

Migration Amendment (Detention of Minors) Bill 2010

Explanatory Memorandum

Circulated by authority of Senator Sarah Hanson-Young

GENERAL OUTLINE: Policy Rationale

The *Migration Amendment (Detention of Minors) Bill 2010* seeks to ensure that the decision to keep children and families out of immigration detention does not rely on the dwill of the Minister of the day.

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

In including the explicit reference to les 4 and 37 of the United Nations Convention on the Rights of the Child, the Bill acts to strengthen and codify within the Migration Act that minors must only be detained as a matter of last resort, not as a matter of first and only resort as is the current practice.

 Bill also seeks to expand the residence determination process, to ensure that the Minister, must, within 12 days, determine that a minor is to reside at a specified place within the community rather than being held in detention.

In expanding the residence determination section, this Bill seeks to appoint a guardian to advocate for the best interests of the minor. This is a particularly important point, when the Minister is both the perceived "detainer" and "guardian" of unaccompanied minors.

As a signatory to the UN Convention on the Rights of the Child, Australia has a responsibility in upholding the full range of human rights—civil, cultural, economic, political and social rights. By cementing our international obligations in legislation, 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

This clause provides for the Act, when enacted, to be cited as the *Migration Amendment (Detention of Minors) Act 2010*.

Clause 2 – Commencement

This clause provides for sections 1 to 3 of the Act to commence on the day it receives Royal Assent, schedule 1 and 2 (part 1) to commence the day after this Act receives Royal Assent, and schedule 2 (part 2) immediately after the commencement of the *Commonwealth Commissioner for Children and Young People Act 2010*.

Clause 3 – Objects

This clause identifies that the object of this Bill is to ensure that children are not held in immigration detention facilities, but rather housed along with their immediate family, where possible, in community housing.

This clause also identifies Articles 4 and 37 of the UN Convention on the Rights of the Child as integral in assisting Australia meet its international obligations.

Schedule 1 – Amendments relating to the detention of minors

Item 1 – Repeal section 4AA and substitute with:

The principles protecting the rights of minors under this Act. This new section specifically inserts Article 37 (b, c, and d) of the UN Convention on the Rights of the Child.

Item 2 – In subsection 5(1) insert:

A formal definition of the Convention on the Rights of the Child.

Item 3 – After section 197AB insert new subdivision 197ABA

This new subdivision seeks to strengthen the residence determination powers currently held by the Immigration Minister. Specifically, it seeks to mandate that the Minister 'must' make a determination within 12 days after arriving that a minor is to reside in a specified place within the community.

Subsection 2 ensures that where a minor has been identified to being a member of a family unit, the Minister must make a determination that, if it's in the best interest of the minor, they are to reside with the family within the community.

Subsection 3 identifies that where no person over the age of 18 has been identified as a member of the same family unit as the minor, but the minor is in the care of another person in detention the Minister must make a determination that the person reside in a place with the minor within the community.

Subsection 4 ensures that for the purposes of subsection (2) and (3), the Minister must act within the best interests of the child.

Subsection 5 allows the Minister to delegate to an authorised officer the power to make the determinations as set out in subsection (1), (2) or (3).

Subsection 6 provides that regulations must be made for the method by which a person under subsection (2) and (3) is to have their relationship to a minor assessed. This process is required to occur within 30 days of application.

Schedule 2 – Amendments relating to the guardianship of minors

Part 1 – Appointment of a guardian

Item 1 – after subsection 197ABA (4):

This ensures that the Minister is required to consult with the guardian if one has been appointed, when acting in the best interest of the child.

Item 2 – at the end of Division 7 of Part 2, add Subdivision C – Appointment of a guardian

Part 2 – Children's Commissioner

This section relates to the appointment of a Children's Commissioner in place of the guardian, following the passing of the *Commonwealth Commissioner for Children and Young People Bill 2010*.