

Legislation (Deferral of Sunsetting – Family Law Instruments) Amendment Certificate 2023

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) Amendment Certificate 2023* (the Amendment Certificate) is made under paragraph 51(1)(c) of the Legislation Act 2003. It amends the *Legislation (Deferral of Sunsetting— Family Law Instruments) Certificate 2022* (the principal certificate). It is a legislative instrument for the purposes of the Legislation Act and must be registered on the Federal Register of Legislation. The Amendment Certificate will be subjected to the disallowance provisions of the Legislation Act as the deferred sunsetting day specified in the Amendment Certificate is after the first anniversary of the originally scheduled sunsetting day, which means that subsection 51(4) of that Act (which provides an exemption for disallowance for deferrals of 12 months or less) does not apply.

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Subsection 50(1) of the Legislation Act provides that the legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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 date of an instrument for a period of six, 12, 18 or 24 months. The instrument will then be repealed on the day specified in the certificate instead of the scheduled sunsetting day.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 sunseting day.

Through the operation of subsection 33(3) of the *Acts Interpretation 1901*, the Attorney-General's power under paragraph 51(1)(c) includes the power to repeal, rescind, revoke, amend or vary such a certificate.

The Amendment Certificate amends the principal certificate, extending the previously granted deferral of sunseting for the following instruments by an additional 12 months, resulting in a deferral of 24 months in total (together the 'Family Law Instruments'):

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

The Family Law Instruments, for which the previous sunseting day was 1 April 2023 and the current sunseting date is 1 April 2024, will now sunset on 1 April 2025 following commencement of the Amendment Certificate.

PROCESS BEFORE THE AMENDMENT CERTIFICATE WAS MADE

Regulatory impact analysis

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

Consultation before making

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

The Family Law Instruments are made under the *Family Law Act 1975* (Cth) (Family Law Act) and form part of the overall federal family law system that supports people to navigate the legal aspects of family separation and property division after relationship breakdown.

The Government has considered and is actioning priority recommendations from the Australian Law Reform Commission's (ALRC) Report 135: *Family Law for the Future – An Inquiry into the Family Law System* and the

report of the Joint Select Committee on Australia's Family Law System, which concluded its inquiry in November 2021. The Government Response to the inquiry of the Joint Select Committee (JSC) was presented on 25 January 2023. As the majority of supported recommendations required amendments to the Family Law Act or its subordinate legislation, the Government is developing legislative reforms as a priority, which has implications for the Family Law Instruments. The Government is in the process of 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) conducted a public inquiry and tabled its final report on 22 November 2021 with some further recommendations on the family law system.

The Government is progressing a first tranche of legislative reforms to the Family Law Act to address a number of key issues regarding the parenting framework following on from recommendations of the ALRC as well as implementing elements of the Government Response to the JSC inquiry. The Government continues to consider next steps regarding the remaining recommendations of these reports.

Reforms to the Family Law Act will necessitate amendments to the Family Law Instruments. A further 12 month deferral of the Family Law Instruments supports the appropriate staggering of work to enable the Attorney-General's Department to structure the review and remaking of the Family Law Instruments so it is informed by stakeholder feedback and policy development undertaken as part of the proposed reforms to the Family Law Act.

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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. 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.

The Amendment Certificate will allow sufficient time for further consultation prior to the replacement instruments being made. The Amendment Certificate 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, given that deferral of the sunset date of the Family Law Instruments is consistent with the policy intent

of the sunseting regime and does not significantly alter existing arrangements, appropriate consultation has occurred for the purposes of section 17 of the Legislation Act.

Statutory preconditions relevant to the Amendment Certificate

If the statutory conditions in section 51 of the Legislation Act are met, an instrument's sunseting day can be deferred for either six, 12, 18 or 24 months by means of a certificate made under that section. In terms of the 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 originally scheduled sunseting day, or
 - 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 or avoided, or
 - iii. the dissolution or expiration of the House of Representatives of 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 the sunseting provisions not applying to the instrument, and
- c) the Attorney-General to issue a certificate, and
- d) the explanatory statement for the certificate to include a statement for the reasons of the issue of the certificate.

As the rule-maker for the Family Law Instruments is the Attorney-General, the Hon Mark Dreyfus KC, there is no written application associated with this Amendment Certificate.

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 the sunseting provisions, be likely to cease to be in force within 24 months of their originally scheduled sunseting day. As such, the criterion in subparagraph 51(1)(b)(i) of the Legislation Act is met.

Statement of Reasons for issuing the Amendment Certificate

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

On 25 January 2022, the previous Attorney-General issued the principal certificate under section 51 of the Legislation Act, deferring the sunseting of the Family Law Instruments from 1 April 2023 to 1 April 2024. Prior

to this, the *Legislation (Family Law Instruments) Sunset-altering Declaration 2018* aligned the previous sunsetting date of the Family Law Instruments to 1 April 2023 to facilitate a thematic review as part of the ALRC’s major review of the family law system referred to above.

A 12-month deferral of the Family Law Instruments would:

- enable the department to structure the review and remaking of the Family Law Instruments, so it is informed by policy development and stakeholder feedback undertaken in 2023 for the proposed reforms to the Family Law Act;
- ensure any regulatory amendments identified through the sunset review of the Family Law Instruments can be considered together with consequential amendments arising from amendments to the Family Law Act;
- minimise operational disruption to the family law system and reduce confusion for professionals and litigants within the family court that may arise should legislative amendments and remaking of the Family Law Instruments proceed on a similar timeframe;
- support targeted and appropriately timed engagement by government with stakeholders; and
- enable the department to effectively prioritise drafting work with the Office of Parliamentary Counsel to prepare legislative amendments and replacement regulations.

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.

Amendments to the Family Law Act are required to implement legislative amendments arising from recommendations of the ALRC Report and JSC Inquiry. These amendments are being progressed as a matter of priority and will likely require consequential amendments to the Regulations to update certain aspects of family law practice and procedure. Subject to the passage of amendments to the Family Law Act, consequential amendments to the Regulations will then be required, and it is unlikely that these amendments could be made ahead of the current sunsetting date of 1 April 2024.

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

The FDR Regulations are also made under the Family Law Act. The department accredits and regulates family dispute resolution (FDR) practitioners under the FDR Regulations. To be recognised as and perform the functions of an FDR practitioner under the Family Law Act, 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. The accreditation scheme supports the requirement under the Family Law Act, which has been in place since 1 July 2007, to attempt FDR before filing an application for a parenting order in a family law court.

Following the *Legislation (Family Law Instruments) Sunset-altering Declaration 2018*, which aligned the previous sunset dates of the Family Law Instruments to 1 April 2023, a sunset review identified a number of regulatory amendments that need to be made to strengthen the effective continuation of the accreditation scheme for FDR practitioners and enhance the effectiveness of FDR service delivery to the community. Therefore, the FDR Regulations made in 2008 need to be completely remade to not only reflect the proposed enhancements to the accreditation scheme but to also ensure that they implement existing government policy and practice and adhere to current legislative drafting conventions. The remaking of the FDR Regulations is a significant piece of work, which will require the department to consult broadly and draw on the expertise of others, including FDR practitioners, Family and Relationship Services Australia, professional associations, higher education providers and Registered Training Organisations.

Aligning the deferral of the remaking of the FDR Regulations with the other regulations will provide the sector maximum opportunity to consider proposed reforms to the Family Law Act.

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

The Superannuation Regulations support the operation of Part VIIIB and Part VIIC 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 prescribe methods and factors for valuing most superannuation interests, how a payment split is to be put into effect, and the superannuation information that trustees must provide parties to proceedings when validly requested.

The department is undertaking a review of the Superannuation Regulations to inform the drafting of new regulations. The review of the Superannuation Regulations is a significant piece of work, requiring the department 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.

The department 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. Completing this review will entail a considerable amount of work and time, due to the complexity involved in developing valuation factors and the large volume of factors contained in the Superannuation Regulations. The review of the Superannuation Regulations will necessitate a review of each of the subordinate instruments. This work is likely to continue past the 1 April 2024 sunseting date.

Therefore, it is practical and appropriate for the existing Family Law Instruments to remain in place until they are repealed as anticipated. Deferring the sunseting date of the Family Law Instruments for a further 12 months will avoid the need to remake the Family Law Instruments for a short period of time. As such, the amendment is consistent with the policy intent of the sunseting regime, that legislative instruments should be kept up to date and only remain in force so long as they are needed.

Further information

Further details on the provisions of the certificate are provided in **Attachment A**.

As the Amendment Certificate is a purely amending instrument, it will be automatically repealed by the operation of section 48A of the Legislation Act at the conclusion of the disallowance period.

The Family Law Instruments, which will now be repealed on a later day as specified in the certificate, are available on the Federal Register of Legislation.

Further information may be requested from the Attorney-General's Department about the operation of the Amendment Certificate and the Family Law Instruments.

STATEMENT OF COMPATABILITY WITH HUMAN RIGHTS

The *Legislation (Deferral of Sunsetting— Family Law Instruments) Amendment Certificate 2023* (Amendment Certificate) is compatible with human rights and freedoms recognised or declared in international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Human Rights Act).

Overview of the Amendment Certificate

The Amendment Certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003*. Under that paragraph the Attorney-General can issue a certificate to defer the sunseting day of an instrument for a period of 6, 12, 18 or 24 months. The instrument will then be repealed on the day specified in the certificate instead of the scheduled sunseting day.

Through the operation of subsection 33(3) of the *Acts Interpretation Act 1901*, the Attorney-General's power under paragraph 51(1)(c) includes power to repeal, rescind, revoke, amend or vary such a certificate.

The Amendment Certificate amends the *Legislation (Deferral of Sunsetting— Family Law Instruments) Certificate 2022* (the principal certificate), extending the previously granted deferral of sunseting for the Family Law Instruments by an additional 12 months, resulting in a deferral of 24 months in total. The Family Law Instruments, for which the previous scheduled sunseting day was 1 April 2023 and the current sunseting date is 1 April 2024, will now sunset on 1 April 2025.

The Family Law Instruments are made under the *Family Law Act 1975* (Cth) and form part of the overall federal family law system that supports people to navigate the legal aspects of family separation and property division after relationship breakdown. Proposed reforms to the Family Law Act are likely to necessitate consequential amendments to the Family Law Instruments. Subject to the passage of amendments to the Family Law Act, consequential amendments to the Family Law Instruments will then be progressed, and it is unlikely that these amendments could be made ahead of the current sunseting date of 1 April 2024.

Deferring the sunseting date of the Family Law Instruments for a further 12 months will ensure that the Attorney-General's Department has sufficient time to develop proposed reforms to the Family Law Act and make consequential amendments to the Family Law Instruments, and avoid the need to remake the Family Law Instruments for a short period of time.

Human rights implications

An amending certificate of deferral of sunseting extends the operation of the instruments but does not change or affect the rights engaged under the original instruments.

A certificate of deferral of sunseting extends the operation of the Family Law Instruments, but does not change or affect the rights engaged under the original instruments, which have previously been subject to a Statement of Compatibility. Amending the certificate to provide that the sunseting date is 1 April 2025 will have minimal impact on the human rights engaged by the Family Law Instruments.

Family Law Regulations 1984

The Family Law Regulations engage and support various rights set out in the United Nations Convention on the Rights of the Child (CRC), including Articles 3, 5, 7, 8, 9, 10, 11, 18, 20 and 21. They also engage:

- the right to protection of and respect for the family in Articles 23 and 24 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the right to the protection from exploitation, violence and abuse in Article 20(2) of the ICCPR and specifically in relation to children in Articles 19 and 34 of the CRC and Article 24(1) of the ICCPR, and
- equality of rights and responsibilities of spouses at the dissolution of a marriage or de facto relationship in Article 23 of the ICCPR and Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

The Family Law Regulations support these rights through prescribing information to support the operation of the Family Law Act. The Family Law Act focuses on the rights of children and the responsibilities that each parent has towards their children in accordance with the rights listed under the CRC. The family law system plays an important role in supporting families to reach agreement over arrangements for children after separation in a safe manner, which does not separate children from their parents against their will except where this is determined to be in a child's best interests, as the paramount consideration. The deferral of the sunseting date of the Family Law Regulations will allow for the continued promotion of these rights through the ongoing operation of the Regulations.

Family Law (Family Dispute Resolution Practitioners) Regulations 2008

The FDR Regulations engage the right for an individual to have an effective remedy for any violation of rights or freedoms in Article 2(3) of the ICCPR, by providing a right of appeal to the Administrative Appeals Tribunal (AAT) for any decision made by an 'Authorised Officer' of the Attorney-General's Department that affects a

person's accreditation under the scheme for FDR practitioners. Decisions of the AAT may be appealed to the Federal Court on a question of law from any decision of the AAT in that proceeding.

The FDR Regulations also engage the right of people to work and have the opportunity to gain a living by work under Article 6(1) of the ICESCR. However, the right to work as an accredited FDR practitioner is subject to an Authorised Officer's determination that they have suitably met the criteria for accreditation as specified under the FDR Regulations. As a critical element of the family law system is to ensure that FDR practitioners are appropriately qualified and skilled to provide safe and high-quality services to meet the needs of vulnerable families, this limitation is warranted. Also consistent with Article 4 of the ICESCR, this limitation is considered to be reasonable and necessary to promote general welfare and safety of vulnerable families as consumers of FDR services in a democratic society.

Family Law (Superannuation) Regulations 2001

The Superannuation Regulations engage the obligation to ensure the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, contained in Article 16 of CEDAW.

The Superannuation Regulations ensure that, if a couple agrees, or if a court determines that it is fair and equitable, the superannuation interests of both parties may be redistributed between them, having regard to the parties' respective contributions (including non-financial and homemaker contributions), and their future needs (including consideration of their future earning capacity). The Superannuation Regulations promote the same rights for both parties, regardless of gender, to that relationship in respect of the ownership, acquisition, management, administration, enjoyment and disposition of superannuation. The Superannuation Regulations therefore promote the equality of the spouses with respect to ownership of property following the end of the relationship. These rights are promoted through the ongoing operation of the Superannuation Regulations, enabled by a deferral of the sunset date.

The rights engaged under the Family Law Instruments are not substantially changed or affected by the issuing of the Amendment Certificate, nor by amending the principal certificate to provide a sunset date of 1 April 2025. The deferral of the sunset date of the Family Law Instruments does not affect the operation of the Family Law Instruments, and therefore does not change the effect of the rights already engaged. Further, the effect of the issuing of the certificate under section 51 of the Legislation Act ensures appropriate safeguards for regular review are retained, by limiting the extended operation of the Family Law Instruments to only 12 months.

Before issuing the Amendment Certificate, the Attorney-General was satisfied that the Family Law Instruments would, apart from the sunset provisions, cease to be in force within 24 months of the originally scheduled sunset day. Any replacement instruments will be subject to parliamentary scrutiny and oversight through disallowance processes unless otherwise exempt. The human rights impact will be individually assessed at that time, including through the requirement to prepare a further Statement of Compatibility with Human Rights.

Conclusion

The Amendment Certificate is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights Act as it is expected that any replacement instruments that unduly limit human rights and freedoms will be subject to parliamentary oversight and scrutiny.

NOTES ON THE AMENDMENT CERTIFICATE

Section 1 Name

This section provides that the Amendment Certificate is named the *Legislation (Deferral of Sunsetting—Family Law Instruments) Amendment Certificate 2023*. The Amendment Certificate may be cited by this name.

Section 2 Commencement

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

Section 3 Authority

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

Section 4 Schedules

This section provides that each instrument specified in a Schedule to the Amendment Certificate is amended or repealed as set out in that Schedule, and any other items have effect according to their terms.

Schedule 1 Amendments

This schedule sets out the amendments to the principal certificate that are necessary to further defer the sunseting of the Family Law Instruments to 1 April 2025.

Item 1 Section 4

This item amends section 4 of the principal certificate by substituting the sunseting date of 1 April 2024 with the amended date of 1 April 2025.

Item 2 Section 4 (note)

This item repeals the note in section 4 of the principal certificate, substituting it with a note to recognise the sunseting date of 1 April 2024 prior to the Amendment Certificate commencing.

Item 3 Section 5

This item changes the self-repealing provision of the principal certificate so that it takes effect on 2 April 2025, rather than 2 April 2024.