves Australia permanently* if:
- (a) the child is removed from Australia under section 198 or 199 of the *Migration Act 1958*; or
  - (b) the child is taken from Australia to a regional processing country under section 198AD of that Act; or
  - (c) the child is deported under section 200 of that Act; or
  - (d) the child is taken to a place outside Australia under paragraph 245F(9)(b) of that Act.

#### **6A Non-citizen child not to leave Australia without consent**

- (1) A non-citizen child shall not leave Australia except with the consent in writing of the Minister.
- (2) The Minister shall not refuse to grant any such consent unless he or she is satisfied that the granting of the consent would be prejudicial to the interests of the non-citizen child.
- (3) A person shall not aid, abet, counsel or procure a non-citizen child to leave Australia contrary to the provisions of this section.

Penalty: Two hundred dollars or imprisonment for six months.

#### **7 Custody of non-citizen children**

- (1) The Minister may place a non-citizen child in the custody of a person who:
  - (a) is willing to be the custodian of that child; and
  - (b) is, in the opinion of the Minister, a suitable person to be the custodian of that child;and that person shall thereupon become the custodian of that child.
- (2) The Minister may, at any time, if he or she considers it necessary so to do in the interests of a non-citizen child, remove the child from the custody of his or her custodian and place the child in the custody of some other person, who shall thereupon be the custodian of that child.

## **8 Operation of other laws**

- (1) Except as prescribed, nothing in this Act shall affect the operation in relation to non-citizen children of any provision of the laws of any State or Territory relating to child welfare.
- (2) Nothing in this Act:
  - (a) affects the operation of the migration law; or
  - (b) affects the performance or exercise, or the purported performance or exercise, of any function, duty or power under the migration law; or
  - (c) imposes any obligation on the Minister to exercise, or to consider exercising, any power conferred on the Minister by or under the migration law.
- (3) Without limiting subsection (2), nothing in this Act affects the performance or exercise, or the purported performance or exercise, of any function, duty or power relating to:
  - (a) the removal of a non-citizen child from Australia under section 198 or 199 of the *Migration Act 1958*; or
  - (b) the taking of a non-citizen child from Australia to a regional processing country under section 198AD of that Act; or
  - (c) the deportation of a non-citizen child under section 200 of that Act; or
  - (d) the taking of a non-citizen child to a place outside Australia under paragraph 245F(9)(b) of that Act.

## **9 Offences in respect of non-citizen child**

A person shall not, without lawful excuse (proof whereof shall lie upon him or her):

- (a) remove any non-citizen child, or counsel or cause any non-citizen child to be withdrawn or to abscond, from the custody of his or her custodian; or
- (b) knowing any non-citizen child to have been so removed or withdrawn or to have so absconded, harbour or conceal the child or prevent him or her from returning to his or her custodian.

Penalty: Two hundred dollars or imprisonment for six months.

## 10 False statements in applications

For the purposes of section 136.1 of the *Criminal Code*, an application made for the purposes of this Act is taken to be an application for a benefit.

## 11 Exemption of children from Act

The Minister may, by order in writing under his or her hand, direct that the provisions of this Act shall not apply in respect of a child specified in the order, or a child included in a class of children so specified, and, while the order is in force, the provisions of this Act do not apply to or in relation to that child or to a child included in that class of children.

## 11A Reconsideration and review of certain decisions

- (1) In this section, unless the contrary intention appears:

**decision** has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

**relevant decision** means a decision of a delegate of the Minister under section 4AA or 11.

**reviewable decision** means:

- (a) a decision of the Minister under section 4AA or 11; or
  - (b) a decision of the Minister under subparagraph (3)(a)(ii) or subsection (4).
- (2) Subject to subsection (3), a person affected by a relevant decision may request the Minister to reconsider the decision.
- (3) The request shall:
- (a) be made by notice in writing given to the Minister within:
    - (i) the period of 28 days after the decision first comes to the notice of the person; or
    - (ii) such further period as the Minister (whether before or after the expiration of that period of 28 days), by notice in writing served on the person, allows; and
  - (b) shall set out the reasons for making the request.

- (4) The Minister shall, within 45 days after receipt of the request, reconsider the relevant decision and may:
  - (a) confirm the decision;
  - (b) vary the decision; or
  - (c) set the decision aside and make a new decision in substitution for the decision set aside.
- (5) Where, pursuant to a request under subsection (2), the Minister reconsiders a relevant decision, the Minister shall, by notice in writing served on the person who made the request, inform the person of the result of the reconsideration.
- (6) Applications may be made to the Administrative Appeals Tribunal for review of reviewable decisions.

### **11B Statements to accompany notification of certain decisions**

- (1) In this section, *decision*, *relevant decision* and *reviewable decision* have the same respective meanings as in section 11A.
- (2) Where a delegate of the Minister makes a relevant decision and gives to a person whose interests are affected by the decision notice in writing of the making of the decision, the notice shall include a statement to the effect that a person affected by the decision:
  - (a) may, if the person is dissatisfied with the decision, seek a reconsideration of the decision by the Minister in accordance with subsection 11A(3); and
  - (b) may, subject to the *Administrative Appeals Tribunal Act 1975*, if the person is dissatisfied with the decision of the Minister on the reconsideration, apply to the Administrative Appeals Tribunal for review of the last-mentioned decision.
- (3) Where the Minister makes a reviewable decision and gives to a person whose interests are affected by the decision notice in writing of the making of the decision, the notice shall include a statement to the effect that subject to the *Administrative Appeals Tribunal Act 1975*, a person affected by the decision may, if the person is dissatisfied with the decision, apply to the Administrative Appeals Tribunal for review of the decision.

- (4) Any failure to comply with the requirements of subsection (2) or (3) in relation to a decision does not affect the validity of the decision.

## 12 Regulations

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:

- (aa) prescribing principles to be observed in considering whether or not to give a direction under section 4AA;
  - (a) prescribing the principles to be observed in relation to the placing of non-citizen children with custodians;
  - (b) regulating the placing of such children with custodians and the transfer of such children from one custodian to another;
  - (c) prescribing provisions to be observed by custodians in relation to the custody, control, welfare, care, education, training and employment of non-citizen children;
  - (d) providing that any provision of the laws of any State or Territory relating to child welfare shall not apply in relation to non-citizen children, and making provision in lieu of any such provision;
- (da) prescribing powers, rights, duties and liabilities of or in relation to the Minister as guardian of the estate in Australia of non-citizen children, including provisions for the receipt, disposition, management and control of property of non-citizen children, and of property of deceased non-citizen children from their deaths until the grant of administration;
- (db) making provision for preventing non-citizen children from leaving Australia without the consent in writing of the Minister; and
- (f) prescribing penalties not exceeding Forty dollars, for any offence against the regulations.



## Table of Acts

**Notes to the *Immigration (Guardianship of Children) Act 1946*****Note 1**

The *Immigration (Guardianship of Children) Act 1946* as shown in this compilation comprises Act No. 45, 1946 amended as indicated in the Tables below.

All relevant information pertaining to application, saving or transitional provisions prior to 24 November 2000 is not included in this compilation. For subsequent information *see* Table A.

**Table of Acts**

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Immigration (Guardianship of Children) Act 1946</i>	45, 1946	15 Aug 1946	30 Dec 1946 (see <i>Gazette</i> 1946, p. 3598)	
<i>Immigration (Guardianship of Children) Act 1948</i>	62, 1948	6 Dec 1948	6 Dec 1948	S. 3(2)
<i>Immigration (Guardianship of Children) Act 1952</i>	29, 1952	16 June 1952	16 June 1952	—
<i>Statute Law Revision (Decimal Currency) Act 1966</i>	93, 1966	29 Oct 1966	1 Dec 1966	—
<i>Statute Law Revision Act 1973</i>	216, 1973	19 Dec 1973	31 Dec 1973	Ss. 9(1) and 10
<i>Migration (Miscellaneous Amendments) Act 1983</i>	84, 1983	14 Nov 1983	Part V (ss. 9–20): 2 Apr 1984 (see s. 2(1) and <i>Gazette</i> 1984, No. S119) (a)	S. 20
<i>Statute Law (Miscellaneous Provisions) Act (No. 1) 1985</i>	65, 1985	5 June 1985	S. 3: 1 July 1986 (see <i>Gazette</i> 1986, No. S311) (b)	—
<i>Immigration (Guardianship of Children) Amendment Act 1994</i>	45, 1994	15 Mar 1994	12 Apr 1994	—

**Table of Acts**

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000</i>	137, 2000	24 Nov 2000	Ss. 1–3 and Schedule 1 (items 1, 4, 6, 7, 9–11, 32): Royal Assent Remainder: 24 May 2001	Sch. 2 (items 418, 419) [see Table A]
<i>Migration Legislation Amendment (Application of Criminal Code) Act 2001</i>	97, 2001	22 Aug 2001	19 Sept 2001	S. 4 [see Table A]
<i>Statute Law Revision Act 2008</i>	73, 2008	3 July 2008	Schedule 4 (items 334–342): 4 July 2008	—
<i>Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008</i>	144, 2008	9 Dec 2008	Schedule 10 (items 79–82): 15 Mar 2009 (see F2009L00259)	Sch. 10 (item 82) [see Table A]
<i>Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012</i>	113, 2012	17 Aug 2012	Schedule 2: 18 Aug 2012	—

**Act Notes**

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- (a) The *Immigration (Guardianship of Children) Act 1946* was amended by Part V (sections 9–20) only of the *Migration (Miscellaneous Amendments) Act 1983*, subsection 2(1) of which provides as follows:
- (1) Subject to subsection (2), this Act shall come into operation on the day on which the *Migration Amendment Act 1983* comes into operation.
- (b) The *Immigration (Guardianship of Children) Act 1946* was amended by section 3 only of the *Statute Law (Miscellaneous Provisions) Act (No. 1) 1985*, subsection 2(24) of which provides as follows:
- (24) The amendments of the *Immigration (Guardianship of Children) Act 1946* made by this Act shall come into operation on a day to be fixed by Proclamation.



**Table of Amendments****Table of Amendments**

ad. = added or inserted    am. = amended    rep. = repealed    rs. = repealed and substituted

Provision affected	How affected
Title .....	am. No. 84, 1983
S. 3 .....	rep. No. 216, 1973 ad. No. 97, 2001
S. 4 .....	am. No. 29, 1952; No. 216, 1973; No. 84, 1983; No. 65, 1985; No. 45, 1994; No. 144, 2008; No. 113, 2012
Ss. 4AAA, 4AAB .....	ad. No. 45, 1994
S. 4AA .....	ad. No. 65, 1985
S. 4A .....	ad. No. 29, 1952 am. No. 216, 1973; No. 84, 1983
S. 5 .....	am. No. 216, 1973; No. 84, 1983; No. 73, 2008
S. 6 .....	am. No. 62, 1948; No. 216, 1973; No. 84, 1983; No. 144, 2008; No. 113, 2012
S. 6A .....	ad. No. 62, 1948 am. No. 93, 1966; No. 84, 1983; No. 73, 2008; No. 113, 2012
S. 7 .....	am. No. 62, 1948; No. 84, 1983; No. 73, 2008
Heading to s. 8 .....	rs. No. 113, 2012
S. 8 .....	am. No. 216, 1973; No. 84, 1983; No. 113, 2012
S. 9 .....	am. No. 93, 1966; No. 84, 1983; No. 73, 2008
S. 10 .....	am. No. 93, 1966 rs. No. 137, 2000
S. 11 .....	rs. No. 29, 1952 am. No. 73, 2008
Ss. 11A, 11B .....	ad. No. 65, 1985
S. 12 .....	am. No. 62, 1948; No. 93, 1966; No. 216, 1973; No. 84, 1983; No. 65, 1985

**Table A**

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**Table A**

**Application, saving or transitional provisions**

*Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (No. 137, 2000)

**Schedule 2**

**418 Transitional—pre-commencement offences**

- (1) Despite the amendment or repeal of a provision by this Schedule, that provision continues to apply, after the commencement of this item, in relation to:
- (a) an offence committed before the commencement of this item; or
  - (b) proceedings for an offence alleged to have been committed before the commencement of this item; or
  - (c) any matter connected with, or arising out of, such proceedings;
- as if the amendment or repeal had not been made.
- (2) Subitem (1) does not limit the operation of section 8 of the *Acts Interpretation Act 1901*.

**419 Transitional—pre-commencement notices**

If:

- (a) a provision in force immediately before the commencement of this item required that a notice set out the effect of one or more other provisions; and
  - (b) any or all of those other provisions are repealed by this Schedule; and
  - (c) the first-mentioned provision is amended by this Schedule;
- the amendment of the first-mentioned provision by this Schedule does not affect the validity of such a notice that was given before the commencement of this item.

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**Table A**

*Migration Legislation Amendment (Application of Criminal Code) Act 2001*  
(No. 97, 2001)

**4 Application of amendments**

- (1) Each amendment made by this Act applies to acts and omissions that take place after the amendment commences.
- (2) For the purposes of this section, if an act or omission is alleged to have taken place between 2 dates, one before and one on or after the day on which a particular amendment commences, the act or omission is alleged to have taken place before the amendment commences.

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*Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (No. 144, 2008)

**Schedule 10**

**82 Application**

The amendments made by this Part apply in relation to persons under 18 who enter Australia on or after commencement.