**FAMILY LAW (BILATERAL ARRANGEMENTS – INTERCOUNTRY ADOPTION) REGULATIONS 2023**

**EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Social Services

under the *Family Law Act 1975*

**Purpose**

The *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 2023* (regulations) 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. 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.

**Background**

*Family Law Act 1975*

Subsection 111C(3) of the *Family Law Act 1975* (Act) 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”. Subsection 111C(4) of the Act relevantly provides that the regulations made for the purposes of subsection 111C(3) may provide for the recognition of adoptions made under a law of a “prescribed overseas jurisdiction”, and may provide that the regulations do not affect the operation of laws of a State or Territory that relate to adoptions.

The term “prescribed overseas jurisdiction” is defined in subsection 4(1) of the Act as any country, or part of a country, outside Australia that is declared by the regulations to be a prescribed overseas jurisdiction for the purposes of the provision in which the expression is used.

Intercountry adoption

In Australia, intercountry adoption is only facilitated where the adoption complies with the principles and standards of the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention). The Hague Convention aims to ensure that intercountry adoption only occurs when in the best interests of the child.

Currently, Australia has bilateral arrangements relating to intercountry adoption with 13 countries. Of these, 11 countries have ratified or accessioned the Hague Convention, and are therefore “Contracting States” to the Convention. Under Article 23(1) of the Hague Convention, where an adoption is certified by the competent authority of the State of the adoption as having been made in accordance with the Convention, the adoption will be recognised by operation of law in the other Contracting States, including Australia. This means it is not necessary to specify the relevant 11 countries as “prescribed overseas jurisdictions” in the regulations, as intercountry adoptions from those countries are recognised under Australian law through the operation of the Hague Convention.

The remaining two countries with which Australia has bilateral arrangements relating to intercountry adoption are the Republic of Korea (also known as South Korea) and Taiwan. These arrangements comply with the principles and standards of the Hague Convention. Although the Republic of Korea has signed the Hague Convention, it is not a “Contracting State”, and therefore Article 23(1) of the Convention does not apply to recognise adoptions from the Republic of Korea in Australia. It is appropriate for the Republic of Korea to continue to be prescribed in the regulations, while it progresses towards ratification of, or accession to, the Hague Convention. Taiwan has not signed the Hague Convention.

This means it is necessary to specify both the Republic of Korea and Taiwan as “prescribed overseas jurisdictions” in the regulations, to ensure adoptions from these countries are recognised under Australian law. This will enable the existing intercountry adoption programs between Australia and these countries to continue effectively.

Regulations

The regulations are not intended to change the effect of the 1998 regulations. Both the Republic of Korea and Taiwan are “prescribed overseas jurisdictions” in Schedule 1 to the 1998 regulations, and this is also the case in the regulations.

The only substantive change is to remove the Federal Democratic Republic of Ethiopia as a “prescribed overseas jurisdiction”. This reference is no longer required as Australia’s intercountry adoption program with Ethiopia closed in 2012, and all adoptions under this program have been finalised. This change does not have any practical effect.

The regulations make structural and minor typographical changes consistent with current drafting practices. The regulations also remove a redundant reference from the equivalent of section 6 of the 1998 regulations, which is section 8 of the regulations. This matter is addressed in section 7 of the regulations and is not required in section 8 as well.

**Authority**

The regulations are made under subsection 125(1) of the Act, 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 the Act.

Subsection 111C(3) of the Act 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.

**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 on the day after registration 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 do not intend to change the effect of the 1998 regulations, and 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) Regulations 2023.

Section 2 - Commencement

This section provides that the regulations commence on the day after the regulations are registered on the Federal Register of Legislation.

Section 3 - Authority

This section provides that the authority for making the regulations is the Family Law Act 1975.

Section 4 - Definitions

Subsection 4(1) contains definitions that are used in the regulations.

In the regulations, the term “Act” is defined in subsection 4(1) as the Family Law Act 1975.

The term “adoption compliance certificate” is defined by reference to paragraph 7(1)(d) of the regulations.

The term “Australian law” refers to a law of the Commonwealth, or a State or Territory of Australia. This is a new definition that is intended to simplify the relevant references to laws in the 1998 regulations.

The term “child” refers to an individual who has not reached 18 years of age, that is, is aged 17 or under.

The term “competent authority” has alternative meanings depending on the context. In respect of a prescribed overseas jurisdiction, “competent authority” means a person, body or office in the jurisdiction responsible for approving the adoption of children. For example, in the Republic of Korea the competent authority is the Ministry of Health and Welfare. In Taiwan the competent authority is also the Ministry of Health and Welfare in that country.

In relation to an Australian State or Territory in which a person adopting a child habitually resides, “competent authority” means a person, body or office in that State or Territory that is responsible for approving the adoption of children. For example, in New South Wales the competent authority is the Department of Communities and Justice, and in Victoria, the competent authority is the Department of Justice and Community Safety.

In subsection 4(1), the term “parental responsibility” is defined in relation to a child as having the same meaning as in section 61B of the Act. Section 61B of the Family Law Act 1975 defines parental responsibility, in relation to a child, as all the duties, powers, responsibilities and authority which parents have in relation to children by law.

Subsection 4(2) provides that where a term is used in both the regulations and section 111C of the Act, that term has the same meaning in the regulations as it does in section 111C. For example, it is intended that the term “Territory” in these regulations has the same meaning as in section 111C of the Family Law Act 1975. This is defined in subsection 111C(8) of the Act as including each external Territory of Australia, and not just Norfolk Island, Christmas Island and Cocos (Keeling) Islands, as in the definition of “Territory” in subsection 4(1) of the Act.

Section 5 – Prescribed overseas jurisdictions

Section 5 specifies prescribed overseas jurisdictions, for the purposes of the definition of “prescribed overseas jurisdiction” in subsection 4(1) of the Family Law Act 1975. Section 5 declares that the Republic of Korea and Taiwan are overseas jurisdictions that are a prescribed overseas jurisdiction, for the purposes of section 111C of the Act and the regulations.

These two countries were also prescribed overseas jurisdictions specified in Schedule 1 to the 1998 regulations. Accordingly, there are not intended to be any changes in law or practice in relation to these countries, and the intercountry adoption programs between Australia and the Republic of Korea and Taiwan will continue in accordance with the regulations.

Part 2 – International agreements about adoption

Section 6 – Purpose and application of Part

Subsection 6(1) provides that Part 2 of the regulations is made for the purposes of subsection 111C(3) of the Family Law Act 1975.

Subsection 6(2) specifies that a provision in Part 2 does not apply to a State or Territory in which there is in force a law of that State or Territory that has the same effect that the provision would have in relation to an adoption, but for Part 2. Such a State or Territory law is referred to in section 6 as an “overseas jurisdiction adoption law”. This means that Part 2 of the regulations do not apply in an Australian State or Territory which passes a law that has the same effect as Part 2.

Subsection 6(2) is made pursuant to subsection 111C(4) of the *Family Law Act 1975*, which states that regulations may provide that they do not affect the operation of laws of a State or Territory that relate to adoptions. Subsection 6(2) ensures that if a State or Territory chooses to pass its own legislation to give effect to a bilateral intercountry adoption agreement or arrangement, there will be no conflict between that law and the regulations.

Subsection 6(3) indicates that Part 2 of the regulations is not intended to affect the jurisdiction of courts in adoption proceedings, court orders in adoption proceedings or the operation of State or Territory adoption laws. Specifically, subsection 6(3) states that nothing in Part 2 affects the following:

1. the jurisdiction of a court, or the power of an authority, under an overseas jurisdiction adoption law, to entertain proceedings, make an order or take any other action in relation to an adoption; or
2. any order or action specified in (a) above; or
3. the operation, within a State or Territory, of an overseas jurisdiction adoption law of the State or Territory.

Section 7 – Recognition of an adoption of a child in a prescribed overseas jurisdiction

Section 7 provides that an adoption of a child granted in accordance with the laws of a prescribed overseas jurisdiction is recognised and effective for the purposes of an Australian law. Subsection 7(1) sets out when section 7 applies to such an adoption. This adoption may take place in the prescribed overseas jurisdiction before or after it became a prescribed overseas jurisdiction.

Subsection 7(1) provides that section 7 will apply to an adoption of a child in a prescribed overseas jurisdiction if all of the following requirements are met:

1. the child was habitually resident in the prescribed overseas jurisdiction at the time of the adoption;
2. the person who adopted the child was habitually resident in a State or Territory of Australia;
3. the competent authority of that State or Territory has agreed that the adoption may proceed. The term “competent authority” is defined in subsection 4(1) of the regulations. This requirement is necessary to ensure that adoptions by expatriate Australians in prescribed overseas jurisdictions continue to be excluded from recognition under Australian law, because there is no oversight of these adoption processes by Commonwealth, State or Territory governments. Expatriate Australians continue to need to satisfy Australian immigration requirements to bring a child they have adopted in a prescribed overseas jurisdiction to Australia;
4. a certificate, known as an “adoption compliance certificate”, is in force in relation to the adoption. This certificate must:
5. have been issued by a competent authority of the relevant prescribed overseas jurisdiction; and
6. state that the adoption was carried out in accordance with the laws of that prescribed overseas jurisdiction;
7. the adoption has the effect of ending the legal relationship between the child and each person who was the child’s parent immediately before the adoption. This requirement ensures that adoptions from prescribed overseas jurisdictions will only be recognised where a full adoption order, which severs the existing and creates a new child-parent legal relationship, has been issued; and
8. a federal, State or Territory court has not made either:
9. an adoption order in relation to the child; or
10. an order recognising or declaring the adoption to be valid.

This is because if the adoption has already been recognised by a federal, State or Territory court in such a manner, it will not be recognised by the regulations as the adoption is already recognised and given effect under Australian law.

Where all of the criteria in subsection 7(1) above are satisfied in relation to an adoption, subsection 7(2) provides that the adoption is recognised and effective for the purposes of an Australian law. This is the case on and after the date of effect of the adoption. The term “Australian law” is defined in subsection 4(1).

Section 8 – Effect of recognition of an adoption

Section 8 provides that the effect of recognition in Australian law of an adoption under the laws of a prescribed overseas jurisdiction includes:

1. establishing the relationship of parent and child between each adoptive parent and the child;
2. conferring parental responsibility for the child on each adoptive parent; and
3. conferring on the child rights equivalent to the rights conferred on a child adopted under the laws of an Australian State or Territory.

For example, following an adoption referred to in section 7, the adoptive parents of a child who applies for a subclass 802 (child) visa in accordance with the *Migration Act 1958* and the *Migration Regulations 1994* will be recognised as the legal parents of the child.

Section 9 – Evidential value of adoption compliance certificate

Section 9 relates to adoption compliance certificates, which are referred to in paragraph 7(1)(d). Section 9 provides that for the purposes of an Australian law, an adoption compliance certificate issued by the competent authority in a prescribed overseas jurisdiction is evidence that the adoption was carried out in accordance with the laws of the prescribed overseas jurisdiction.

**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**

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 *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 2023* (the regulations) 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, the Republic of Korea and Taiwan, 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.

**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* (Hague Convention), which is the basis on which intercountry adoption is facilitated in Australia, including in accordance with the regulations.

*Country program review (CPR) process*

Specifically, through the CPR process, the Department of Social Services (the department) has determined that the intercountry adoption programs between Australia and the prescribed overseas jurisdictions specified in the regulations (the Republic of Korea and Taiwan), operate in compliance with the principles and obligations of the Hague Convention.

The department, in its role as the Australian Central Authority (ACA) for intercountry adoption, reviews the ongoing compliance of Australia’s intercountry adoption programs with prescribed overseas jurisdictions against the Hague Convention every two years. This is required by the *Commonwealth-State Agreement for the Continued Operation of Australia’s Intercountry Adoption Program*.

The Hague Convention reinforces the CRC (Article 21) and seeks to ensure that intercountry adoptions are only conducted when in the best interests of the child and with respect of their fundamental rights. Through the department’s CPR process, compliance with the Hague Convention also indicates compliance with the CRC.

Review of Australia’s intercountry adoption partner programs is an ongoing process, involving systematic review of intercountry adoption frameworks, safeguards,legislation, regulation, policy and practice, incorporating independent validation of local adoption practices, and close consultation with State and Territory Central Authorities (STCAs).

The purpose of the CPR is to assess the operation of each program, including its compliance against key principles and standards set out in the Hague Convention, for a two-year period of operation. Hague Convention principles, requirements and obligations are categorised and rated across three tables. Ratings are accompanied by a detailed explanation containing excerpts from and references to relevant legislation, civil codes, constitutions, international treaties, International Social Service Country Situation Reports, media articles or academic papers, and in-practice examples (including specific operational or case details) provided by STCAs and the ACA.

Along with detailed information on local circumstances and identification of issues and challenges facing the program, the CPR also includes a finding or findings on the suitability of the prescribed overseas jurisdiction’s intercountry adoption framework, which is the basis for ongoing program operation.

Prior to finalisation, the draft CPR is circulated to all STCAs for input. STCAs provide feedback on any changes in process, procedures or issues that arise in their
day-to-day activity working with partner authorities, changes to state or territory intercountry adoption legislation, and any advice directly received from overseas adoption agencies or from individuals undergoing, or having completed, the intercountry adoption process.

Although not Hague Convention signatories (or in the case of the Republic of Korea, a signatory, but not yet ratified), intercountry adoptions from the Republic of Korea and Taiwan conducted under established bilateral arrangements are deemed to demonstrate practical compliance with the Hague Convention principles and standards via the CPR assessment process.

In addition to the CPR process, the ACA communicates with partner Central Authorities on an ongoing basis, including engagement on program operation and individual cases.

**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]**