

FAMILY LAW (BILATERAL ARRANGEMENTS – INTERCOUNTRY ADOPTION) (REPEALS AND CONSEQUENTIAL AMENDMENTS) REGULATIONS 2023

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

under the *Australian Citizenship Act 2007*, *Family Law Act 1975*
and *Migration Act 1958*

Purpose

The *Family Law (Bilateral Arrangements – Intercountry Adoption) (Repeals and Consequential Amendments) Regulations 2023* (regulations) repeal the *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998* (1998 regulations), which are sunsetting on 1 April 2023. These are being remade as the *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 2023* (2023 regulations) in substantially the same terms.

The regulations also make minor consequential amendments to the *Australian Citizenship Regulation 2016* and the *Migration Regulations 1994*, to update the references to the 1998 regulations to the 2023 regulations.

Background

1998 regulations and 2023 regulations

The 1998 regulations facilitate Australia’s bilateral arrangements for intercountry adoptions with “prescribed overseas jurisdictions”.

The 1998 regulations are sunsetting on 1 April 2023, and are being remade as the 2023 regulations in substantially the same terms. The 2023 regulations are made under the *Family Law Act 1975*, and provide that adoptions made under the laws of a prescribed overseas jurisdiction are recognised for the purposes of Australian law. The 2023 regulations also provide that an adoption compliance certificate issued by a competent authority in a prescribed overseas jurisdiction is evidence that the adoption was carried out in accordance with the laws of that jurisdiction.

The 2023 regulations prescribe two countries as “prescribed overseas jurisdictions”, to ensure that intercountry adoptions from those countries are recognised in Australia.

Regulations

The regulations repeal the 1998 regulations, which are due to sunset on 1 April 2023.

The regulations also update references to the 1998 regulations, to instead refer to the 2023 regulations, in the *Australian Citizenship Regulation 2016* and the *Migration Regulations 1994*.

Authority

The regulations are made under subsection 125(1) of the *Family Law Act 1975*, which provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or are necessary or convenient for carrying out or giving effect to that Act. Subsection 111C(3) of the *Family Law Act 1975* provides that the regulations may make such provision as is necessary or convenient to enable Australia to give effect to any bilateral agreement or arrangement on the adoption of children made between Australia, or a State or Territory of Australia, and a prescribed overseas jurisdiction.

The regulations are also made under section 54 of the *Australian Citizenship Act 2007* and subsection 504(1) of the *Migration Act 1958*.

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. The regulations rely on this subsection as the basis for repealing the 1998 regulations and amending the *Australian Citizenship Regulation 2016* and the *Migration Regulations 1994*.

Information sharing

The collection, use, recording, disclosure and security of information about individuals is subject to the Australian Privacy Principles in the *Privacy Act 1988*.

Availability of independent review

The regulations are a legislative instrument for the purposes of the *Legislation Act 2003* and are subject to disallowance.

Commencement

The regulations commence at the same time as the *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 2023* commence. This is the day after registration of the 2023 regulations on the Federal Register of Legislation.

Consultation

The Department of Social Services consulted with the Attorney-General's Department and the Department of Home Affairs on the text of the regulations. These departments are best placed to provide comments on the proposed provisions given their portfolio responsibilities.

The Department of Social Services also consulted with each State and Territory Central Authority for intercountry adoption on the intention to make the regulations.

Impact Analysis

The Office of Impact Analysis has advised that an Impact Analysis is not required as the regulations are unlikely to have more than a minor regulatory impact (OBPR22-03868).

Explanation of the provisions

Part 1 - Preliminary

Section 1 – Name

This section provides that the name of the regulations is the *Family Law (Bilateral Arrangements – Intercountry Adoption) (Repeals and Consequential Amendments) Regulations 2023*.

Section 2 - Commencement

This section provides that the regulations commence at the same time as the *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 2023* commence. This is the day after the 2023 regulations are registered on the Federal Register of Legislation.

Section 3 - Authority

This section provides that the authority for making the regulations is the *Australian Citizenship Act 2007*, the *Family Law Act 1975* and the *Migration Act 1958*.

Section 4 – Schedules

Section 4 provides that each instrument specified in the Schedule to the regulations is amended or repealed as set out in the applicable items in the Schedule, and any other item in the Schedule has effect according to its terms.

Schedule 1 – Repeals and amendments

Part 1 - Repeals

Item 1 of Schedule 1 provides that the whole of the *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998* are repealed.

The 1998 regulations are due to sunset on 1 April 2023. These are being remade as the *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 2023*, in substantially the same terms as the 1998 regulations.

The 2023 regulations would continue to facilitate Australia's bilateral arrangements for intercountry adoptions with prescribed overseas jurisdictions, and would not intend to change the effect of the 1998 regulations.

Part 2 – Amendments

Part 2 contains consequential amendments to update references to the 1998 regulations, which are repealed by item 1 of Schedule 1, to instead refer to the 2023 regulations.

Item 2 of Schedule 1 amends subsection 6A(1) of the *Australian Citizenship Regulation 2016*. The reference to the 1998 regulations is removed and replaced with the name of the 2023 regulations.

Items 3 to 6 of Schedule 1 amend the *Migration Regulations 1994*.

Item 3 amends the definitions of “adoption compliance certificate” and “bilateral adoption arrangement” in regulation 1.03 of the *Migration Regulations 1994*. In these definitions, the references to the 1998 regulations are removed and replaced with references to the 2023 regulations.

Item 4 amends subparagraph (a)(ii) of the definition of “competent authority” in regulation 1.03 in the *Migration Regulations 1994*. This relates to the case of an adoption to which a bilateral adoption arrangement applies.

In subparagraph (a)(ii), the reference to the 1998 regulations is removed. Instead, in this case “competent authority” in subparagraph (a)(ii) is amended to mean a competent authority within the meaning of paragraph (b) of the definition of “competent authority” in subsection 4(1) of the 2023 regulations. This paragraph (b) applies in the case of an Australian State or Territory in which a person adopting a child habitually resides, and provides that “competent authority” means a person, body or office in the State or Territory responsible for approving the adoption of children.

Item 5 repeals paragraph (c) of the definition of “competent authority” in regulation 1.03 of the *Migration Regulations 1994*, and substitutes a new paragraph. This applies in the case of an overseas jurisdiction that is declared under section 5 of the 2023 regulations to be a prescribed overseas jurisdiction for the purposes of those regulations. In this case, “competent authority” in paragraph (c) means a person, body or office in the prescribed overseas jurisdiction responsible for approving the adoption of children.

Item 6 amends subparagraph 102.211(4)(d)(ii) of Schedule 2 to the *Migration Regulations 1994*. The reference to regulation 5 of the 1998 regulations is removed and replaced with a reference to section 7 of the 2023 regulations. Due to some structural changes when remaking the 1998 regulations, section 7 of the 2023 regulations, relating to recognition of an adoption of a child in a prescribed overseas jurisdiction, is the equivalent provision to regulation 5 of the 1998 regulations.

Statement of Compatibility with Human Rights

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

Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 2023

Family Law (Bilateral Arrangements – Intercountry Adoption) (Repeals and Consequential Amendments) Regulations 2023

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 instruments

The *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 2023* remake the *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998* (1998 regulations), which are sunsetting on 1 April 2023, in similar terms.

The purpose of the regulations is to facilitate Australia’s bilateral arrangements for intercountry adoptions with “prescribed overseas jurisdictions”. The regulations provide that adoptions made under the laws of a prescribed overseas jurisdiction are recognised for the purposes of Australian law. The regulations also provide that an adoption compliance certificate issued by a competent authority in a prescribed overseas jurisdiction is evidence that the adoption was carried out in accordance with the laws of that jurisdiction.

The regulations prescribe two countries as “prescribed overseas jurisdictions”, to ensure that intercountry adoptions from those countries are recognised in Australia. However, one country prescribed in the 1998 regulations has been removed as Australia’s intercountry adoption program with that country has closed and all adoptions under this program have been finalised.

The *Family Law (Bilateral Arrangements – Intercountry Adoption) (Repeals and Consequential Amendments) Regulations 2023* repeal the 1998 regulations, which are sunsetting on 1 April 2023. These regulations also make minor consequential amendments to the *Australian Citizenship Regulation 2016* and the *Migration Regulations 1994*, to remove the references to the 1998 regulations. To the extent that these regulations are amended, there is no human rights engagement.

Human rights implications

The regulations engage the following human rights:

The best interests of the child: Article 3(1) of the *Convention on the Rights of the Child* (CRC) provides that in all actions concerning children, the best interests of the child shall be a primary consideration. Article 7(2) of the *Convention on the Rights of Persons with Disabilities* (CRPD) provides for this right in relation to children with disabilities. Article 3(2) of the CRC requires all legislative, administrative and judicial

bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions. Article 9(1) of the CRC provides that a child shall not be separated from their 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. Article 12(1) of the CRC provides that a child capable of forming their own views has a right to express those views in matters affecting the child and that those views should be given due weight in accordance with the child's age and maturity.

The rights of parents and children: Article 5 of the CRC provides that States shall respect the responsibilities, rights and duties of parents, legal guardians or other persons legally responsible for a child to provide direction and guidance in the child's exercise of the rights recognised in the CRC. Article 18 of the CRC provides for the recognition of the principle that both parents (or legal guardians) have common responsibilities for the upbringing and development of a child.

The right to respect for the family: Article 23 of the International Covenant on Civil and Political Rights (ICCPR) provides that the family is entitled to the protection of the State and that States shall take appropriate steps to ensure the equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides that the widest possible protection and assistance should be accorded to the family. Article 17(1) of the ICCPR provides that a person has a right not to be subjected to arbitrary or unlawful interference with their family. Article 16(1) of the CRC provides for this right in relation to children. Article 23(3) of the CRPD provides that children with disabilities have equal rights with respect to family life.

The regulations have a positive impact on those rights concerned with upholding the best interests of the child as the paramount consideration and the protection of the institution of family, as outlined in the international instruments above, by facilitating intercountry adoptions with prescribed overseas jurisdictions, and ensuring these are recognised under Australian law. These human rights are consistent with the principles and standards contained in the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, which is the basis on which intercountry adoption is facilitated in Australia, including in accordance with the regulations.

Conclusion

The regulations are compatible with human rights as they do not limit any human rights, but support and enhance the treatment of the rights listed above.

[The Hon Amanda Rishworth MP, Minister for Social Services]