

***Legislation (Deferral of Sunsetting—Family Law Instruments)
Certificate 2022***

EXPLANATORY STATEMENT

Issued by the Attorney-General in compliance with
section 15G of the *Legislation Act 2003*

INTRODUCTION

The *Legislation (Deferral of Sunsetting—Family Law Instruments) Certificate 2022* (the Certificate) is made under paragraph 51(1)(c) of the *Legislation Act 2003* (Cth) (the Legislation Act). It is a legislative instrument for the purposes of the Legislation Act and must be registered on the Federal Register of Legislation.

OUTLINE

Sunsetting is the automatic repeal of legislative instruments after a fixed period. The Australian Government's sunsetting framework is established under Part 4 of Chapter 3 of the Legislation Act. The purpose of the sunsetting framework is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed.

Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration. Under paragraph 51(1)(c) of the Legislation Act the Attorney-General can issue a certificate to defer the sunsetting day of an instrument for a period of either 6, 12, 18 or 24 months. The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.

This allows instruments to continue to be in force for a further but limited period of time when they would otherwise sunset. This removes the administrative burden of remaking instruments which would have a limited duration prior to their repeal and potential replacement, or where circumstances prevent the making of replacement instruments prior to the sunsetting day.

The Certificate defers the sunsetting date of the following instruments by 12 months from 1 April 2023 to 1 April 2024 (together, the 'Family Law Instruments'):

- (a) the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth);
- (b) the *Family Law Regulations 1984* (Cth); and
- (c) the *Family Law (Superannuation) Regulations 2001* (Cth).

Pursuant to subsection 51(4) of the Legislation Act the Certificate will not be subject to the disallowance provisions of that Act as the deferred sunsetting day specified in the Certificate is on or before the first anniversary of the originally scheduled sunsetting day. Subsection 51(4) of the Legislation Act provides that a certificate of deferral is exempt from disallowance if it defers the sunsetting day of an instrument by up to 12 months.

The ability to defer sunset dates is an integral part of the sunset framework. It provides the necessary flexibility to ensure the standard 10 year sunset period does not result in unintended consequences or impose an unreasonable administrative burden on Commonwealth agencies or the Parliament. Where the deferral is for a short period (6 or 12 months), the certificate is exempt from disallowance because the instrument will shortly be reviewed and, if remade, subject to parliamentary scrutiny. Subjecting short term certificates of deferral to disallowance would undermine the flexibility afforded by their further but strictly limited postponement of sunset. In this case, the Family Law Instruments are expected to be reviewed and remade within 12 months of the current sunset date as a result of broader reviews of the *Family Law Act 1975* (Cth) (the Family Law Act). If this Certificate were to be disallowed, there would not be enough time to thoroughly review and replace the Family Law Instruments prior to the sunset day.

PROCESS BEFORE CERTIFICATE WAS MADE

Regulatory impact analysis

Certificates of deferral of sunset are machinery of government instruments, and are therefore not subject to the regulatory impact assessment requirements set out by the Office of Best Practice Regulation (OBPR). The OBPR reference for this standing exemption is ID19633.

Consultation before making

Before the Certificate was issued, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

The Attorney-General, Senator the Hon Michaelia Cash, is the relevant rule-maker for the instrument for the purposes of section 6 of the Legislation Act.

The Family Law Instruments are part of the overall federal family law system that support people to navigate the legal aspects of family separation and relationship breakdown.

In September 2017, the Australian Law Reform Commission (ALRC) received Terms of Reference to undertake an inquiry into the family law system. The ALRC delivered its final report in March 2019, ALRC Report 135: *Family Law for the Future – An Inquiry into the Family Law System*, making 60 recommendations for reform. In March 2021, the Government published a detailed response to the ALRC's report, indicating its position on each of the ALRC's recommendations. As the majority of supported recommendations require amendments to the Family Law Act or its subordinate legislation, the Government is developing legislative reforms as a priority, which will have implications for the Family Law Instruments. The Government has committed to consulting stakeholders on the details of family law reform and has since undertaken a number of public consultation processes. Additionally, the Joint Select Committee on Australia's Family Law System (the JSC) has been conducting a public inquiry and is due to deliver its final report by 16 December 2021.

Certificates of deferral are machinery in nature, and enable legislative instruments that would otherwise sunset to remain in force for a further, but strictly limited, period of time. This will minimise the administrative burden on stakeholders associated with consultation on the deferral. Any replacement instruments will be subject to further consultation and parliamentary oversight, including

oversight of whether adequate consultation occurred with persons likely to be affected by the replacement instruments.

A 12 month deferral will allow sufficient time for further consultation and the replacement instruments to be made. The deferral will avoid the need to remake the Family Law Instruments in their current form for the short period of time before they are repealed and replacement instruments made. As such, deferral of the sunseting date of the Family Law Instruments is consistent with the policy intent of the sunseting regime, and does not significantly alter existing arrangements.

Statutory preconditions relevant to the Certificate

If the statutory conditions in section 51 of the Legislation Act are met, an instrument's sunseting day can be deferred for 6, 12, 18 or 24 months by means of a certificate made under that section. In terms of process, the Legislation Act requires:

- (a) the responsible rule-maker to apply to the Attorney-General in writing, and
- (b) the Attorney-General to be satisfied that:
 - (i) the instrument would (apart from the operation of the sunseting provisions) be likely to cease to be in force within 24 months after its sunseting day
 - (ii) the proposed replacement instrument will not be able to be completed before the sunseting day for reasons that the rule-maker could not have foreseen and avoided
 - (iii) the dissolution of expiration of the House of Representatives or the prorogation of the Parliament renders it inappropriate to make a replacement instrument before a new government is formed, or
 - (iv) the Attorney-General has approved Part 4 of Chapter 3 of the Legislation Act (Sunsetting) not applying to that instrument, and
- (c) the Attorney-General to issue a certificate. The explanatory statement for the certificate must include a statement of reasons for the issue of the certificate.

The rule-maker for the Family Law Instruments is the Attorney-General, Senator the Hon Michaelia Cash. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Family Law Instruments would, apart from the operation of Part 4 of Chapter 3 of the Legislation Act, be likely to cease to be in force within 24 months after their sunseting day. As such, the criterion in subparagraph 51(1)(b)(i) of the Legislation Act is met.

Statement of Reasons for issuing of the Certificate

For the purposes of subsection 51(5) of the Legislation Act this section sets out the statement of the reasons for issuing the Certificate.

Of relevance to each of the Family Law Instruments, a 12 month deferral of the sunseting day will allow sufficient time to complete a review of the regulations, consult with stakeholders and work with the Office of Parliamentary Counsel to prepare replacement regulations. The Office of Parliamentary Counsel has indicated that, for regulations of this size, at least 12-18 months should be allowed following the receipt of drafting instructions.

Family Law Regulations 1984 (the Regulations)

The Regulations prescribe matters of practice and procedure in the federal family law courts and other courts exercising jurisdiction under the Family Law Act. This includes matters pertaining to parentage testing; registration of overseas orders; the conferral of family law jurisdiction on certain state or territory courts; regulating who can conduct family law arbitration; and prescribing relevant state and territory laws and agencies to facilitate the Act's operation. As there is an ongoing need for such matters to be prescribed, the Regulations will need to be replaced before they sunset.

The review of the family law system conducted by the ALRC made 44 recommendations for legislative amendments to the Family Law Act or the Regulations. The Government has indicated its agreement with a number of the ALRC's recommendations. The majority of the Government-supported recommendations require legislative amendments, which are being progressed as a matter of priority. Additionally, the JSC is conducting an inquiry into the family law system and is due to deliver its final report by 16 December 2021.

Amendments to the Family Law Act are likely to require consequential amendments to the Regulations to update certain aspects of family law practice and procedure. Should the Parliament pass amendments to the Act in 2022, the timeframe for making consequential amendments to the Regulations may extend beyond the current sunset date of 1 April 2023.

A 12 month deferral would also help ensure that any regulatory amendments identified through the sunset review can be aligned with amendments arising from work the Government is progressing in response to the ALRC and JSC inquiries.

Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (the FDR Regulations)

The FDR Regulations are also made under the Family Law Act. The Attorney-General's Department (AGD) accredits and regulates family dispute resolution (FDR) practitioners under the FDR Regulations. To be called an FDR practitioner, individuals must meet the accreditation standards in the FDR Regulations. An FDR practitioner is an independent person who helps people affected by separation or divorce to resolve their parenting and property disputes.

It is likely that through a sunset review, regulatory amendments will be identified to ensure the FDR Regulations implement existing government policy and practice, and that they operate as intended. The FDR Regulations were made in 2008, and need to be completely replaced, rather than revised, to ensure that they adhere to current legislative drafting conventions. A review to inform the replacement of the FDR Regulations will be a significant piece of work, requiring AGD to consult broadly and draw on the expertise of others, including FDR practitioners, professional associations, higher education providers and Registered Training Organisations.

A 12 month deferral would help ensure that any regulatory amendments identified through the sunset review can be aligned with consequential amendments arising from amendments to the Family Law Act relating to FDR. Should amendments to the Act be passed by the Parliament in 2022, the timeframe for making consequential amendments to the FDR Regulations may extend beyond the current sunset date of 1 April 2023.

Family Law (Superannuation) Regulations 2001 (the Superannuation Regulations)

The Superannuation Regulations support the operation of Part VIII B of the Family Law Act to enable superannuation interests to be valued and divided when parties to a marriage or de facto relationship separate. The Superannuation Regulations and subordinate instruments provide the different methods of valuing most superannuation interests, the way in which a payment split is to be put into effect, and the information about superannuation interests that superannuation trustees must provide parties to proceedings.

The review of the Superannuation Regulations is a significant piece of work, requiring AGD to consult widely and draw on the expertise of others. The Superannuation Regulations are lengthy and complex, due in part to the actuarial methods and factors they provide for valuing superannuation for the purposes of family law.

AGD has identified the need for a comprehensive review of the actuarial methods and factors contained in the Superannuation Regulations and subordinate instruments to ensure the underlying methods and factors reflect current economic and demographic assumptions and are effective in providing accurate valuations of superannuation interests for the purposes of family law. The methods and factors have not been reviewed since they were first calculated in 2001 and may not be up-to-date.

Reviewing the factors will involve a considerable amount of work and time, requiring AGD to procure and engage external actuarial expertise. The review of the Superannuation Regulations will necessitate a review of each of the subordinate instruments. This work is likely to continue past the April 2023 sunset date. Upon its completion, legislative amendments implementing the findings of the review will be progressed.

A 12 month deferral would help ensure that any regulatory amendments identified through the sunset review can be aligned with consequential amendments arising from legislative amendments to the Family Law Act relating to superannuation. Should amendments to the Act be passed by the Parliament in 2022, the timeframe for making consequential amendments to the Superannuation Regulations may extend beyond the current sunset date of 1 April 2023.

More information

Further details on the provisions of the Certificate are provided in [Attachment A](#).

The Family Law Instruments which are subject to the Certificate, and which will now sunset at a later day as specified in the Certificate, are available on the Federal Register of Legislation.

Further information may be requested from AGD about the operation of the Certificate and the Family Law Instruments.

ATTACHMENT A

NOTES ON THE CERTIFICATE

Section 1 Name

This section provides that the Certificate is named the *Legislation (Deferral of Sunsetting—Family Law Instruments) Certificate 2022*. The Certificate may be cited by this name.

Section 2 Commencement

This section provides for the Certificate to commence on the day after it is registered.

Section 3 Authority

This section provides that the Certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003*.

Section 4 Deferral of sunseting

This section provides that the following instruments, for which the sunseting day is 1 April 2023, are repealed by section 51 of the *Legislation Act 2003* on 1 April 2024:

- the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*;
- the *Family Law Regulations 1984*; and
- the *Family Law (Superannuation) Regulations 2001*.

Section 5 Repeal of the instrument

This section provides that the Certificate is repealed at the start of 2 April 2024.