

**FAMILY LAW AMENDMENT (RECOGNITION OF SURROGACY PARENTAGE
ORDERS) REGULATIONS 2022**

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

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

PURPOSE AND OPERATION OF THE INSTRUMENT

The purpose of this instrument is to make amendments to regulation 12CAA of the *Family Law Regulations 1984* (the Principal Regulations) to prescribe relevant Northern Territory (NT) and Tasmanian legislative provisions that provide for parentage orders to be made by a court for certain children born of surrogacy. Prescribing these provisions enables state and territory parentage orders to be recognised for the purposes of the *Family Law Act 1975* (Family Law Act).

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 courts exercising family law jurisdiction. 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.

Section 60HB(1) of the Family Law Act provides that regulations may prescribe state and territory laws for the purposes of determining legal parentage for children born of surrogacy. This has the effect of ensuring that a child born of surrogacy 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 legal parentage of a child is important for establishing who has obligations pertaining to the care of and decisions concerning children, and who may apply for certain parenting and child welfare orders, under the Family Law Act.

Regulation 12CAA – Children Born Under Surrogacy Arrangements – Prescribed Laws, of the Principal Regulations prescribes state and territory laws for the purposes of recognising legal parentage under surrogacy arrangements.

Following the passage of the *Surrogacy Act 2022* (NT) (the Surrogacy Act (NT)), and identification of an omission of section 22 in the prescribed *Surrogacy Act 2012* (TAS) (Surrogacy Act (TAS)), amendments were required to regulation 12CAA of the Principal Regulations.

The *Family Law Amendment (Recognition of Surrogacy Parentage Orders) Regulations 2022* (the Regulations) prescribe section 34 of the Surrogacy Act (NT) and sections 16 and 22 of the Surrogacy Act (TAS) under Regulation 12CAA of the Principal Regulations for the purpose of subsection 60HB(1) of the Family Law Act. This ensures that the Family Law Act can continue to operate as intended and recognise the legal parentage of children born of surrogacy arising under relevant state and territory legislation. Details of the Regulations are set out in [Attachment A](#).

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

The Regulations recognise certain provisions of the Surrogacy Act (NT) and the Surrogacy Act (TAS). Subsection 125(1) of the Family Law Act provides legislative authority for this recognition.

The intention of the Regulations is for regulation 12CAA of the Principal Regulations to recognise an order made under section 34 of the Surrogacy Act (NT) as in force from time to time. The Surrogacy Act (NT) provides a regime for lawful surrogacy in the NT and includes provisions providing for parentage orders. Section 34 allows NT courts to make orders recognising the parentage of a child born as a result of a lawful surrogacy arrangement for the purposes of NT law. The Regulations allow NT court orders made pursuant to section 34 of the Surrogacy Act (NT) to be recognised for the purposes of section 60HB of the Family Law Act.

The Surrogacy Act (NT) received assent on 26 May 2022, and will commence by proclamation, or on 21 March 2024, whichever is earliest. The Surrogacy Act (NT) is available at: <https://legislation.nt.gov.au/en/Bills/Surrogacy-Bill-2022-S50?format=assented>.

A further intention of the Regulations is for regulation 12CAA of the Principal Regulations to retain recognition of section 16 and recognise an order made under section 22 of the Surrogacy Act (TAS) as in force from time to time. The Surrogacy Act (TAS) provides a regime for lawful surrogacy in Tasmania and includes provisions for parentage orders. Section 16 empowers a relevant state court to make orders as to parentage of a child born as a result of a lawful surrogacy agreement under the Act. Section 22 empowers a relevant state court to make orders as to parentage of a child born as a result of a lawful surrogacy agreement made before the Surrogacy Act (TAS) commenced (i.e. prior to 2012). The Regulations allow Tasmanian court orders made pursuant to sections 16 and 22 of the Surrogacy Act (TAS) to be recognised for the purposes of section 60HB of the Family Law Act. The Surrogacy Act (TAS) is available at: <https://www.legislation.tas.gov.au/view/html/inforce/current/act-2012-034>

CONSULTATION

In August 2022 the NT Government requested amendments to regulation 12CAA of the Principal Regulations to prescribe relevant sections of the Surrogacy Act (NT) to enable courts exercising family law jurisdiction to recognise NT parentage orders for children born of surrogacy.

The Attorney-General's Department consulted the Tasmanian Department of Justice on amending regulation 12CAA of the Principal Regulations to include section 22 of the Surrogacy Act (TAS) which, in addition to section 16 that is currently prescribed, also provides for a court to make parentage orders. Officers from the Tasmanian Department of Justice have advised that they have no concerns with the proposed changes to regulation 12CAA to also prescribe section 22 of the Surrogacy Act (TAS).

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) have assessed the Regulations as having minor regulatory impact. OBPR has confirmed that a Regulation Impact Statement is not required for the Regulations. The OBPR reference ID is OBPR22-03606.

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 (Recognition of Surrogacy Parentage Orders) Regulations 2022

Section 1 – Name

This section provides that the title of the Regulations is the *Family Law Amendment (Recognition of Surrogacy Parentage Orders) Regulations 2022*.

Section 2 – Commencement

This section provides that the instrument commences on the day after registration on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Regulations are made under the *Family Law Act 1975* (the 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]

Section 60HB of the 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 Act, the child is the child of each of those persons.

Regulation 12CAA of the *Family Law Regulations 1984* 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 Act.

Item 1 amends table item 7 of regulation 12CAA to omit “section 16” and substitute “sections 16 and 22” of the *Surrogacy Act 2012* (TAS) as a prescribed law. The purpose is to retain recognition of parentage orders made under section 16, and address an omission by recognising parentage orders made under section 22 of the Surrogacy Act (TAS) which empowers the state court(s) to make a parentage order in connection to a surrogacy arrangement made before the Act commenced i.e. prior to 2012. The effect of this

amendment is that the parents of a child as recognised under sections 16 and 22 parentage orders are also recognised as parents for the purposes of the Act.

Item 2 adds table item 8 of regulation 12CAA to add “*Surrogacy Act 2022 (NT), section 34*” as prescribed law. This is to ensure that parentage orders made under section 34 of the Surrogacy Act (NT), which provide who are the parents of a child born through surrogacy, are also recognised as parents for the purposes of the Act.

Statement of Compatibility with Human Rights

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

Family Law Amendment (Recognition of Surrogacy Parentage Orders) Regulations 2022

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 amendments to the *Family Law Regulations 1984* (Principal 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 Principal Regulations are made under the *Family Law Act 1975*. The Principal Regulations prescribe information to support the operation of the Family Law Act, including relevant state and territory laws for the purposes of certain provisions in the Family Law Act. Section 60HB of the Family Law Act operates by recognising parentage orders made under

prescribed state and territory surrogacy legislation for the purposes of the Family Law Act. This facilitates consistency in the recognition of parentage of children born through surrogacy under state, territory and Commonwealth laws.

The purpose of the Regulations is to ensure that the prescribed state and territory laws concerning the making of parentage orders for children born of surrogacy are accurate and up to date following the passage of new Northern Territory surrogacy legislation and the identification of an omission in the prescribed Tasmanian surrogacy legislation. This instrument amends regulation 12CAA of the Principal Regulations to prescribe the relevant parentage orders provision (section 34) in the *Surrogacy Act 2022* (NT) as relevant for the purposes of section 60HB of the Family Law Act. The instrument also amends the Principal Regulations to prescribe an additional section (section 22) of the *Surrogacy Act 2012* (TAS) as relevant for the purposes of section 60HB of the Family Law Act in order to cover an omission in the recognition of parentage orders.

These amendments support 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 and recognition of parentage for children born of lawful surrogacy, these amendments protect the best interests of the child and the child's right to identity.

Conclusion

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