

EXPLANATORY STATEMENT

Select Legislative Instrument No. 137, 2015

Issued by Authority of the Attorney-General

Family Law Act 1975

Family Law Amendment (Publication of Court Proceedings) Regulation 2015

Subsection 125(1) of the *Family Law Act 1975* provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 121 of the Family Law Act restricts the publication of any accounts of any proceedings, or parts of any proceedings, or lists of proceedings (subject to permissible exceptions) under the Act that identify the parties or others involved in the case. The restriction applies to publication, or other dissemination, to the public or a section of the public, and can apply to disclosures online as well as through the media. Breaches of section 121 are offences punishable by imprisonment of up to one year.

Subsection 121(9) of the Family Law Act sets out the circumstances in which the general prohibition does not apply. The fact that the publication or dissemination of certain information is permitted by an exception in subsection 121(9) of the Family Law Act will not make the release of information lawful if the provision of that information is prohibited by other legislation.

In 2013, the Attorney-General's Department engaged Professor Richard Chisholm (a former Family Court Judge) to chair a taskforce to report on how experts' reports can be better shared between the federal family law system and the State and Territory child protection systems. Professor Chisholm's report, *The sharing of experts' reports between the child protection system and the family law system*, issued in March 2014, identified the existence of differing views about whether section 121 of the Family Law Act prevents family court reports being provided to authorities within the State and Territory child protection systems. Due to this uncertainty, some child welfare authorities currently seek court orders to obtain family court reports, despite the strength of the view that the release of this information to a State or Territory child welfare authority is not publication or dissemination to the public or to a section of the public. The report recommended that the Commonwealth review section 121 of the Family Law Act and consider removing this doubt by stating explicitly that section 121 of the Family Law Act does not apply to the provision of information to State and Territory authorities in the child protection system.

The *Civil Law and Justice Legislation Amendment Act 2015* inserted new paragraph 121(9)(aa) into subsection 121(9) of the Family Law Act. This paragraph clarifies the exceptions to subsection 121(9) of the Family Law Act by explicitly permitting the communication of any pleading, transcript of evidence or other document in a family law proceeding to a prescribed State or Territory child welfare authority that has responsibilities for child welfare. This is to ensure that there is appropriate information sharing between the family law and child protection systems to ensure the best possible outcomes for children. The amendment will ensure that there is no doubt that child welfare authorities can have

access to any relevant family law material and will enhance interactions between the family law and child protection systems.

Section 6 of Schedule 3 of the *Civil Law and Justice Legislation Amendment Act 2015* provided that new paragraph 121(9)(aa) of the Family Law Act applies in relation to communications made on or after the commencement of that provision, regardless of whether the communications relate to proceedings occurring before, on or after the commencement date of that provision.

This Regulation seeks to give effect to new paragraph 121(9)(aa) of the Family Law Act, which requires that state and territory authorities with responsibilities for child welfare be prescribed.

The Regulation commences on the day after it is registered.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Consultation

The amendments to facilitate appropriate information sharing between the family law and child protection systems were a recommendation of the report of the taskforce chaired by Professor Chisholm. The taskforce comprised representatives from key stakeholders in the family law sector, including the Family Court of Australia, Federal Circuit Court, Family Court of Western Australia, National Legal Aid, NSW Department of Family and Community Services and Queensland Department of Communities, Child Safety and Disability Services. This consultation appropriately engaged with relevant stakeholders. Further consultation was not necessary in development of the Regulation.

Regulatory impact

This Regulation has no regulatory impact. Its sole purpose is to facilitate appropriate sharing of information between Commonwealth, state and territory authorities.

Details of the Regulation are as follows:

Section 1 — Name of regulation

Section 1 provides that the title of the Regulation is the *Family Law Amendment (Publication of Court Proceedings) Regulation 2015*.

Section 2 — Commencement

Section 2 provides that the Regulation commences on the day after it is registered.

Section 3 — Authority

Section 3 provides that the Regulation is made under the *Family Law Act 1975*.

Section 4 — Schedule(s)

Section 4 provides that the *Family Law Regulations 1984* are amended as set out in Schedule 1.

Schedule 1 — Amendments

Item [1] — Regulation 19A

Item 1 inserts Regulation 19A into the *Family Law Regulations 1984*. Regulation 19A prescribes the following state and territory welfare authorities for the purposes of paragraph 121(9)(aa) of the *Family Law Act 1975*:

- a) for New South Wales—the Department of Family and Community Services
- b) for Victoria—the Department of Health and Human Services
- c) for Queensland—the Department of Communities, Child Safety and Disability Services
- d) for Western Australia—the Department for Child Protection and Family Support
- e) for South Australia—the Department for Education and Child Development
- f) for Tasmania—the Department of Health and Human Services
- g) for the Australian Capital Territory—the Department of Community Services, and
- h) for the Northern Territory—the Department of Children and Families.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Family Law Amendment (Publication of Court Proceedings) Regulation 2015

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Family Law Act 1975* sets out the rules for dealing with various aspects of relationship breakdown, including making arrangements for the future parenting of children and for the resolution of property disputes. These matters are heard by the Family Court of Australia and the Federal Circuit Court.

While court proceedings in Australia are generally open to the public, section 121 of the Family Law Act restricts the publication of court proceedings where such publication would identify a party to the proceedings or a person associated with the proceedings including a witness. This is due to the sensitive nature of many family law proceedings. This general prohibition on publication is subject to a number of exemptions. In particular, paragraph 121(9)(aa) of the Family Law Act was inserted by the *Civil Law and Justice Legislation Amendment Act 2015* to explicitly permit the provision of information in family law proceedings to prescribed State and Territory child welfare authorities. Although there is a strong argument that such information sharing with child welfare authorities was not prohibited by section 121 because it is not publication or dissemination to ‘the public or... a section of the public’, the amendment was intended to remove any doubt that such information sharing is not prohibited by the Family Law Act. This Regulation will prescribe relevant State and Territory authorities for the purpose of paragraph 121(9)(aa) of the Act. This will ensure that child welfare authorities have access to relevant information and promote best outcomes for children.

Human rights implications

The Regulation engages the following rights:

- Children’s rights to be protected from harm in Article 19 of the *Convention on the Rights of the Child* (CRC) and the rights of children removed from their families to special protection and assistance in Article 20 of the CRC, and
- The right to protection against arbitrary and unlawful interferences with privacy in Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

Children’s rights

Article 19 of the CRC requires States parties to take appropriate legislative measures to protect children from all forms of violence, injury or abuse, neglect or negligent treatment, and maltreatment or exploitation. Pursuant to Article 19(2) of the CRC, relevant measures should include procedures for identification, reporting, referral and investigation of instances of child maltreatment. This Regulation is such a measure.

The Regulation promotes children's rights under the CRC to be protected from harm and for children deprived of their family environment to receive special protection and assistance by listing the child welfare authorities to whom information disclosed in family law proceedings can be provided. This includes information in relation to allegations or findings related to physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, which occurs in the care of parents, legal guardians or other persons responsible for the care of the child. The authorities listed in the Regulation are the primary authorities for ensuring the protection of children in each state and territory in Australia and have expertise in dealing with such matters.

Right to privacy

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence and that everyone has the right to the protection of the law against such interference or attacks. Interferences with privacy may be permissible, provided that they are authorised by law and not arbitrary.

In order for an interference with the right to privacy not to be arbitrary, the interference must be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in the particular circumstances. The United Nations Human Rights Committee (the HRC) has interpreted 'reasonableness' in this context to mean that 'any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case'.

The Regulation lists the welfare agencies to which information regarding proceedings under the Family Law Act may be released without breaching the prohibition in section 121 of the Act. The information that will be shared will include personal information relating to parties to proceedings under the Family Law Act, including children. The sharing of information envisaged by these provisions engages and limits the right to privacy. However, the sharing of such information with these authorities is done so for the specific purpose of protecting the welfare of children, which is an important and legitimate public purpose.

This Regulation is a necessary measure to protect children from harm. The limitation is reasonable in that it only permits the sharing of information to those agencies which are the primary authorities for ensuring the protection of children in each state and territory in Australia and have expertise in dealing with such matters. The sharing of such information is proportionate as the information will be used, handled and stored by these authorities consistently with the way they handle other similar information. The fact that the publication or dissemination of certain information to these agencies is permitted by the prescription of these agencies for the purposes of section 121 will also not make the release of information lawful if the provision of that information is prohibited by other legislation. On this basis, this limitation is reasonable, necessary and proportionate to achieving a legitimate objective, being the protection of children, and is consistent with the provisions, aims and objectives of the ICCPR.

Conclusion

This Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, the limitation is reasonable, necessary and proportionate.