

FAMILY LAW AMENDMENT (MISCELLANEOUS MEASURES) REGULATIONS

2020

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

under subsection 125(1) of the *Family Law Act 1975*

Family Law Regulations 1984

PURPOSE AND OPERATION OF THE INSTRUMENT

The purpose of this instrument is to make amendments consequential to new state legislation and a Commonwealth machinery of government change.

The *Family Law Act 1975* (the Family Law Act) concerns matters relating to the dissolution of married and de facto relationships, including divorce, parenting arrangements, property distribution, financial agreements, and child and spousal maintenance. It also deals with matters of parentage, welfare of children and the jurisdiction of the family law courts.

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

The purpose of the *Family Law Amendment (Miscellaneous Measures) Regulations 2020* (the Regulations) is to make minor and technical amendments to the *Family Law Regulations 1984* (the Family Law Regulations) to ensure that they are accurate and operate as intended; prescribing relevant state legislation and Commonwealth entities that give effect to certain Family Law Act provisions relating to parentage and Commonwealth Information Orders (CIOs). Amendments to the Regulations are required following the passage of new state legislation and a Commonwealth machinery of government change.

The Family Law Act provides that regulations may prescribe state and territory laws for the purposes of determining legal parentage in cases of artificial conception procedures and under surrogacy arrangements. This has the effect of ensuring that a child recognised as the child of a person(s) under certain state and territory laws will also be recognised as such for the purposes of the Family Law Act. The Family Law Act also provides that the Family Law Regulations can prescribe Commonwealth entities for the purposes of receiving and complying with CIOs under section 67N of the Family Law Act. CIOs are orders made by the family law courts that compel a Commonwealth department or instrumentality to provide information concerning the location of a missing child. This information is often used by the court to make further orders for the recovery of a child, or to allow for service of a parenting application.

The Regulations prescribe the *Surrogacy Act 2019* (SA) (the Surrogacy Act) for the purpose of subsection 60HB(1) of the Family Law Act which recognises parentage of children born under domestic surrogacy arrangements. This ensures that the Family Law Act can continue to operate as intended and recognise parentage arising from the new South Australian surrogacy regime.

The Regulations would also update and remove unnecessary and obsolete references to provisions in the *Family Relationships Act 1975* (SA) (the Family Relationships Act), that are prescribed under the Family Law Regulations in respect of artificial conception procedures for the purposes of section 60H of the Family Law Act. These updates reflect amendments that have been made to the Family Relationships Act, and ensure that the Family Law Act is up to date and continues to recognise the parentage of children born of artificial conception procedures in South Australia.

The Regulations also prescribe Services Australia, which was an entity created following a Commonwealth machinery of government change, as a Commonwealth entity for the purposes of receiving and complying with CIOs under section 67N of the Family Law Act.

Details of the Regulations are set out in [Attachment A](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* (Cth).

DOCUMENTS INCORPORATED BY REFERENCE

The Regulations incorporate certain provisions of South Australian legislation into the Family Law Regulations by reference. Subsection 125(1) of the Family Law Act provides legislative authority for this incorporation.

This instrument incorporates sections 10C and 10EA of the Family Relationships Act into regulation 12C of the Family Law Regulations. These provisions of the Family Relationships Act specify the rules relating to the parentage of a child conceived using an artificial fertilisation procedure for the purposes of South Australian law. Regulation 12C of the Family Law Regulations allows South Australian court orders made under these provisions of the Family Relationships Act to be recognised for the purposes of section 60H of the Family Law Act.

This instrument incorporates section 18 of the Surrogacy Act, as in force from time to time, into regulation 12CAA of the Family Law Regulations. The Family Law Regulations previously incorporated section 10HB of the Family Relationships Act into regulation 12CAA. As section 10HB of the Family Relationships Act has been repealed, this instrument clarifies that the Family Law Regulations continue to incorporate section 10HB of the Family Relationships Act, as that section was in force immediately before the commencement of section 18 of the Surrogacy Act. These provisions of the Surrogacy Act and the Family Relationships Act allow South Australian courts to make orders recognising the parentage of a child born as a result of a lawful surrogacy arrangement for the purposes of South

Australian law. Regulation 12CAA of the Family Law Regulations allows South Australian court orders made pursuant to these provisions of the Surrogacy Act and Family Relationships Act to be recognised for the purposes of section 60HB of the Family Law Act.

The Surrogacy Act is available at:

www.legislation.sa.gov.au/LZ/C/A/SURROGACY%20ACT%202019/CURRENT/2019.31.AUTH.PDF

The Family Relationships Act is available at:

www.legislation.sa.gov.au/LZ/C/A/FAMILY%20RELATIONSHIPS%20ACT%201975/CURRENT/1975.115.AUTH.PDF

CONSULTATION

The Attorney-General's Department consulted with the South Australian Attorney-General's Department in relation to updating the South Australian legislation prescribed in the Family Law Regulations, and it supports the amendments in the Regulations.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) has been consulted and have assessed the Regulations as having minor regulatory impacts. OBPR has confirmed that a Regulation Impact Statement is not required for the Regulations. The OBPR reference ID is 42645.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The 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*. A Statement of Compatibility with Human Rights is set out in Attachment B.

Details of the *Family Law Amendment (Miscellaneous Measures) Regulations 2020*

Section 1 – Name

This section provides that the title of the Regulations is the *Family Law Amendment (Miscellaneous Measures) Regulations 2020*.

Section 2 – Commencement

This section provides that the instrument commences on the later of, the date after the instrument is registered, and the date that section 18 of the *Surrogacy Act 2019* (SA) commences. This section also provides that the instrument does not commence if section 18 of the *Surrogacy Act 2019* (SA) does not commence.

Section 3 – Authority

This section provides that the *Family Law Amendment (Miscellaneous Measures) Regulations 2020* are made under the *Family Law Act 1975* (Cth) (the Family Law Act).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms.

Schedule 1 – Amendments

Family Law Regulations 1984

Items [1-2]

Subparagraph 60H(1)(b)(ii) of the Family Law Act provides that if a child is born to a woman as a result of an artificial conception procedure while the woman was married to, or a de facto partner of, another person, and under a prescribed law of the Commonwealth or a state or territory, the child is a child of the woman and of the other intended parent, then the child is the child of the woman and of the other intended parent, irrespective of whether another person provided genetic material.

Regulation 12C of the *Family Law Regulations 1984* (the Family Law Regulations) prescribes state and territory legislation that governs the parentage of a child born of an artificial conception procedure for the purposes of subparagraph 60H(1)(b)(ii) of the Family Law Act. Table item 5 of regulation 12C previously prescribed the *Family Relationships Act 1975* (SA) (the Family Relationships Act), sections 10A, 10B, 10C, 10D and 10E as relevant provisions.

Item 1 repeals the provisions listed in table item 5 and substitutes the current provisions in the Family Relationships Act that govern parentage in cases of artificial conception procedures, namely, sections 10C and 10EA.

The references to sections 10D and 10E are obsolete, given that amendments to the Family Relationships Act have removed these sections. References to sections 10A and 10B are unnecessary as they are interpretation and application provisions that would, in any case, be read together with the prescribed sections. Similarly, item 2 also omits the reference to section 10B of the Family Relationships Act in table item 4 of regulation 12CA as it is an interpretation and application provision that does not need to be prescribed. These unnecessary and outdated provisions have been removed for clarity.

Item [3]

Section 60HB of the Family Law Act provides that, in the case of children born under surrogacy arrangements, if a court has made an order under a prescribed law of a state or territory recognising that a child is a child of one or more persons, or that each of one or more persons is a parent of a child, then, for the purposes of the Family Law Act, the child is the child of each of those persons.

Regulation 12CAA of the Family Law Regulations prescribes state and territory legislation that governs the parentage of a child born under surrogacy arrangements for the purposes of subsection 60HB(1) of the Family Law Act.

Item 3 amends table item 5 of regulation 12CAA to add the *Surrogacy Act 2019* (SA) as a prescribed law, while retaining the reference to section 10HB of the Family Relationships Act, as that section was in force immediately before it was repealed. It is necessary to retain this reference to ensure that orders made under the Family Relationships Act before the commencement of the *Surrogacy Act 2019* (SA) can continue to be relied upon and recognised for the purposes of the Family Law Act.

Item [4]

Section 67N of the Act empowers the family law courts to make Commonwealth Information Orders (CIOs) that compel a Commonwealth department or instrumentality to provide information concerning the location of a missing child. This information is often used by the court to make further orders for the recovery of a child, or to facilitate service of a parenting application.

Regulation 12CB of the Family Law Regulations prescribes relevant Commonwealth entities that can be served with CIOs under paragraph 67N(3)(b) of the Family Law Act.

Following a Commonwealth machinery of government change which commenced on 1 February 2020, item 4 of this instrument updates the reference to the 'Department of Human Services' with 'Services Australia'.

Statement of Compatibility with Human Rights

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

Family Law Amendment (Miscellaneous Measures) Regulations 2020

The 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 Regulations make technical and minor amendments to the *Family Law Regulations 1984* (the Family Law Regulations) to ensure they are accurate and fit-for-purpose.

Human rights implications

The Regulations engage and support the rights set out in Articles 7 and 8 of the United Nations Convention on the Rights of the Child (CRC).

Article 7 of the CRC states that:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8 of the CRC states that:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

The Family Law Regulations are made under the Family Law Act. The Family Law Regulations prescribe information to support the operation of the Family Law Act, including relevant state and territory laws and Commonwealth entities for the purposes of certain provisions in the Family Law Act. The purpose of these amendments is to ensure that

references to prescribed laws and entities are accurate and up to date following the passage of new South Australian legislation and a Commonwealth machinery of government change.

This instrument amends regulation 12CAA of the Family Law Regulations to prescribe the new *Surrogacy Act 2019* (SA) (the new Surrogacy Act) as a relevant piece of state legislation for the purposes of section 60HB of the Family Law Act. Section 60HB operates by recognising parentage orders made under prescribed state and territory legislation for the purposes of the Family Law Act.

This amendment is necessary as the new Surrogacy Act partially repeals the *Family Relationships Act 1975* (SA) (the Family Relationships Act), which was previously prescribed under regulation 12CAA of the Family Law Regulations. While regulation 12CAA will continue to prescribe the Family Relationships Act to enable parentage orders made under the previous South Australian surrogacy regime to be recognised under the Family Law Act, it is necessary to prescribe the new Surrogacy Act to ensure that orders made under the new regime are also able to be recognised. This amendment supports the human rights set out in Articles 7 and 8 of the CRC by clarifying the legal framework for determining parentage of children born under surrogacy arrangements and ensuring that parental responsibilities and duties in relation to children are clear and continue to operate as intended. By contributing towards the comprehensive regulation of surrogacy in Australia, this amendment protects the best interests of the child and the child's right to identity.

The Regulations also make minor amendments to regulations 12C and 12CA to remove outdated references to provisions of the Family Relationships Act that have been repealed or are unnecessary. This amendment is of a technical nature and simply facilitates updates to the Family Law Regulations to ensure they remain clear and fit-for-purpose. This amendment does not involve any substantive changes to the law and therefore does not engage any human rights or freedoms.

This instrument also amends regulation 12CB to prescribe Services Australia as a relevant Commonwealth entity for the purposes of receiving Commonwealth Information Orders (CIOs) under section 67N of the Family Law Act. This amendment clarifies the interaction between the responsibilities for Services Australia to respond to CIOs under the Family Law Act and their responsibilities under other Commonwealth social services legislation. This amendment does not make any substantive changes to the law, but clarifies the operation of the existing law and therefore does not engage any rights or freedoms.

Conclusion

The Regulations are compatible with human rights as they support the human rights described under the CRC.