

**FAMILY LAW (CHILD ABDUCTION CONVENTION) AMENDMENT (CHILD'S
OBJECTION) REGULATIONS 2024**

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

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

Family Law (Child Abduction Convention) Regulations 1986

PURPOSE AND OPERATION OF THE INSTRUMENT

Subsection 125(1) of the *Family Law Act 1975* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with this Act, prescribing all matters that are required or permitted by the Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 111B of the Act provides that the regulations may make such provision as is necessary or convenient to enable Australia to perform its obligations, or obtain any advantage or benefit, under the 1980 *Hague Convention on the Civil Aspects of International Child Abduction* (the Child Abduction Convention), which entered into force in Australia on 1 January 1987.

Regulation 1A of the *Family Law (Child Abduction Convention) Regulations 1986* (the Principal Regulations) provides that the purpose of the Regulations is to give effect to section 111B of the Act, and that the Regulations are to be construed having regard to the principles and objects of the Child Abduction Convention.

The Principal Regulations prescribe information to support the operation of the Act with respect to matters arising under the Child Abduction Convention.

The Child Abduction Convention seeks to secure the prompt return of children wrongfully removed to or retained in any Convention country, and to ensure that rights of custody and access to children under the laws of a Convention country are effectively respected in the other Convention countries.

The Child Abduction Convention allows a number of exceptions to the return of a child. Under Article 13, a court does not have to order the return of a child if the child objects to being returned, and has attained an age and degree of maturity at which it is appropriate to take account of their views. The Principal Regulations also require a child's objection to show 'a strength of feeling beyond the mere expression of a preference or of ordinary wishes'. This is an additional requirement under Australian domestic law.

The purpose of the *Family Law (Child Abduction Convention) Amendment (Child's Objection) Regulations 2024* (the Amendment Regulations) is to amend the Principal Regulations by repealing the higher threshold requirement to realign Australia's

implementation of the Child Abduction Convention with international obligations. Specifically, the Amendment Regulations:

- repeal subregulation 16(3)(c)(ii) of the Principal Regulations so that it is no longer necessary to show that a child’s objection ‘shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes,’ in order to be considered by the court
- realigns the Principal Regulations and Australia’s approach to the child’s objection exception with international obligations under Article 13 of the Child Abduction Convention, consistent with Article 12 of the United Nations Convention on the Rights of the Child.

The Amendment Regulations implement recommendation 6 of the Senate Legal and Constitutional Affairs Legislation Committee’s Inquiry into the *Family Law Amendment Bill 2023* (the Committee Inquiry). The Committee recommended repealing section 111B(1B) of the Act and regulation 16(3)(c)(ii) of the Principal Regulations. The *Family Law Amendment Act 2023* (the Amendment Act) was passed by Parliament to repeal section 111B(1B) of the Act. The Amendment Regulations will complete the removal of the higher threshold in relation to the child’s objections from Australia’s approach.

Details of the Amendment Regulations are set out in [Attachment A](#).

The Act specifies no conditions that need to be met before the power to make Regulations may be exercised.

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* (Cth). The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

A person who is dissatisfied with a judicial decision made under the Principal Regulations, once amended, could seek to appeal that decision in accordance with the appeal procedures set out in the Act.

CONSULTATION

The Amendment Regulations implement recommendation six of the Committee Inquiry, which consulted with the Family Law Council and Child Abduction Convention academics. The Amendment Regulations have been informed by consultation with State Central Authorities, the Federal Circuit and Family Court of Australia, the Family Court of Western Australia, and the International Hague Network of Judges. All stakeholders were broadly supportive of the proposal. This is consistent with the requirements of the *Legislation Act 2003*.

REGULATION IMPACT STATEMENT

The Office of Impact Analysis (OIA) was consulted and assessed the Amendment Regulations as unlikely to have a more than minor regulatory impact, as the proposal relates

to a threshold test for specific legal proceedings and introduces no new regulatory burden. The OIA has confirmed that a Regulation Impact Statement is not required for the Regulations. The OIA reference ID is OIA23-05536.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The Amendment 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* (Cth). A Statement of Compatibility with Human Rights is set out in Attachment B.

Details of the Family Law (Child Abduction Convention) Amendment (Child's Objection) Regulations 2024 (Cth)

FAMILY LAW (CHILD ABDUCTION CONVENTION) AMENDMENT (CHILD'S OBJECTION) REGULATIONS 2024

Section 1 – Name

This section provides that the title is the *Family Law (Child Abduction Convention) Amendment (Child's Objection) Regulations 2024* (the Amendment Regulations).

Section 2 – Commencement

This section provides that the Amendment Regulations commence the latter of: (a) the day after the Amendment Regulations are registered, or (b) the day on which Schedule 4 to the *Family Law Amendment Act 2023* commences.

Section 3 – Authority

This section provides that the Amendment Regulations are made under the *Family Law Act 1975* (Cth) (the Family Law Act).

Section 4 – Schedules

This regulation provides that the *Family Law (Child Abduction Convention) Regulations 1986* (the Principal Regulations) are amended as set out in Schedule 1.

Schedule 1 – Amendments

Family Law (Child Abduction Convention) Regulations 1986

Item [1]: Repeal of subregulation 16(3)(c)(ii)

Subregulation 16(3) of the Principal Regulations states that 'a court may refuse to make an order under subregulation (1) or (2) if a person opposing return establishes that (c) each of the following applies: (i) the child objects to being returned; (ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes; (iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views.'

Item 1 repeals subregulation 16(3)(c)(ii), so that it is no longer necessary to show that a child's objection 'shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes' in order to be considered by the court.

Item [2]: Application Provision

Item 2 would clarify that the Amendment Regulations apply in relation to the following proceedings: (a) proceedings instituted on or after the day that Schedule 4 to the *Family Law*

Amendment Act 2023 commences (the commencement day), and (b) proceedings instituted before, and not finally determined by, the commencement day, other than proceedings in respect of which a final hearing has commenced by the commencement day.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

FAMILY LAW (CHILD ABDUCTION CONVENTION) AMENDMENT (CHILD'S OBJECTION) REGULATIONS 2024

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 Instrument

The *Family Law (Child Abduction Convention) Amendment (Child's Objection) Regulations 2024* ('the Instrument') will amend the *Family Law (Child Abduction Convention) Regulations 1986* ('the Principal Regulations') to realign Australia's implementation of the 1980 *Hague Convention on the Civil Aspects of International Child Abduction* (Child Abduction Convention) with international obligations, by repealing the higher threshold requirement within the child's objection exception to a return order.

The Principal Regulations are made under the *Family Law Act 1975* (Cth) (the Act). The Principal Regulations prescribe information to support the operation of the Act with respect to matters arising under the Child Abduction Convention.

The Instrument repeals subregulation 16(3)(c)(ii) of the Principal Regulations so that it is no longer necessary to show that a child's objection 'shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes' in order to be considered by the court.

Human Rights Implications

The Instrument engages the following rights:

- The right of children to be heard:
 - Articles 9(1) and (2), and 12(1) and (2) of the United Nations Convention on the Rights of the Child ('CRC').
- The right to respect for the family:
 - Articles 16(1) and (2) of the CRC; and
 - Articles 17(1) and 23(1) of the International Covenant on Civil and Political Rights ('ICCPR').
- The right to protection from exploitation, violence and abuse:
 - Articles 11(1), 19(1) and (2) of the CRC.
- The rights of parents and children:

- Article 3 of the CRC; and
- Article 24(1) of the ICCPR.

The right of children to be heard:

In relation to the right of children to be heard, the CRC provides that:

- States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child (Article 12(1)); and
- For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law (Article 12(2)).

The Instrument promotes and strengthens the right of the child to be heard in proceedings affecting them. The Instrument removes the higher threshold requirement of regulation 16(3)(c)(ii), that a child’s objection must show ‘a strength of feeling beyond the mere expression of a preference or of ordinary wishes,’ in order to be considered by the court, and realigns it with the right set out in Article 12(1). The repeal of regulation 16(3)(c)(ii) will allow a child’s views to be more readily taken into account by a court in Child Abduction Convention proceedings. The Instrument ensures that the right of the child to be heard in Child Abduction Convention cases will be strengthened and promoted, while upholding the Child Abduction Convention’s objectives to protect children from the harmful effects of child abduction and ensure their prompt return in appropriate cases.

The CRC further provides 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 (Article 9(1)); and
- In any proceedings pursuant to Article 9(1), all interested parties shall be given an opportunity to participate in the proceedings and make their views known (Article 9(2)).

The Instrument promotes the rights articulated in Article 9 of the CRC. Article 9(1) provides that States Parties shall ensure children are not separated from their parents against their will, unless such a separation is necessary for the best interests of the child. The Instrument enhances the ability for a child to freely express their will and views by allowing a court to more readily consider any objections they may voice. At the same time, the Instrument

preserves the discretion of the court, to either make or refuse to make an order for the return of the child based on their determination.

Article 9(2) provides that all interested parties shall be given the opportunity to participate in proceedings and make their views known. The Instrument, by removing the higher threshold requirement of the child's objection exception, provides children subject to Child Abduction Convention proceedings with a greater opportunity to participate in proceedings and allow their views to be more easily considered.

The Instrument ensures that children's voices are heard more easily in matters under the Child Abduction Convention, therefore enhancing the right of children to be heard under Articles 9 and 12 of the CRC.

The right to respect for the family:

In relation to the right to respect for the family, the CRC provides that:

- No child shall be subjected to arbitrary or unlawful interference with his or her family (Article 16(1)); and
- The child has the right to the protection of the law against such interference or attacks (Article 16(2)).

The ICCPR further provides that:

- No one shall be subjected to arbitrary or unlawful interference with their family (Article 17(1)); and
- The family is the natural and fundamental group unit of society and is entitled to protection by society and the State (Article 23(1)).

The Instrument does not provide for arbitrary or unlawful interference with a family. The Instrument enhances the right of the child and family to protection by the State.

The Instrument seeks to protect and amplify the voices of children who are potentially subject to unlawful familial interference in the form of parental abduction, child abuse, or family violence. The Instrument seeks to lawfully enhance the voice of the child in Child Abduction Convention proceedings, importing them with a greater right to be heard and express their views.

The Instrument positively engages with and supports the right to respect for the family found within the CRC and ICCPR.

The right to protection from exploitation, violence and abuse

In relation to the right to protection from exploitation, violence and abuse, 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 care of the child (Article 19(1)); and
- Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement (Article 19(2)).

The Instrument upholds the rights articulated in Article 19 of the CRC. The Instrument will allow children to more readily express their independent views on any exploitation, violence or abuse they may be subjected to, which may form the basis of their objection to return. Over 70% of Child Abduction Convention cases in Australia raise allegations of family and domestic violence, meaning a large proportion of children to which the Instrument will apply may have been subjected or exposed to family and domestic violence. The Instrument will grant children who have experienced or been exposed to family and domestic violence a greater opportunity to express their views, and have those views considered and heard by the court.

The Instrument therefore enhances the right to be protected from exploitation, violence or abuse.

The CRC further provides that:

- States Parties shall take measures to combat the illicit transfer and non-return of children abroad (Article 11(1)); and
- To end this, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements (Article 11(2)).

The Instrument promotes the rights set out at Article 11 of the CRC. The Child Abduction Convention and the Principal 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. The Instrument does not alter, change or amend this fundamental purpose of the Child Abduction Convention or of the Principal Regulations.

The Instrument upholds the rights articulated in Article 11 of the CRC.

The rights of parents and children:

In relation to the rights of parents and children, 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 (Article 3(1)); and
- States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures (Article 3(2)).

In relation to the rights of parents and children, the ICCPR provides that:

- Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State (Article 24(1)).

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. The Child Abduction 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 Child Abduction Convention also sets out exceptions where the court has discretion to refuse to make an order for the return of a child. The Instrument upholds the Articles 3(1), 3(2) of the CRC and Article 24(1) of the ICCPR. The amendment to the Principal regulations allows the Court to exercise their discretion not to order a return when a child who is at an appropriate age and level of maturity expresses an objection to a return. This ability to exercise this discretion protects the child from a return which may not be in their best interests.

Conclusion

The Instrument is compatible with human rights because it advances the protection and enjoyment of human rights provided for under the CRC and ICCPR.