

FAMILY LAW (CHILD ABDUCTION CONVENTION) AMENDMENT (FAMILY VIOLENCE) REGULATIONS 2022

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

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

Family Law (Child Abduction Convention) Regulations 1986

PURPOSE AND OPERATION OF THE INSTRUMENT

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

Section 111B of the Act provides that the regulations may make such provision as is necessary or convenient to enable Australia to perform its obligations, or obtain any advantage or benefit, under the 1980 *Hague Convention on the Civil Aspects of International Child Abduction* (the Convention). The Convention deals with the civil, not criminal, aspects of international child abduction.

Regulation 1A of the *Family Law (Child Abduction Convention) Regulations 1986* (the Principal Regulations) provides that the purpose of the Regulations is to give effect to section 111B of the Act, and that the Regulations are to be construed having regard to the principles and objects of the Convention.

The objects of the Convention are to secure the prompt return of children wrongfully removed to or retained in any Convention country, and to ensure that rights of custody and access to children under the laws of a Convention country are effectively respected in the other Convention countries. Australia signed and ratified the Convention on 25 October 1986, and the Convention came into force in respect of Australia on 1 January 1987.

The Principal Regulations prescribe information to support the operation of the Family Law Act with respect to matters arising under the Convention.

The purpose of the *Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022* (the Amendment Regulations) is to amend the Principal Regulations to clarify the operation of the Convention in Australia through its implementing legislation. In particular, the Amendment Regulations seek to clarify the judicial handling of family violence risks in matters brought under the Convention, and codify judicial good practice. Specifically, the Amendment Regulations:

- clarify that court consideration of the ‘grave risk defence’ in paragraph 16(3)(b) can include consideration of any risk that the child would be subjected or exposed to family violence, regardless of whether the court is satisfied that family violence has occurred, will occur or is likely to occur;
- clarify that the court can include conditions on a return order for the purposes of reducing a risk under paragraph 16(3)(b) of the Regulations (being a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation), regardless of whether the court considers that the risk will eventuate, is likely to eventuate or has eventuated in the past;
- add a non-exhaustive list of considerations that the court may have regard to when considering whether to include a condition in a return order or other order made to give effect to the Convention; and
- require that where the court is considering whether to refuse to make a return order on the basis of the grave risk defence, and a party to the proceedings raises a condition that could be included for the purpose of reducing a paragraph 16(3)(b) risk, that the court must consider whether it is appropriate to include the condition.

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

The Act specifies no conditions that need to be met before the power to make Regulations may be exercised.

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* (Cth). The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

A person who is dissatisfied with a judicial decision made under the Principal Regulations, once amended, could seek to appeal that decision in accordance with the appeal procedures set out in the Act.

CONSULTATION

Consistent with the requirements of the *Legislation Act 2003*, the Amendment Regulations have been informed by consultation with State Central Authorities, which have responsibilities under the Principal Regulations, as well as other relevant Commonwealth government bodies. The Attorney-General’s Department consulted with the Federal Family and Circuit Court of Australia and the Family Court of Western Australia, who support the proposed Amendment Regulations. The Attorney-General’s Department also consulted internally, including with the Office of International Law, Human Rights Unit, and the Australian Government Solicitor in alignment with OPC drafting direction 4.2 – Referral of drafts to agencies.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) has been consulted and has assessed the Amendment Regulations as unlikely to have a more than minor regulatory impact. OBPR has confirmed that a Regulation Impact Statement is not required for the Regulations. The OBPR reference ID is OBPR22-03655.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Details of the Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022 (Cth)

FAMILY LAW (CHILD ABDUCTION CONVENTION) AMENDMENT REGULATIONS

Section 1 – Name

This section provides that the title is the Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022 (Cth) (the Amendment Regulations).

Section 2 – Commencement

This section provides that the Amendment Regulations commence the day after they are registered.

Section 3 – Authority

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

Section 4 – Schedules

This regulation provides that the Family Law (Child Abduction Convention) Regulations 1986 (the Principal Regulations) are amended as set out in Schedule 1.

Schedule 1 – Amendments

Family Law (Child Abduction Convention) Regulations 1986

Item [1]: New subregulation 15(5), 15(6) and 15(7)

Subregulation 15(1) of the Principal Regulations states that the court may, if it is satisfied it is desirable to do so, make an order in relation to an application under regulation 14. Such an order can be of a kind mentioned in regulation 14 or an order the court considers appropriate to give effect to the Convention (together, ‘Convention orders’). Paragraph 15(1)(c) provides that courts may include in these orders a ‘condition’ that the court considers appropriate to give effect to the Convention.

Item 1 inserts a new subregulation 15(5) as an avoidance of doubt provision, to make clear that courts can include a condition in a Convention order, or make a Convention order, for the purpose of reducing a risk under paragraph 16(3)(b). The amendment notes that this is regardless of whether the court is satisfied that the risk will eventuate, is likely to eventuate or has eventuated in the past.

Item 1 inserts a new subregulation 15(6) to codify a non-exhaustive list of principles that the court may have regard to when considering whether to include a condition in a Convention order. These principles are drawn from those set out by the courts in *Commonwealth Central*

Authority v Sangster [2018] FamCA 765 at [166], and *State Central Authority v Del Rosario* [2019] FamCA 607 at [27].

New subregulation 15(7) notes that these factors are not intended to be exhaustive and the court may have regard to other matters when considering whether to include a condition in a Convention order.

Item [2]: Statutory notes at the end of subregulation 16(3)

Subregulation 16(3) of the Principal Regulations outlines the circumstances in which the court may refuse to make a return order. Paragraph 16(3)(b) states that the court may refuse to make a return order if a person opposing the return establishes that there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (the ‘grave risk defence’).

Item 2 inserts two statutory notes at the end of subregulation 16(3). The first is a statutory note to clarify that family violence can be taken into account in considering whether the grave risk defence has been established. The note states that in this context, the court may have regard to any risk that the return of the child under the Convention would result in the child being subject to, or exposed to, family violence, as well as the extent to which the child could be protected from any such risk if the child was returned under the Convention. The note states that the court may have regard to these matters regardless of whether the court is satisfied that family violence has occurred, will occur or is likely to occur.

The second statutory note stipulates that family violence is defined in section 4AB of the *Family Law Act 197* (Cth).

Item [3]: New subregulations 16(6), 16(7) and 16(8)

Regulation 16 of the Principal Regulations sets out the circumstances in which the court is obligated to make an order for the return of a child (Convention order) and the circumstances in which the court may refuse to make a Convention order. Item 3 inserts three new provisions to clarify the considerations that the court may have regard to for the purpose of reducing a risk under paragraph 16(3)(b) and when considering whether to refuse to make a Convention order on the basis of a matter mentioned in paragraph 16(3)(b) (the grave risk defence).

New subregulation 16(6) states that where a party to the proceedings or an independent children’s lawyer raises, in the proceedings, a condition on a return order for the purpose of reducing a risk under paragraph 16(3)(b), the court must consider whether it would be appropriate to include the condition in a Convention order.

New subregulation 16(7) clarifies that the court may have regard to any other measures that would be reasonably likely to reduce the risk mentioned in paragraph 16(3)(b) when considering whether to refuse to make a return order.

New subregulation 16(8) clarifies that these two new subregulations are not intended to limit the matters to which the court may have regard when considering whether to refuse to make a return order on the basis of the grave risk defence.

Item [4]: Saving provision

Item 4 clarifies that the Amendment Regulations apply only to applications made after the commencement of the instrument. Applications that were made under regulation 14 of the Principal Regulations prior to commencement should treat the Principle Regulations as if the Amendment Regulations has not been made.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

FAMILY LAW (CHILD ABDUCTION CONVENTION) AMENDMENT (FAMILY VIOLENCE) REGULATIONS 2022

This Disallowable 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 Instrument

The *Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022* ('the Instrument') would amend the *Family Law (Child Abduction Convention) Regulations 1986* ('the Primary Regulations') to codify the current way that family violence is considered in cases arising under the Primary Regulations and the 1980 *Hague Convention on the Civil Aspects of International Child Abduction* ('the Convention').

The Primary Regulations are made under the *Family Law Act 1975* (Cth) ('the Family Law Act'). The Primary Regulations prescribe information to support the operation of the Family Law Act with respect to matters arising under the Convention.

The Instrument amends regulation 15 of the Principal Regulations to make it clear that courts can impose conditions or make an order to give effect to the Convention for the purpose of reducing a risk under paragraph 16(3)(b) of the Principal Regulations, regardless of whether the court considers that the risk will eventuate, be likely to eventuate or has eventuated in the past.

This Instrument also amends regulation 15 of the Principal Regulations to establish a list of non-exhaustive principles to which the court may have regard when considering whether to impose conditions in a Convention order.

This Instrument further inserts an explanatory note following regulation 16 of the Principal Regulations to make clear that 'family violence' can be considered in the context of assessing the grave risk defence in regulation 16(3)(b). The explanatory note confirms that the court may have regard to any risk that the return of the child under the Convention would result in the child being subject to, or exposed to, family violence, as well as the extent to which the child could be protected from any such risk if they were returned under the Convention. The explanatory note states that the court may have regard to these matters regardless of whether the court is satisfied that family violence has occurred, will occur or is likely to occur. A second explanatory note explains that 'family violence' should be defined by its definition in section 4AB of the Family Law Act.

This Instrument also includes new non-exhaustive considerations that the court may have regard to, for the purpose of reducing a risk under paragraph 16(3)(b) and when considering whether to refuse to make a return order on the basis of matter the mentioned in paragraph 16(3)(b).

Human Rights Implications

The Instrument engages the following human rights:

- The right to respect for the family (Articles 16(1) and (2) of the Convention on the Rights of the Child ('CRC'), Articles 17(1) and 23(1) of the International Covenant on Civil and Political Rights ('ICCPR') and Article 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'));
- The right to protection from exploitation, violence, abuse (Articles 11(1), 19(1) and (2) of the CRC); and
- The rights of parents and children (Articles 9(1), 12(1) and 1(2) of the CRC and Article 16 of the CEDAW).

The right to respect for the family

In relation to the right to respect for the family, the CRC provides that:

- No child shall be subjected to arbitrary or unlawful interference with his or her family (Article 16(1)); and
- The child has the right to the protection of the law against such interference or attacks (Article 16(2)).

The ICCPR further provides that:

- No one shall be subjected to arbitrary or unlawful interference with their family (Article 17(1));
- Everyone has the right to the protection of the law against such interference or attacks (Article 17(2)); and
- The family is the natural and fundamental group unit of society and is entitled to protection by society and the State (Article 23(1)).

The Instrument does not provide for arbitrary or unlawful interference with a family or children. The proposed Regulations enhance the right of the child and family to protection by the State.

The Instrument serves to enhance the safety of women and children fleeing family violence by clarifying the protections available to them against any arbitrary or unlawful interference that could be associated with a return to an intolerable situation. Where allegations of family violence are substantiated, these amendments affirm that the court has discretion not to return children to an unsafe environment, which positively engages the right of children to be protected by the law from unlawful interference.

The Instrument further provides a non-exhaustive list of guiding principles that the court may consider when imposing protective conditions upon return orders. The codification of these principles provides additional safeguards against conditions being used arbitrarily, disproportionately or unlawfully to hamper the return of a child under the Convention.

The Instrument would not undermine the family as the natural and fundamental group unit of society. Instead, the Instrument seeks to clarify the protective measures available to family units who are subject to unlawful interference in the form of family violence.

The Instrument is not arbitrary and it seeks to lawfully protect individuals and children from violence within their family units.

Further, in relation to the right to respect for the family, the CEDAW provides that:

- States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount (Article 16(1)(d)).

The codification of the court's treatment of family violence in the context of the grave risk defence will positively engage the right of women to not be discriminated against and ensure their equal treatment in the course of resolving disputes under the Convention involving allegations of family violence.

This express codification will ensure that litigants and their representatives are aware of how the court considers family violence in Convention cases. This clarity will primarily benefit women, as they are disproportionately subjected to family and domestic violence.

While there is no reference to gender or sex in the Instrument or in the Primary Regulations, the practical effect of the amendments will be to enhance the right of women to be protected from discrimination on the grounds of gender-based violence.

Further, the Instrument positively engages the right of women to not be discriminated against in matters relating to family relations in accordance with Article 16(1)(d) of the CEDAW. The Instrument would promote appropriate legal outcomes where a respondent mother has not contributed to the violence, abuse or neglect, and has indeed attempted to remove herself and her child/ren from an intolerable situation. Observable trends in Australian cases over recent years indicate that a growing number of female respondents in Convention matters raise allegations of family violence during those proceedings. A specific reference to family violence in the Primary Regulations would promote the protection of equal access for women to parenting rights and responsibilities over their children in circumstances involving family violence.

The evidence requirements for proving family violence allegations are consistent with those already provided for in the Family Law Act, the *Family Law Regulations 1984* (Cth), and the Primary Regulations.

The Instrument positively engages with and supports the right to respect for the family found within the CRC, the ICCPR and the CEDAW.

The right to protection from exploitation, violence, and abuse:

In relation to the right for children to be protected from all forms of physical or mental violence, the CRC provides that:

- States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child (Article 19(1)); and

- Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement (Article 19(2)).

The codification of the ‘grave risk’ defence to explicitly encompass subjection and exposure to family violence positively engages the right of protection from exploitation, violence and abuse. The Instrument clarifies that where there is evidence of family violence, such that there is a grave risk that returning the child would place the child at risk of harm or otherwise place them in an intolerable situation, the court may refuse to issue a return order. This aligns with CRC obligations to take appropriate legislative measures to protect children from exploitation, violence and abuse.

The Principal Regulations, consistent with the preamble to the Convention, provide for the prompt return of abducted children, to minimise the harmful effects of international child abduction and discourage its occurrence. Safety risks associated with such returns can be mitigated through the use of protective measures. The Instrument seeks to clarify the discretion available to the courts in relation to the use of protective measures or ‘conditions’.

The Instrument provides that ‘family violence’ is as defined by section 4AB (2) of the Family Law Act. Family violence encompasses a broad range of behaviours as defined by section 4AB (2) of the Act, and includes, but is not limited to, ‘assault, sexual assault... intentionally damaging property... unreasonably denying a family member financial autonomy, unreasonably withholding financial support, and unlawfully depriving a family member of their liberty.’ Under section 4AB (3) of the Act, a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence. This definition of family violence accords with the behaviours that a child has a right to be protected from that are articulated in Article 19(1) of the CRC.

As a result, the Instrument positively engages the right to protection from exploitation, violence and abuse through (i) the inclusion of the statutory note expressly providing that family violence can be taken into account in considering the grave risk defence, and (ii) a statutory note linking to the definition of family violence in the Family Law Act, which is consistent with the behaviours that the CRC articulates children have the right to be protected from.

The CRC also provides that:

- States Parties shall take measures to combat the illicit transfer and non-return of children abroad (Article 11(1)); and
- To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements (Article 11(2)).

The Instrument promotes the rights set out at Article 11 of the CRC. The Convention and the Principal Regulations provide for the prompt return of abducted children and seek to both minimise the harmful effects of international child abduction and to discourage its occurrence. The Instrument does not alter, change or amend this fundamental purpose of the Convention or of the Principal Regulations. Further, not every Convention matter heard by a

court where family violence is alleged and established will result in a non-return order being imposed.

The rights of parents and children:

In relation to the rights of parents and children, the CRC provides that:

- States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence (Article 9(1));
- States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child (Article 12(1));
- For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law (Article 12(2)).

The Instrument promotes the Article 9(1) right articulated in the CRC by codifying the courts' approach to considering allegations of family violence in Convention cases. Such allegations may result in the making of an order that results in the separation of a child from one of its parents, however this is consistent with the exception provided for in Article 9(1) of the CRC. Therefore, the amendment shall have the effect of promoting this right. In instances where the child is returned to their state of habitual residence, contact with both parents can be maintained in appropriate cases, thereby ensuring this right is not infringed upon.

In relation to Article 12 of the CRC, the Instrument codifies that where an independent children's lawyer representing the interests of the child proposes that a protective measure be included, the court must consider including such measure. This provision therefore promotes the views of the child being heard and considered during proceedings.

Conclusion

The Instrument is compatible with human rights because it advances the protection and enjoyment of human rights provided for under the CRC, CEDAW and ICCPR.