

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

Child Support (Assessment) Act 1989

Child Support (Assessment) Regulations 2018

Background

The *Child Support (Assessment) Act 1989* (the Act) provides for the assessment of child support to ensure that children receive a proper level of financial support from their parents.

The *Child Support (Assessment) Regulations 2018* (the Regulations) prescribe matters relevant to the assessment of the level of parents' child support liabilities for their children.

Section 164 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Commencement

The Regulations commence the day after the Regulations are registered on the Federal Register of Legislation.

The *Child Support (Assessment) Regulations 1989* (the 1989 Regulations) were due to cease operation on 1 April 2018 due to the sunset provisions in the *Legislation Act 2003*. These Regulations are substantially in the same terms as the 1989 Regulations.

Consultation

The Department of Human Services, Australian Taxation Office and relevant state governments were consulted prior to and during the preparation of these Regulations. The consultation was in relation to the remaking of the 1989 Regulations and whether certain provisions should be repealed or amended to reflect changes to certain terms and procedures.

These changes are not inconsistent with the relevant legislation. They provide guidance as to certain procedural provisions of the legislation. Public consultation was therefore not considered unnecessary.

Regulation Impact Statement (RIS)

The Regulations do not require a Regulatory Impact Statement (RIS). These Regulations are not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact. It is not expected that any compliance costs will be incurred by business.

Explanation of the provisions

Part 1 - Preliminary

Section 1 provides that the name of the Regulations is the *Child Support (Assessment) Regulations 2018*.

Section 2 provides that the Regulations commence on the day after the Regulations are registered on the Federal Register of Legislation.

Section 3 states that the authority for making the Regulations is the *Child Support (Assessment) Act 1989*.

Section 4 provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms. Schedule 1 of the Regulations repeals the 1989 Regulations which were due to sunset on 1 April 2018. The Regulations are made in substantially the same form as the 1989 Regulations.

Section 5 defines the terms used in the Regulations as follows:

Act means the *Child Support (Assessment) Act 1989*.

address for service, in relation to a person, includes both:

- (a) the person's address for the physical delivery of notices; and
- (b) the person's address for the electronic delivery of notices.

amenity allowance or gratuity means periodical payments of an incidental nature to a person for any of the following:

- (a) the purchase of personal items such as toiletries;
- (b) other minor expenses.

Australia-New Zealand Agreement means the Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance done at Canberra on 12 April 2000, a copy of the text of which is set out in Schedule 1 to the *Child Support (Registration and Collection) Regulations 2018*.

consent has the same meaning as in subsection 5(1) of the *Electronic Transactions Act 1999*.

electronic communication has the same meaning as in subsection 5(1) of the *Electronic Transactions Act 1999*.

Governor means the person in charge of a prison, however described.

NDIS amount has the same meaning as in section 9 of the *National Disability Insurance Scheme Act 2013*.

social security law has the same meaning as in subsection 3(3) of the *Social Security (Administration) Act 1999*.

Tax Act means the *Income Tax Assessment Act 1936*.

Part 2 – Children who may be covered by the Act

Section 6 sets out which children are not eligible to be covered by the Act for the purposes of subsection 22(1) of the Act. It provides that a child is not an eligible child if they are in the custody of, or under the guardianship, care and control or supervision of, a person under a child welfare law of Western Australia or South Australia.

Part 3 - Applications to Registrar for administrative assessment of child support

Section 7 sets out that the Registrar can be satisfied that a person is a parent of a child if they are acknowledged as the parent of a child (as per paragraphs 29(2)(b),(c) and (d) of the Act) under the law of a prescribed overseas jurisdiction. This section states that each foreign country, or part of a foreign country, listed in Schedule 2 to the *Child Support (Registration and Collection) Regulations 2018* is a prescribed overseas jurisdiction for the purposes of the Act.

Section 8 prescribes, for the purposes of subsections 29B(2) and (3) of the Act, actions that an overseas authority of a reciprocating jurisdiction may take if an application under section 25 or 25A of the Act is made by a person or an overseas authority of a reciprocating jurisdiction on behalf of a person. The prescribed actions are as follows:

- (a) making an election of any kind under a provision of the Act;
- (b) under Part 6A of the Act, applying to the Registrar to make a determination under section 98S of the Act;
- (c) under Part 7 of the Act, filing an application for leave to appeal and appealing against a decision;
- (d) under Part 7 of the Act, applying to a court to make an order under section 118 of the Act;
- (e) subject to Part VII of the Registration and Collection Act, lodging an objection to a decision;
- (f) subject to Part VIIA of the Registration and Collection Act, applying to the AAT for review of a decision;
- (g) subject to Part IVA of the *Administrative Appeals Tribunal Act 1975*, appealing on a question of law from a decision of the AAT.

Section 9 sets out the following excluded reciprocating jurisdictions for the purposes of section 30A of the Act:

- (a) Brunei Darussalam;
- (b) Cook Islands;
- (c) Israel;
- (d) Niue;
- (e) Papua New Guinea;
- (f) Samoa;
- (g) Yukon Territory of Canada.

In effect, this section outlines the reciprocating jurisdictions where the acceptance of an application for an administrative assessment of child support for a child, or a child

support agreement, in relation to a parent by whom child support is reasonably likely to be payable who is a resident of the jurisdiction, would not be permitted by the law of the jurisdiction.

Part 4 – Administrative assessment of child support

Section 10 prescribes provisions of the Tax Act for the purposes of paragraph 56(2)(b) of the Act and prescribes circumstances for the purposes of paragraph 56(2)(c) and subsection 57(7) of the Act.

Subsection 10(1) sets out the provisions and circumstances that are prescribed for the purposes of paragraphs 56(2)(b) and (c) of the Act.

Subsection 56(2) of the Act provides that if, after an administrative assessment of child support is made, the assessment (the **tax assessment**) of a parent's taxable income is amended (whether or not because of an objection, appeal or review), the Registrar must not amend the administrative assessment to take account of the amendment to the tax assessment unless one of four circumstances applies. One of these four circumstances involves the situation in which an amendment to the tax assessment is made under provisions of an Income Tax Assessment Act that are prescribed by the regulations for the purposes of paragraph 56(2)(b) of the Act. Another of these circumstances involves the situation in which the amendment is made in circumstances prescribed for the purposes of paragraph 56(2)(c) of the Act.

Subsection 10(1) prescribes the following provisions and circumstances for the purposes of paragraphs 56(2)(b) and (c) of the Act:

- (a) sections 78A, 82KJ, 82KK, 82KL, and 177F of the Tax Act;
- (b) sections 136AD, 136AE and 136AF of the Tax Act as in force immediately before 29 June 2013;
- (c) the circumstances in which subsection 170(9B) of the Tax Act, as in force immediately before 29 June 2013, applied.

Subsection 10(2) sets out the circumstances that are prescribed for subsection 57(7) of the Act.

Subsection 57(7) of the Act provides that if after an administrative assessment of child support is made, the assessment (the **tax assessment**) of the parent's taxable income is amended (whether or not because of an objection, appeal or review), the Registrar must not amend the administrative assessment to take account of the amendment to the tax assessment unless either of the following applies:

- (a) the subsequent assessment was made because the parent had not made to the Commissioner a full and true disclosure of all the material facts necessary for the Commissioner's assessment, or in other circumstances prescribed for the purposes of this subsection;
- (b) the amendment is made solely for the purposes of working out the parent's adjusted taxable income for the last relevant year of income

for the purposes of paragraph 60(1)(b) (first estimate must be lower than adjusted taxable income).

Subsection 10(2) sets out the following circumstances that are prescribed for the purposes of subsection 57(7) of the Act:

- (a) the circumstance in which a tax assessment under the Tax Act could be amended to give effect to the provisions of the Tax Act; or
- (b) the circumstances mentioned in paragraph (1)(c).

Section 11 prescribes circumstances in relation to a parent who was unable to provide information about the parent's adjusted taxable income to the Registrar at the time the relevant administrative assessment was made.

If the circumstances applied in relation to the parent at the time of the relevant administrative assessment, the Registrar is to confirm that the circumstances made the parent unable to provide information at the time of the administrative assessment. The circumstances are as follows:

- (a) the parent did not know that an application for the assessment had been made and accepted;
- (b) the parent had a serious illness or injury;
- (c) the parent was under detention or imprisonment;
- (d) the parent resided in a remote location which made it difficult to contact the Registrar;
- (e) a natural disaster prevented the parent from being able to contact the Registrar;
- (f) there was some other exceptional circumstance that prevented the parent from providing the information.

Once the parent later provides the information to the Registrar, the Registrar can amend the administrative assessment in accordance with section 58A of the Act.

This section prescribes the following circumstances in relation to a parent who resided overseas during the last relevant year of income for the child support period for which the Registrar made the relevant administrative assessment:

- (a) the parent was not required to lodge a tax return under the Tax Act;
- (b) the parent provides the information about the parent's adjusted taxable income to the Registrar within a reasonable time in the circumstances.

Section 12 provides that an amount of income expressed in foreign currency must be converted into an equivalent amount in Australian currency for the purposes of determining a person's overseas income. The section prescribes that the equivalent amount must be worked out using the average exchange rate for the foreign currency for the financial year in which the income was derived, being the average of

the international money transfer buying rates published by the Commonwealth Bank of Australia for that currency for that financial year. Alternatively, if no such rate is available for the foreign currency for that financial year, then an exchange rate for the foreign currency that the Registrar considers appropriate can be used for the conversion of that foreign currency.

This Section is made using the necessary or convenient power as set out in paragraph 164(b) of the Act. The 'necessary and convenient' power is relied upon to support the effective operation of the Act and Regulations.

This Section is procedural and assists with calculating a person's overseas income (for the purposes of Subdivision BA of Division 7 of Part 5 of the Act). It is not inconsistent with any provisions of the Act.

Section 13 prescribes the kinds of payments paid to a person that satisfies the definition of income in subsection 66A(4) of the Act. The payments in subsection 13(2) are as follows:

- (a) an NDIS amount paid to the person;
- (b) payments, in the nature of an amenity allowance or gratuity, authorised by the Governor of a prison, paid to the person if he or she is serving a term of imprisonment in the prison, to the extent that the payment is not for:
 - (i) work done by the person inside or outside the prison; or
 - (ii) approved study undertaken by the person inside or outside the prison; or
 - (iii) participation by the person in any other program approved by the Governor;
- (c) disability support pension paid to the person under the social security law;
- (d) pension paid to the person as a veteran who is totally and permanently incapacitated as mentioned in paragraph 24(1)(b) of the *Veterans' Entitlements Act 1986*;
- (e) Special Rate Disability Pension paid in relation to the person under Part 6 of Chapter 4 of the *Military Rehabilitation and Compensation Act 2004*.

Subsection 13(3) provides that paragraphs 13(2)(c), (d) and (e) apply in relation to a pension only if the Registrar is satisfied that at least 85% of the pension is paid by, or on behalf of, the pension recipient to another person, and the other person provides ongoing care to the pension recipient in return for the payment.

Section 14 provides the formula for converting an annual rate of child support payment into a daily rate for the purposes of section 69 of the Act.

Part 5 – Consent arrangements

Section 15 provides the formulas for working out the annual rate of payment where a child support agreement refers to a periodic amount of payment.

This Section is made using the necessary or convenient power as set out in paragraph 164(b) of the Act. The ‘necessary and convenient’ power is relied upon to support the effective operation of the Act and Regulations. It is not inconsistent with any provisions of the Act.

It is necessary and convenient for these formulas to be listed in the regulations to provide certainty for the Registrar to convert periodic amounts to annual rates. These Regulations prescribe a clear method statement to provide assurance to external review bodies that a consistent approach is used in calculating an annual rate payable in a child support agreement.

Part 6 – Administration

Section 16 prescribes that if the Registrar receives notice in accordance with Article 5.2 of the Australia-New Zealand Agreement that a carer entitled to child support is habitually resident in New Zealand, then for the purposes of section 150DA of the Act the jurisdiction of the Registrar ceases in accordance with that article.

Part 7 - Miscellaneous

Section 17 prescribes scales of expenses to be allowed to a person required to attend before the Registrar under section 161 of the Act.

This section refers to amounts provided for in the *High Court Rules 2004* (High Court Rules) as in force at the commencement of this section.

The High Court Rules are made under section 86 of the *Judiciary Act 1903*. These rules prescribe the rules of procedure in proceedings in the High Court of Australia, and are available on the Federal Register of Legislation. Schedule 2 to the High Court Rules contains the relevant scales of expenses for the purposes of this section. Therefore, the amount prescribed by this section for witnesses’ expenses would be \$266.90 per hour or part thereof for each witness.

This section also allows, if a person is required to be absent overnight from his or her place of residence, an amount as is reasonable for meals and accommodation.

Section 18 prescribes the manner in which a copy of an order made under subsection 162(1) must be served on a person.

An order is validly served on a natural person by:

- (a) delivering the copy to the person personally; or
- (b) leaving the copy at, or sending the copy by prepaid post to, the address of the person last known to the proper officer of the court.

An order is validly served on a body corporate by leaving the copy at, or sending the copy by prepaid post to, the head office, a registered office or a principal office of the body corporate.

Section 19 prescribes the manner in which a notice or other communication given by or on behalf of the Registrar under the Act may be served on a person.

A notice would be validly served on a natural person by:

- (a) causing it to be personally served on the person; or
- (b) leaving it at the person's address for service; or
- (c) delivering the notice or other communication by means of electronic communication if the person has consented to receiving such notices or communications by way of electronic communication; or
- (d) sending it by prepaid post to the person's address for service.

A notice would be validly served on a body corporate by:

- (a) leaving it at the person's address for service; or
- (b) delivering the notice or other communication by means of electronic communication if the person has consented to receiving such notices or communications by way of electronic communication; or
- (c) leaving it at, or sending it by prepaid post to, the head office, a registered office or a principal office of the body corporate.

This section makes clear that if service has been attempted by use of prepaid post, then, unless the contrary is proved, service will be taken to have been effected at the time when the notice or other communication would, in the ordinary course of the post, have arrived at the place to which it was addressed.

This Section is made using the necessary or convenient power as set out in paragraph 164(b) of the Act. The 'necessary and convenient' power is relied upon to support the effective operation of the Act and Regulations.

This Section is procedural and assists with determining when service of a notice is taken to have been effected. It is not inconsistent with any provisions of the Act.

Section 20 provides that the address for service of a person is the address last notified by the person to the Registrar or the last address attributed to the person in any record held by the Registrar.

This Section is made using the necessary or convenient power as set out in paragraph 164(b) of the Act. The 'necessary and convenient' power is relied upon to support the effective operation of the Act and Regulations.

This Section is procedural and assists with working out the practicalities of how a copy of an order or a notice may be served on a person, and makes clear that electronic transmission of notices are valid. It is not inconsistent with any provisions of the Act.

Section 21 states that if a document is required to be served by an overseas authority of a reciprocating jurisdiction on a person who is in Australia, the Registrar (or a person authorised to do so on the Registrar's behalf) may serve the document on behalf of an overseas authority.

This Section will only apply if it is necessary or convenient to do so for the purposes of an international maintenance agreement with the reciprocating jurisdiction. Therefore, this Section is supported by the 'necessary or convenient' power as set out in paragraph 164(b) of the Act. It assists with the practicalities of service of documents, and it is not inconsistent with any provisions of the Act.

Section 22 provides that, for the purposes of section 162B of the Act, a notice or other communication that is required to be given to a person who is a resident of a reciprocating jurisdiction may be given to an overseas authority of the reciprocating jurisdiction. This will occur if the Registrar considers that it is desirable or appropriate to do so.

Section 23 provides rules as to when certain applications, elections or other matters required under the Act to be done in approved form are taken to have been made or received.

Subsection 23(1) states that an application for administrative assessment or for the acceptance of a child support agreement is taken to have been made on the day on which the application is received in an office of the Human Services Department.

Subsection 23(2) states that an election under section 60 of the Act, or a revocation under section 62, is taken to have been made on the day on which the form of election or revocation is received in an office of the Human Services Department.

Subsection 23(3) states that if any matter is required by the Act to be done in an approved form, the form is taken to have been received on the day on which the form is received in an office of the Human Services Department.

This Section relies on the 'necessary or convenient' power as set out in paragraph 164(b) of the Act. It is procedural and sets out the date on which an application for administrative assessment or acceptance of a child support agreement is taken to have been made. This is necessary for working out the day on which a child support period starts and the day on which child support first becomes payable under the Act. This section is also necessary for working out the start day on which an income election under section 60 of the Act is made and, conversely, for working out the day on which a revocation of an income election has been made under section 62 of the Act.

Section 24 provides that any certificate, notice or other document written, printed or stamped by the Registrar or their delegate, is taken to have been duly signed by the

Registrar and that judicial notice must be taken of the names of persons who hold or have held the office of Registrar.

This Section is made using the necessary or convenient power as set out in paragraph 164(b) of the Act. The 'necessary and convenient' power is relied upon to support the effective operation of the Act and Regulations.

This Section intends to extend the judicial notice requirement under section 158 of the Act from signatures to names, and from the Registrar to delegates of the Registrar. It is not inconsistent with any provisions of the Act.

Schedule 1 repeals the 1989 Regulations that were due to sunset on 1 April 2018. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Statement of Compatibility with Human Rights

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

Child Support (Assessment) Regulations 2018

These Regulations are 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 *Child Support (Assessment) Act 1989* (the Act) provides for the assessment of child support in accordance with an administrative formula to ensure that children receive a proper level of financial support from their parents.

Section 164 of the Act provides 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.

The purpose of the *Child Support (Assessment) Regulations 2018* (the Regulations) is to repeal and replace the *Child Support (Assessment) Regulations 1989* (the 1989 Regulations), which cease operation on 1 April 2018 due to the sunset provisions in the *Legislation Act 2003*.

The Regulations are remade in substantially the same form as the 1989 Regulations. They prescribe matters relevant to the assessment of the level of parents' child support liabilities for their children and ensure that the current arrangements for the assessment of child support remain in place. Specifically, the Regulations prescribe:

- which children are not covered by the Act;
- which foreign countries, or parts of foreign countries, are excluded reciprocating jurisdictions for the purposes of the child support scheme;
- a formula for conversion of an annual rate of child support into a daily rate of payment; and
- how the Registrar may communicate with a person or an overseas authority of a reciprocating jurisdiction.

Human rights implications

These Regulations engage the following rights:

- Article 27 of the *Convention on the Rights of the Child* (CRC)

The Regulations engage the right of a child to a standard of living adequate for the child's development.

Article 27 of the CRC recognises the right of a child to a standard of living adequate for the child's mental, spiritual, moral and social development. The parent(s) or

others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. Countries are required to take appropriate measures to assist parents and others responsible for the child to implement this right. Countries are also required to take all appropriate measures to secure the recovery of maintenance for the child from the parents or other people having financial responsibility for the child.

The Regulations are consistent with the right of the child to a standard of living adequate for the child's development as they facilitate the assessment of child support liabilities to ensure children receive a proper level of financial support from their parents.

This reflects the responsibility of the parent(s) or others responsible for the child, to secure the conditions of living necessary for the child's development, in line with their financial capacity to do so.

Conclusion

These Regulations are compatible with human rights because they advance the protection of human rights, and to the extent that they may limit access to child support, these limitations are reasonable and proportionate.

Minister for Social Services, the Hon Dan Tehan MP