

# Family Law Amendment (Registered Relationships) Regulations 2017

## EXPLANATORY STATEMENT

Select Legislative Instrument No. , 2017

Issued under the Authority of the Attorney-General  
in compliance with section 26 of the *Legislation Act 2003*

---

### INTRODUCTION

1. These regulations are made under section 51 of the *Acts Interpretation Act 1901* and section 125 of the *Family Law Act 1975*
2. The Acts Interpretation Act provides rules for the interpretation of Acts of the Commonwealth Parliament.
3. Section 51 of the Acts Interpretation Act provides that the Governor General may make regulations prescribing 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.
4. The Family Law Act is the primary Australian legislation dealing with divorce, parenting arrangements, property settlements and financial maintenance for divorced or separated married or de facto couples.
5. Section 125 of the Family Law Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

### OUTLINE

6. On 15 December 2016, South Australia enacted the *Relationships Register Act 2016* (SA) which is an Act to make provision for the registration of certain relationships, and to make consequential, related and other amendments to certain South Australian legislation.
7. Specifically, subsection 5(1) of the Relationships Register Act (SA) will, subject to other provisions in that Act, allow two adults who are in a relationship as a couple to apply to the South Australian Registrar of Births, Deaths and Marriages for registration of their relationship.
8. The Relationships Register Act (SA) has not yet commenced, but will commence on proclamation.
9. Section 2D of the Acts Interpretation Act provides a definition of ‘de facto partner’ which may be referred to by other Commonwealth laws. Paragraph 2D(a) provides that person is the de facto partner of another person if they are in a registered relationship with the other person under section 2E of the Acts Interpretation Act.

10. Section 2E of the Acts Interpretation Act provides a definition of ‘registered relationship’ for the purposes of the definition of ‘de facto partner’. It provides that a registered relationship is a relationship which is registered under a prescribed state or territory law, as a prescribed kind of relationship.
11. Registration of a prescribed kind of relationship under a prescribed state or territory law is sufficient to establish that a person is another person’s de facto partner for the purposes of section 2D. Relationship registration will therefore provide conclusive proof that a person is another person’s de facto partner throughout a wide range of Commonwealth laws that use the definition of de facto partner provided by the Acts Interpretation Act.
12. Section 4AA of the Family Law Act provides the meaning of ‘de facto relationship’ for the purposes of the Family Law Act. A key element of identifying whether a person is in a de facto relationship is the requirement under paragraph 4AA(1)(c) of the Family Law Act that, “having regards to all the circumstances of their relationship, [the person and another person] have a relationship as a couple living together on a genuine domestic basis”.
13. Subsection 4AA(2) of the Family Law Act provides an inclusive list of circumstances for the purposes of determining whether this requirement is met. Relevantly, paragraph 4AA(2)(g) provides that the circumstances may include “whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship”.
14. Section 90SB of the Family Law Act provides rules governing when the court may make an order under Division 2 of Part VIIIAB of that Act, which relates to property and maintenance in de facto relationships. Section 90SB provides four conditions, one of which must be satisfied, for the court to make an order. Paragraph 90SB(d) provides that one of those conditions is that the relationship is, or was, registered under a prescribed law of a state or territory.

### **Regulatory impact analysis**

15. The Office of Best Practice Regulation (OBPR) was consulted on the impact of these amendments. OBPR advised that no Regulation Impact Statement is required for the proposed amendments as they are machinery in nature (OBPR reference 21686).

### **Statement of compatibility with human rights obligations**

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

#### ***Family Law Amendment (Registered Relationships) Regulations 2017***

### **Overview of the Legislative Instrument**

16. 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*.

### **Human Rights Implications**

The Regulation engages the following human rights:

### *Equality and non-discrimination*

Recognising relationships registered under a prescribed scheme of relationship recognition engages article 26 of the *International Covenant on Civil and Political Rights*. Article 26 guarantees the right to equal protection of the law without discrimination.

Both the Acts Interpretation Act and the Family Law Act include definitions of ‘de facto partner’ that are gender neutral and apply to both same-sex and opposite-sex couples. The Acts Interpretation Act also provides that a person is a ‘de facto partner’ of another if they are in a ‘registered relationship’, while the Family Law Act provides that evidence of a registered relationship is a (non-conclusive) circumstance that can be considered when determining whether a de facto relationship exists.

Section 90SB of the Family Law Act provides rules governing when the court may make an order under Division 2 of Part VIIIAB of that Act, which relates to property and maintenance in de facto relationships. Section 90SB provides four conditions, one of which must be satisfied, for the court to make an order. Paragraph 90SB(d) provides that one of those conditions is that the relationship is, or was, registered under a prescribed law of a state or territory. An unregistered couple will have to satisfy one of the other conditions, one of which is that the period or total periods of the relationship total at least two years. This is in contrast to the situation for a married relationship, where the court automatically has jurisdiction.

Paragraph 90SB(d) ensures that de facto couples can, by registering their relationship, achieve an equal status to a married couple for the purpose of determining whether the court has authority to make certain orders. This allows same-sex couples an avenue to enjoy protections under law that would otherwise be more limited than those available to married couples.

The Regulations protect the right to non-discrimination by ensuring that same-sex couples are recognised and have the same entitlements as opposite-sex de facto couples for the purposes of those Commonwealth laws that refer to the definition of ‘de facto partner’ in the Acts Interpretation Act.

### **Consultation before making**

The South Australian Government was consulted on the Regulations. No further consultation was considered necessary because the Regulations preserve the existing substantive effect of the Principal Regulations, and reflect similar arrangements made in other states and the Australian Capital Territory.

### **Statutory preconditions and Parliamentary undertakings relevant to this regulation**

There are no statutory preconditions or Parliamentary undertakings relevant to the making of this regulation.

**Section 1 Name of regulation**

1. This section that provides the name by which the regulation may be cited is the *Family Law Amendment (Registered Relationships) Regulations 2017*.

**Section 2 Commencement**

2. This section provides for commencement of the Regulations. Specifically, the Regulations will commence on the later of:
  - the start of the day after the instrument is registered; and
  - the start of the day the Relationships Register Act (SA) commences.
3. The intention of this section is to ensure that, if possible, these Regulations will commence at the same time as the provisions of the Relationships Register Act (SA) that allow people to apply for registration of their relationship (specifically, subsection 5(1) of the Relationships Register Act (SA)).
4. The Relationships Register Act (SA) will commence on proclamation. It is therefore not possible to identify for the purpose of these commencement provisions the exact date on which it will commence.
5. The alternative provision, that the instrument will commence on the day after the instrument is registered, is to avoid the possibility that this instrument would operate retrospectively should the Relationships Register Act (SA) commence prior to this instrument being registered. Without this provision, it would be possible that the instrument would commence prior to the start of the day after this instrument is registered, and could potentially negatively affect a person's rights, contrary to subsection 12(3) of the *Legislation Act 2003*.
6. While this provision appears to provide for the Regulations to have an open-ended commencement date, the Regulations will commence no later than 15 December 2018. Subsection 7(5) of the *Acts Interpretation Act 1915* (SA) relevantly provides that an Act that is to be brought into operation by proclamation, but that does not otherwise commence, will be taken to come into operation on the second anniversary of the date on which the Act received royal assent. As the Relationships Register Act (SA) received Royal Assent on 15 December 2016, it will come into effect no later than 15 December 2018, and these Regulations will come into effect on the same date.

**Section 3 Authority**

7. This section identifies the Acts that authorise the making of the regulation. Specifically it provides that the Act is made under the Acts Interpretation Act and the Family Law Act. The authority for making regulations under those Acts can be found in section 51 of the Acts Interpretation Act and section 125 of the Family Law Act.
8. Regulations prescribing a registered relationship are a permitted matter under section 51 of the Acts Interpretation Act, as section 2E specifically refers to relationships registered under a prescribed law of a state or territory

9. Regulations prescribing a registered relationship are a permitted matter under section 125 of the Family Law Act, as paragraphs 4AA(2)(g) and 90SB(d) specifically refer to relationships registered under a prescribed law of a state or territory

#### **Section 4 Schedules**

10. This section provides that the instruments specified in the Schedule are amended or repealed as set out in the Schedule.

#### **Schedule 1 Amendments**

##### ***Acts Interpretation (Registered Relationships) Regulations 2008***

##### **Item 1—At the end of regulation 3**

11. Item 1 adds a new paragraph (f) to regulation 3 of the *Acts Interpretation (Registered Relationships) Regulations 2008*. Regulation 3 provides a list of laws and kinds of relationships prescribed for the purposes of section 2E of the Acts Interpretation Act.
12. New paragraph 3(f) will prescribe the Relationships Register Act (SA) as a law for the purposes of section 2E of the Acts Interpretation Act, where the kind of relationship is a relationship as a couple between 2 adults who meet the eligibility criteria mentioned in section 5 of the Relationships Register Act (SA) for entry into a registered relationship.
13. Registration of a relationship under the Relationships Register Act (SA) will therefore provide conclusive proof that a person is another person's de facto partner throughout a wide range of Commonwealth laws that use the definition of de facto partner provided by the Acts Interpretation Act.
14. The purpose of specifying couple relationships meeting the eligibility criteria set out in section 5 of the Relationships Register Act (SA) (rather than any relationship registered under that Act) is to ensure that, should South Australia in the future allow for a greater variety of relationships to be registered (for example, caring relationships), then only relationships that meet the criteria in section 5 of that Act, which specifies the current eligibility criteria for a relationship to be registered under that Act, would be registered relationships for the purpose of the Acts Interpretation Act.

##### ***Family Law Regulations 1984***

##### **Item 2—Regulation 12BC (after table item 2A)**

15. Item 2 inserts a new table item into the table in Regulation 12BC of the *Family Law Regulations 1984*. The table in 12BC specifies the laws and kinds of relationships that are prescribed for the purposes of paragraph 4AA(2)(g) of the Family Law Act.
16. New table item 2B will provide that the Relationships Register Act (SA) is a prescribed law for the purposes of paragraph 4AA(2)(g) of the Family Law Act, where the relationship is a relationship as a couple between 2 adults who meet the eligibility criteria mentioned in section 5 of the Relationships Register Act (SA) for entry into a registered relationship.

17. Registration of a relationship under the Relationships Register Act (SA) will therefore be a consideration that can be taken into account when determining whether a person is another person's de facto partner for the purposes of the Family Law Act.
18. The purpose of specifying couple relationships meeting the eligibility criteria set out in section 5 of the Relationships Register Act (SA) (rather than any relationship registered under that Act) is to ensure that, should South Australia in the future allow for a greater variety of relationships to be registered (for example, caring relationships), then only relationships that meet the criteria in section 5 of that Act, which specifies the current eligibility criteria for a relationship to be registered under that Act, would be registered relationships for the purpose of the Family Law Act.

**Item 3—Regulation 15AB (after table item 2A)**

19. Item 3 inserts a new table item into the table in Regulation 15AB of the *Family Law Regulations 1984*. The table in 15AB specifies laws for the purposes of paragraph 90SB(d) of the Family Law Act.
20. Registration of a relationship under the Relationships Register Act (SA) will therefore satisfy the requirements of paragraph 90SB(d) of the Family Law Act, allowing the family law courts to make orders related to property and maintenance specified in section 90SB for the purposes of that relationship.
21. Unlike section 2E of the Acts Interpretation Act and paragraph 4AA(2)(g) of the Family Law Act, paragraph 90SB(d) does not provide the authority to prescribe types of relationships. Paragraph 90SB(d) only provides authority to prescribe laws of a state or territory. As such, the additional specification in items 2 and 3 of this instrument of types of relationship has not been replicated for this item.