

REPLACEMENT EXPLANATORY STATEMENT

This Explanatory Statement replaces the Explanatory Statement registered on 27 October 2023 for the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023* [F2023L01417] to include further information on the justification for excluding independent merits review for the Financial assistance scheme for respondents to applications brought under the *Family Law (Child Abduction Convention) Regulations 1986*.

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

Financial Framework (Supplementary Powers) Amendment
(Attorney-General's Portfolio Measures No. 1) Regulations 2023

The *Financial Framework (Supplementary Powers) Act 1997* (the FFSP Act) confers on the Commonwealth, in certain circumstances, powers to make arrangements under which money can be spent; or to make grants of financial assistance; and to form, or otherwise be involved in, companies. The arrangements, grants, programs and companies (or classes of arrangements or grants in relation to which the powers are conferred) are specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal Regulations). The powers in the FFSP Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

The Principal Regulations are exempt from sunseting under section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (item 28A). If the Principal Regulations were subject to the sunseting regime under the *Legislation Act 2003*, this would generate uncertainty about the continuing operation of existing contracts and funding agreements between the Commonwealth and third parties (particularly those extending beyond 10 years), as well as the Commonwealth's legislative authority to continue making, varying or administering arrangements, grants and programs.

Additionally, the Principal Regulations authorise a number of activities that form part of intergovernmental schemes. It would not be appropriate for the Commonwealth to unilaterally sunset an instrument that provides authority for Commonwealth funding for activities that are underpinned by an intergovernmental arrangement. To ensure that the Principal Regulations continue to reflect government priorities and remain up to date, the Principal Regulations are subject to periodic review to identify and repeal items that are redundant or no longer required.

Section 32B of the FFSP Act authorises the Commonwealth to make, vary and administer arrangements and grants specified in the Principal Regulations. Section 32B also authorises the Commonwealth to make, vary and administer arrangements for the purposes of programs specified in the Principal Regulations. Section 32D of the FFSP Act confers powers of delegation on Ministers and the accountable authorities of non-corporate Commonwealth entities, including subsection 32B(1) of the Act. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

Section 65 of the FFSP Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the financial assistance scheme for respondents to applications brought under the *Family Law (Child Abduction Convention) Regulations 1986* (the CAC Regulations), administered by the Attorney-General's Department.

As part of the Government's measures to support the *National Plan to End Violence Against Women and Children*, and reflecting their commitment to women's safety, the Government is introducing a new financial legal assistance scheme as part of a suite of measures to improve the safe implementation of the 1980 Hague *Convention on the Civil Aspects of International Child Abduction* (the Convention).

The Government has committed \$7.4 million (including departmental funding) over four years from 2023-24 and \$2.1 million per year ongoing, to create the legal financial assistance scheme, the Incoming Overseas Child Abduction Scheme (the Scheme), to pay for legal costs parents may incur in defending proceedings brought under the CAC Regulations for return orders in respect of children before the Australian courts.

At present, the Australian Government meets the legal costs associated with seeking the return of a child, and a parent defending against the return of the child must cover their own legal costs. The new Scheme will ensure parents who are defending a return application receive the same level of access to legal representation provided by the Australian Government to applicant parents. This will ensure both parents have access to funding for legal representation in return applications under the CAC Regulations heard in Australian courts.

Details of the Regulations are set out at [Attachment A](#). A Statement of Compatibility with Human Rights is at [Attachment B](#).

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

The Regulations commence on the day after registration on the Federal Register of Legislation.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Attorney-General's Department.

A regulatory impact analysis is not required as the Regulations only apply to non-corporate Commonwealth entities and do not adversely affect the private sector.

Details of the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023*.

Section 2 – Commencement

This section provides that the Regulations commence on the day after registration on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Regulations are made under the *Financial Framework (Supplementary Powers) Act 1997*.

Section 4 – Schedules

This section provides that the *Financial Framework (Supplementary Powers) Regulations 1997* are amended as set out in the Schedule to the Regulations.

Schedule 1 – Amendments

Financial Framework (Supplementary Powers) Regulations 1997

Item 1 – In the appropriate position in Part 4 of Schedule 1AB (table)

This item adds one new table item to Part 4 of Schedule 1AB to establish legislative authority for government spending on an activity administered by the Attorney-General's Department (the department).

New **table item 633** establishes legislative authority for government spending on the financial assistance scheme for respondents to applications brought under the *Family Law (Child Abduction Convention) Regulations 1986* (the CAC Regulations).

As part of the Government's measures to support the *National Plan to End Violence against Women and Children*, and reflecting their commitment to women's safety, the Government is introducing a new financial legal assistance scheme as part of a suite of measures to improve the safe implementation of the 1980 *Hague Convention on the Civil Aspects of International Child Abduction* (the Convention).

The Government has committed \$7.4 million (including departmental funding) over four years from 2023-24 and \$2.1 million per year ongoing, to create the Incoming Overseas Child Abduction Scheme (the Scheme), to pay for legal costs parents may incur in defending

proceedings brought under the CAC Regulations for return orders in respect of children before the Australian courts.

The Scheme was announced in the Women's Budget Statement on 9 May 2023 (https://budget.gov.au/content/womens-statement/download/womens_budget_statement_2023-24.pdf).

The new Scheme will ensure defending parents (almost always the mother) receive the same level of access to funding for legal advice and representation provided by the Australian Government to parents seeking a return.

Consistent with Australia's obligations under the Convention, proceedings are brought under the CAC Regulations by state Government agencies at the request of overseas applicant parents and all costs are met by the Australian Government, including legal representation.

Matters are heard in the Federal Circuit and Family Court of Australia (FCFCA) or the Family Court of Western Australia (FCWA) and the case for the child's return is normally presented by Counsel and experienced state and territory government lawyers with expertise in these matters.

At present, parents seeking to defend a return application must pay their own legal costs. Statistics show that in matters before the Australian courts, 80 per cent of defending parents are women, and there are allegations of family and domestic violence in 70 per cent of Convention matters.

The status quo of parents, usually women, paying out of pocket for legal expenses to respond to return applications can result in significant debt, and make some women more vulnerable to financial abuse and coercive control. The expenses incurred in unsuccessfully defending a return application can also leave the defending parent without the financial resources to participate in any subsequent custody hearings. It can also result in defending parents choosing to self-represent instead of paying legal costs, limiting their ability to make effective legal arguments against return where there are safety concerns, or to argue for protective conditions to be placed on a return order.

Equal access to legal representation for eligible defending parents in Convention cases will strengthen legal justice and safety outcomes for women and children in particular, and families and the community as a whole.

The Scheme will be available to all respondent parents who meet the requirements regardless of gender or whether family violence allegations have been made, but will not extend to other family members who do not have parental rights.

Funding of \$5.3 million will be used for legal financial assistance payments and the remainder \$2.1 million to adequately resource the department to establish and administer the Scheme. The Scheme is to commence on 1 January 2024.

The Scheme will be administered through an open non-competitive grant program in accordance with the *Commonwealth Grants Rules and Guidelines 2017* (CGRGs), the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), PGPA Rule, the Commonwealth legal financial assistance guidelines, as well as program specific guidelines

which will reflect the intention of the Scheme and be consistent with other similar schemes (for example, the Overseas Child Abduction Scheme).

To be eligible for the Scheme, the person must be opposing an application for the return of a child under the Convention in an Australian court. The child must be under the age of 16 years old, and the person must have parental rights over the child. Applicants will be means tested, and legal costs will be assessed, consistent with other non-statutory legal assistance schemes administered by the department.

Individuals will apply for a grant, which is the amount of money they expect to incur in legal costs. The grant is not paid to the individual, but is held by the department. If the application is approved, the recipient's legal practitioners will invoice the department directly for work undertaken within the scope of that grant. The grant is valid for six months. At the end of the period, if the matter has not concluded, the person can re-apply and seek to have any unspent funds rolled into the next 6-month period. Any grants money not spent will return to the Financial Assistance towards legal costs and related expenses program at the end of the 6-month period.

Grant opportunity guidelines which cover the Scheme, the Commonwealth legal financial assistance Guidelines, are currently being developed. These guidelines will be published on GrantConnect, as per requirement of the CGRGs. Information about the Scheme will be made available on the department's website.

Final spending decisions will be made by the Attorney-General or an appropriate SES delegate, in accordance with the *Attorney-General's authorisations to decide applications for financial assistance 2022 (No. 2)*. The authorised delegates occupy specific position numbers, which means the delegates, as senior officers in relevant areas of the department, will have the correct knowledge and skills to consider the applications. Each delegate is authorised to approve grants to a certain amount.

Merits review of decisions made in connection with grants made from the Financial Assistance towards legal costs and related expenses program, is not considered appropriate because these decisions relate to the provision of a grant to one or more applicants over other applicants under a finite resource. The Administrative Review Council (ARC) has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 4.11 to 4.15 of the guide, *What decisions should be subject to merit review?* (ARC guide)).

In accordance with the ARC guide, decisions made in relation to grants under the Scheme are not appropriate for merits review. There is a finite amount of funding available under the appropriation for the Scheme each financial year for the provision of grants. The appropriation is fixed, with any increase to funds in the appropriation requiring further consideration from the Government. In line with the Commonwealth Grants Policy Framework, grants cannot exceed the amount of available funds.

The Scheme is being delivered as an open non-competitive grants program and individual applicants are assessed against eligibility and assessment criteria in relevant guidelines. To determine whether to make the grant, and to determine the grant amount, the decision-maker is required to take into account the total funds available for all grants under the appropriation and the number of other eligible grants made or likely to be made under the appropriation.

The fact that an applicant meets the specified criteria does not guarantee them funding or that they will be granted the entire amount of funding that they seek. This is to ensure that there are sufficient funds available for other meritorious applications submitted during the year, given that it is not possible to predict the demand on the Scheme or number of grants under the program in any given financial year.

As there is limited available funding under the appropriation, any change to the amount or amounts allocated to one party as a result of overturning an original decision would likely have a direct effect on the allocations for other Scheme applicants. All subsequent decisions to approve a grant on the basis of consideration of the amount of available funding in the appropriation for other eligible grants would be affected, and other eligible and meritorious grants would either need to have funding removed or reduced so that the department does not overspend its appropriation.

External merits review would also create uncertainty for decision makers deciding on grant amounts with reference to the availability of funds, and may disadvantage other applicants competing for the same funds, if other applications are undergoing merits review. Undertaking merits review would delay decision-making on other grant applications, undermining the ability of the Scheme to meet its objective to provide prompt legal financial assistance to a vulnerable cohort.

On this basis, decisions made in relation to grants under the Scheme are not appropriate for merits review in accordance with paragraphs 4.11-4.15 of the ARC guide.

The ARC guide provides that even though such decisions should not be reviewed, administrative accountability in relation to such allocative decisions should be given greater emphasis, including ensuring that:

- the processes of allocating funds are fair,
- the criteria for funding are made clear, and
- decisions are made objectively.

Consistent with best practice decision making, where there are issues with an application prior to a decision being made, the department will provide the applicant an opportunity to respond to that issue before finalising its assessment of the application for the relevant decision maker. The guidelines for the Scheme will set out clear funding criteria. The department will ensure objective decision-making, with a departmental officer assessing each application on its merits, and the decision-maker considering consistent factors in deciding whether to approve the grant.

Internal review is available for departmental decisions. Applicants are made aware of the availability of internal review in the grant decision letter. They are invited to provide updated or new information in support of their review request.

Judicial review is also available, including under the *Administrative Decisions (Judicial Review) Act 1976*. This provides an avenue for applicants to seek review of a decision if natural justice had not been provided.

The department consulted a number of stakeholders with considerable experience in Convention matters while developing the proposal, including the FCFCoA, the FCWA, State and Territory Central Authorities, National Legal Aid and other advocacy groups.

Feedback indicated stakeholders were supportive of the Scheme, and where appropriate, their comments and concerns have been taken into account in the design of the program.

Funding of \$7.4 million (including departmental funding) for the Scheme was included in the 2023-24 Budget under the measure ‘Women’s Safety’ for a period of four years commencing in 2023-24 (and \$2.1 million per year ongoing). Details are set out in *Budget 2023-24, Budget Measures, Budget Paper No. 2* at pages 88-89.

Funding for this item will come from Program 1.4: Justice Services: Financial assistance towards legal and related expenses, which is part of Outcome 1. Details are set out in the *Portfolio Budget Statements 2023-24, Budget Related Paper No. 1.2, Attorney-General’s Portfolio* at page 21.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:

- the power to make laws with respect to divorce and matrimonial causes, including in relation to parental rights or the custody and guardianship of infants (section 51(xxii)); and
- the external affairs power (section 51(xxix)).

Divorce, matrimonial causes and parental rights power

Section 51(xxii) of the Constitution empowers the Parliament to make laws with respect to ‘divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants’.

A person will only be eligible for the Scheme if they have parental rights under Australian law regarding the child who is subject to proceeding under the *Family Law (Child Abduction Convention) Regulations*.

External affairs power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to ‘external affairs’.

Geographically external aspect of the external affairs power

The external affairs power supports legislation with respect to matters or things outside the geographical limits of Australia.

The Scheme will provide financial assistance in legal proceedings relating to the movement of children between countries.

Statement of Compatibility with Human Rights

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

Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023

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 legislative instrument

Section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (the FFSP Act) authorises the Commonwealth to make, vary and administer arrangements and grants specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the FFSP Regulations) and to make, vary and administer arrangements and grants for the purposes of programs specified in the Regulations. Schedule 1AA and Schedule 1AB to the FFSP Regulations specify the arrangements, grants and programs. The powers in the FFSP Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

The *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023* (the Regulations) amend Schedule 1AB to the FFSP Regulations to establish legislative authority for government spending on the financial assistance scheme for respondents to applications brought under the *Family Law (Child Abduction Convention) Regulations 1986* (CAC Regulations), administered by the Attorney-General's Department.

The new Incoming Overseas Child Abduction Scheme (the Scheme) forms part of a package of measures to improve the safe implementation of the 1980 *Hague Convention on the Civil Aspects of International Child Abduction Convention* (the Convention). Consistent with the Convention, currently the Australian Government meets the legal costs associated with seeking the return of a child, and a parent defending against the return of the child must cover their own legal costs.

The status quo of parents, usually women, paying out of pocket for legal expenses to respond to return applications can result in significant debt, and make some women more vulnerable to financial abuse and coercive control. The expenses incurred in unsuccessfully defending a return application can also leave the defending parent without the financial resources to participate in any subsequent custody hearings. It can also result in defending parents choosing to self-represent instead of paying legal costs, limiting their ability to make effective legal arguments against return where there are safety concerns, or to argue for protective conditions to be placed on a return order.

The Scheme will provide eligible parents, who are defending against a return, funding to pay their legal expenses. This will ensure both parents have access to funding for legal representation in return applications under the CAC Regulations heard in Australian courts.

Funding of \$7.4 million (including departmental funding) over four years from 2023-24 and \$2.1 million per year ongoing will be available under the Scheme.

Human rights implications

This disallowable legislative instrument engages the following rights:

- the right of the child to have their best interests a primary consideration – Article 3 of the *Convention on the Rights of the Child* (CRC), read with Article 4;
- the right of the child to live with a family who cares for them – Article 9 of the CRC;
- the right to protection from violence and abuse – Article 19 of the CRC; and
- the right to a fair hearing – Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), read with Article 2.

Right of the child to have their best interests a primary consideration

Article 4 of the CRC provides that States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Convention.

Article 3(1) of the CRC provides that:

- In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Convention aims to protect children from the harmful effects of abduction. The Convention safeguards the best interests of the child by ensuring that orders relating to the child's care, welfare and development are made in the jurisdiction which is ordinarily the child's country of habitual residence prior to their abduction. The Convention also sets out exceptions where the court has discretion to refuse to make an order for the return of a child.

This disallowable legislative instrument engages, and is consistent with, Article 3(1) of the CRC as the child's best interests are served when the court has appropriate evidence to make the determination as to whether they should be returned to their country of habitual residence so the court with the most appropriate jurisdiction can make decisions about the long term care and custody of the child. By funding defending parents, this Scheme will improve access to legal advice and representation, which should give both parties the ability to put forward their case, make decisions informed by legal advice, and ensure important evidence is available for the Court to consider. This will mean an Australian Court tasked with making the decision about the child's return will do so with the best possible evidence.

Right of the child to live with a family who cares for them

In relation to the rights of a child to live with a family who cares for them, Article 9(1) of the CRC states 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.

This disallowable legislative instrument promotes the Article 9(1) right articulated in the CRC, as Convention proceedings can determine a child's habitual residence and the correct jurisdiction to decide the long-term care and custody of the child. By ensuring that defending parents also have access to appropriate representation and advice, the Scheme allows both parties to participate in the proceedings and make their arguments to the Court, and will aid the Court in making an informed decision.

Right to protection from violence and abuse

Article 19(1) of 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.

This disallowable legislative instrument promotes the rights set out at Article 19 of the CRC. The Convention and the CAC 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. This disallowable legislative instrument does not alter, change or amend this fundamental purpose of the Convention or of the CAC Regulations.

The Convention also sets out exceptions where the court has discretion to refuse to make an order for the return of a child in situation where there is a grave risk that the return of a child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The Scheme promotes the right to protection from violence and abuse through the enhancement of legal representation for a defending parent who may have grounds for raising these exceptions.

Right to a fair hearing

Article 2(2) of the ICCPR provides that where not already provided for by existing legislative or other measures, each State Party to the Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant.

In relation to the right to a fair hearing, Article 14(1) of the ICCPR provides:

- All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties

so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

The Scheme seeks to promote equal procedural rights for all parties by ensuring equal access to funding for legal representation which enhances access to justice, by ensuring parties both sides having a reasonable opportunity to present their case.

Conclusion

This disallowable legislative instrument is compatible with human rights because it promotes the protection of human rights.

**Senator the Hon Katy Gallagher
Minister for Finance**