

Family Law (Child Abduction Convention) Regulations (Amendment) 1995 No. 296

EXPLANATORY STATEMENT

STATUTORY RULES 1995 No. 296

Issued by the Authority of the Attorney-General

Family Law Act 1975

Family Law (Child Abduction Convention) Regulations (Amendment)

Subsection 125(1) of the *Family Law Act* 1975 (the Act) empowers the Governor-General to make regulations for the purposes of the Act.

Section 111B of the Act provides that the regulations may make such provision as is necessary to enable Australia to perform its obligations under the Hague Convention on the Civil Aspects of International Child Abduction (the Convention).

The objects of the Convention are to locate, and secure the prompt return, of children abducted 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. On 22 April 1986, the Family Law (Child Abduction Convention) Regulations were made to give effect to the Convention for Australia.

The purpose of the amendments is to ensure that the words of the regulations more closely reflect the provisions of the Hague Convention on Civil Aspects of International Child Abduction, to clarify or improve a number of the provisions in the regulations and to re-arrange the regulations into 5 Parts.

Part 1 will include provisions defining words used in the regulations and will state the duties, powers and functions of authorities implementing the Convention in Australia. Part 2 will provide for individuals to make applications under the Convention for the return of abducted children. Part 3 will provide for authorities to seek orders from the courts for the return to another country of children abducted to Australia. Part 4 will provide for individuals to make applications under the Convention for assistance in securing access to children in Convention countries. Part 5 will include miscellaneous provisions relating to court proceedings in cases under the Convention in Australia.

Details of the amendments are contained in the attachment.

Attachment

Regulation 1 is formal.

Regulation 2 inserts a new heading consequential upon the re-arrangement of the regulations into 5 Parts.

Regulation 3.1 omits the definition of Commonwealth Central Authority and inserts a new definition of consequential upon the repeal by regulations 4, 5 and 7 of provisions relating to the Commonwealth Central Authority.

Regulation 3.2 replaces the existing definition of 'removal' consequential upon the inclusion in new regulation 3 of a new definition of that word.

Regulation 3.3 replaces the existing definition of 'rights of access' with a new definition to ensure consistency with the meaning given to those words by Article 5 of the Convention.

Regulation 3.4 replaces the existing definition of 'rights of custody' consequential upon the inclusion in new regulation 4 of a new definition of those words.

Regulation 3.5 inserts a new definition of court for the purposes of new regulation 14 (applications to court).

Regulation 3.5 also inserts a new definition of Registrar for the purposes of new subregulation 15(4) (Registrar to provide reasons for failure by court to expeditiously determine application for return of an abducted child).

Regulation 3.5 also inserts a new definition of 'retention' consequential upon the inclusion in new regulation 3 of a new definition of that word.

Regulation 3.6 inserts a new subregulation 2(1B) to provide that, except so far as the contrary intention appears, an expression that is used in the Regulations and in the Convention has, in the Regulations, the same meaning as in the Convention.

Regulation 3.6 also inserts a new subregulation 2(1C) to make clear that applications for the return of a child are not limited to situations in which a child is removed directly from one Convention country to another. Consistently with the Convention, new subregulation 2(1C) provides that removal of a child includes removal to a convention country, whether or not the child is first removed to another country.

Regulations 4 and 5 omit existing regulations 3 and 4 which make extensive provision for appointment and resignation of the Commonwealth Central Authority for the purposes of the Convention. In practice officers authorised by the Secretary of the Attorney-General's Department carry out the functions of the Commonwealth Central Authority. In order to simplify the Regulations and avoid unnecessary work in appointments, existing regulations 3 and 4 are omitted and a new definition of Commonwealth Central Authority is included by regulation 3.1 to provide for the Secretary of the Department to be the Central Authority.

Regulation 4 also inserts a new regulation 3 to define removal and retention to ensure the consistency of the regulations with the meaning given to those words by Article 3 of the Convention. Regulation 5 also inserts a new regulation 4 to define 'rights of custody' to ensure the consistency of the regulations with Articles 3 and 5 of the Convention.

Regulation 6 amends existing regulation 5 to provide that the functions of the Commonwealth Central Authority include doing everything necessary or appropriate to give effect to the Convention in relation to the welfare of a child on return to Australia. This amendment is necessary to ensure consistency with the obligation imposed by Article 7 of the Convention for

Central Authorities to take steps as necessary and appropriate to secure the safe return of a child.

Regulation 6 also amends existing regulation 5 to require the Commonwealth Central Authority to act expeditiously in dealing with applications under the Convention. This will ensure consistency with Article 11 of the Convention provides that administrative authorities shall act expeditiously in proceedings for the return of a child.

Regulation 7 omits existing regulation 6 which makes extensive provision for acting appointments as the Commonwealth Central Authority for the purposes of the Convention. In practice officers authorised by the Secretary of the Attorney-General's Department carry out the functions of the Commonwealth Central Authority. In order to simplify the Regulations and avoid unnecessary work in appointments, existing regulation 6 is omitted and a new definition of Commonwealth Central Authority is included by regulation 3.5 to provide for the Secretary of the Department to be the Central Authority.

Regulation 7 also inserts a new regulation 6 consequential upon the re-arrangement of the Regulations into 5 Parts. Provisions in existing regulations 14 and 25 are now relocated in new regulation 6.

Regulation 8 inserts a new heading consequential upon the re-arrangement of the regulations into 5 Parts.

Regulation 9 omits existing subregulation 11 (1) and replaces it with a new subregulation 11 (1) for the purpose of ensuring consistency with Article 8 of the Convention, which allows an application to be made by a person, institution or other body and refers to both removal and retention of a child as being grounds for an application under the Convention.

Regulation 10 omits existing regulation 12 which, requires applicants seeking the return of a child to Australia to submit with their application a translation into the language of the country to which the child has been abducted. In practice other countries accept applications in English or the Commonwealth Central Authority takes responsibility for arranging translations. Regulation 12 is therefore unnecessary and is repealed.

Regulation 11 omits existing regulation 13 and replaces it with a new regulation 13 for the purpose of ensuring consistency with Article 8 of the Convention (which refers to both removal and retention of a child as being grounds for an application under the Convention), Article 27 of the Convention (which provides that a Central Authority is not bound to accept an application that does not meet the requirements of the Convention or is otherwise not well founded but must give reasons for its decision to refuse an application) and Articles 7 and 10 of the Convention (which make clear that the action to be taken by the Central Authority may include action to seek the voluntary return of a child or to seek an amicable resolution of the issues).

Regulation 12 inserts a new heading consequential upon the re-arrangement of the regulations into 5 Parts.

Regulation 13 omits existing regulation 14 consequential upon the re-arrangement of the regulations into 5 Parts. Provisions in existing regulations 14 and 25 are now relocated in new regulation 6.

Regulation 13 also inserts a new regulation 14 to replace existing provisions in regulation 15 with some alterations:

- New paragraph 14(1)(a) replaces existing paragraph 15(1)(d).
- New paragraph 14(1)(b) replaces existing paragraph 15(1)(a), which provides that a warrant may be issued by the court for the location and apprehension of an abducted child. New paragraph 14(1)(b) will clarify the scope of the powers that attach to a warrant so that they will have the same scope as the powers attaching to warrants issued under the *Family Law Act 1975*.

Article 7 of the Convention requires Australia to take measures to discover the whereabouts of abducted children and return them to their country of habitual residence.

- New paragraph 14(1)(c) replaces existing paragraph 15(1)(b) which provides that the Central Authority may apply for an order that a child not be removed from a particular place (eg. from a particular locality, from a State or from Australia). New paragraph 14(1)(c) extends this provision by making clear that the order sought may include a direction that the Australian Federal Police are to prevent the removal of the child.
- New paragraph 14(1)(d) replaces existing paragraph 15(1)(c) which provides that the Central Authority may seek orders to secure the welfare of the child pending determination of the application for return to a Convention country.
- New paragraph 14(1)(e) is a new provision providing that, in proceedings relating to an application for the return of a child to a Convention country, the Central Authority may seek any other order it thinks fit to give effect to the Convention.
- New paragraph 14(2)(a) is an extension of existing paragraph 15(1)(a), which provides that a Central Authority may seek a warrant for the apprehension of a child who has been abducted to Australia. New paragraph 14(2)(a) will ensure that a Central Authority may seek a warrant for the apprehension of a child who is alleged to have been abducted from Australia. Such a warrant may be necessary in order to obtain the assistance of Interpol or overseas police forces in locating a child. The powers attaching to such warrants will be the same as those applying to warrants issued under the *Family Law Act* 1975. Article 7 of the Convention requires Australia to take measures to discover the whereabouts of abducted children and return them to their country of habitual residence.
- New paragraph 14(2)(b) is a new provision to ensure consistency with the obligation imposed by Article 7 of the Convention, which requires Central Authorities to take steps as necessary and appropriate to secure the safe return of a child. New paragraph 14(2)(b) will therefore provide that a Central Authority may seek orders in relation to the welfare of the child on return to Australia under the Convention.
- New paragraph 14(2)(c) is a new provision providing that, in proceedings relating to an application for the return of a child to Australia under the Convention, the Central Authority may seek any other order it thinks fit to give effect to the Convention.
- New subregulations 14(3) and 14(4) replace existing subregulations 15(1B) and 15(4) which provides for answers and cross applications in relation to applications under subregulations 14(1) or 14(2).

Regulation 14 omits existing regulation 15 and replaces it with a new regulation 15 with minor amendments:

- New subregulation 15(1) replaces existing subregulations 15(2) and (3) providing that a court may make orders sought in an application or cross application under regulation 14 and may impose conditions on such orders.
- New subregulations 15(2) and 15(4) give effect to Article 11 of the Convention which provides that judicial authorities shall act expeditiously in proceedings for the return of a child. New subregulations 15(2) and 15(4) are based on section 14 of the New Zealand Guardianship Amendment Act 1991.
- New subregulation 15(3) is a new provision allowing the court to order the surrender of a passport to prevent the removal of an abducted child.

Regulation 15 omits existing regulation 16 and replaces it with a new regulation 16 with minor amendments:

- New subregulation 16(1) replaces existing subregulations 16(1) and 16(2).
- New subregulation 16(2) is a new provision which is inserted in the Regulations to make clear that the court has power to determine that an application under regulation 13 is not one to which the Convention applies and therefore the Central Authority's application to the court under regulation 14 should be rejected. New subregulation 16(2) lists the grounds upon which an application under regulation 13 may be rejected by the Central Authority.
- New subregulation 16(3) replaces existing subregulation 16(3) which sets out the discretionary grounds upon which the court may refuse to order the return of a child.
- New subregulation 16(4) replaces existing subregulation 16(4) which provides for the court to take into account information relating to the social background of a child.
- New subregulation 16(5) is a new provision which makes clear that the court has a discretion to order the return of a child to his or her country of habitual residence despite the existence of grounds for refusing to order the return under subregulation 16(3). This provision gives effect to Article 13 of the Convention.

Regulation 16 omits existing regulation 17 and replaces it with a new regulation 17 for the purpose of ensuring consistency with Article 8 of the Convention (which refers to both removal and retention of a child as being grounds for an application under the Convention) and Article 15 of the Convention (which allows a person seeking the return of a child to seek a declaration from a court that a child has been wrongfully removed).

Regulation 17 omits existing regulation 18 and replaces it with a new regulation 18 for the purpose of ensuring consistency with Article 17 of the Convention (which provides that custody orders made by the courts are not to prevent the making of an order for return under the Convention) and Article 19 of the Convention (which provides that an order for the return of a child to its country of habitual residence is not to be taken as a determination of the merits of any dispute as to who should have custody of the child upon return to its country of habitual residence).

Regulation 18 omits existing regulation 19(1) consequential upon the new provisions in new subregulations 15(2) and 15(4) which implement article 11 of the Convention (judicial authorities to proceed expeditiously in determining applications for the return of a child).

Regulation 18 also omits existing subregulation 19(2), which provides that applications must be served on persons who have possession of the child. Subregulation 19(2) is replaced by new regulation 27. This is one of a number of changes in the regulations which are necessary to give effect to a re-arrangement of the Regulations into 5 Parts.

Regulation 19 amends existing regulation 20 to give effect to the objective of the Convention, as stated in the Preamble, which is to ensure the return of a child to his or her country of habitual residence rather than to the applicant. The words 'to the applicant' in regulation 20 are therefore replaced with words in effect meaning return of the child to his or her country of habitual residence.

Regulation 20 amends existing regulation 21 (which refers to proceedings instituted for the purpose of the performance by Australia of its obligations under the Convention) is amended to more closely follow the words of Article 22 of the Convention which refers to proceedings falling within the scope of the Convention.

Regulation 21 repeals existing regulation 22 consequential upon the re-arrangement of the Regulations into 5 Parts. Provisions in existing regulation 22 are now relocated in new regulation 30.

Regulation 22 repeals existing regulation 23 consequential upon the re-arrangement of the regulations into 5 Parts. Provisions in existing regulation 23 are now relocated in new regulation 29.

Regulation 23 inserts a new heading consequential upon the re-arrangement of the regulations into 5 Parts.

Regulation 24.1 omits existing subregulation 24(1) and replaces it with new provisions to clarify the operation of provisions relating to access:

- New subregulation 24(1) deals with applications by persons in Australia to have arrangements made for organising or securing access in another Convention country; new regulation 25 deals with applications by persons in a Convention country to have arrangements made for organising or securing access in Australia;
- New subregulation 24(1), consistently with Article 21 of the Convention, refers to an application to have arrangements made for organising or securing access (rather than an application by a person claiming to have existing rights of access referred to in existing subregulation 24(1));

Regulation 24.2 omits existing subregulations 24(5)(5A)(5B)(6) and (7) as those provisions are replaced by new regulation 25. Regulation 24.2 also inserts new subregulations 24(5) and 24(6) to implement Article 27 which provides that a Central Authority is not bound to accept an application that does not meet the requirements of the Convention or is otherwise not well founded but must give reasons for its decision to refuse an application.

Regulation 25 repeals existing regulation 25 consequential upon the re-arrangement of the Regulations into 5 Parts. New regulation 6 replaces existing regulations 14 and 25.

Regulation 25 also inserts a new regulation 25 consequential upon the amendments made by regulation 24 and to make new provision in relation to access applications:

- new regulation 25 deals with applications by persons in a Convention country to have arrangements made for organising or securing access in Australia; new subregulation 24(1) deals with applications by persons in Australia to have arrangements made for organising or securing access in another Convention country;
- new paragraph 25(1)(a) is an extension of existing paragraph 15(1)(a), which provides that a Central Authority may seek a warrant for the apprehension of a child who is subject to the provisions of the Convention. New paragraph 25(1)(a) will ensure that a Central Authority may seek a warrant for the apprehension of a child whose whereabouts in Australia is unknown. Such a warrant may be necessary in order to obtain the assistance of police forces and other government agencies in locating a child. The powers attaching to such warrants will be the same as those applying to warrants issued under the *Family Law Act 1975*. Article 7 of the Convention requires Australia to take measures to discover the whereabouts of children who are subject to the provisions of the Convention and assist in enforcing access rights;
- new paragraph 25(1)(b) is a new provision allowing the Central Authority to seek any order appropriate to give effect to the provisions of the Convention relating to enforcement of access;
- new subregulations 25(2), (3), (4) and (5) replace existing subregulations 24(5A), (5B), (6) and (7).

Regulation 26 inserts a new heading consequential upon the re-arrangement of the Regulations into 5 Parts.

Regulation 26 also inserts a new regulation 26. In the course of deciding on an application for the return of a child or an access application, it may be necessary for the court to have expert independent evidence (eg as to the wishes of the child). New regulation 26 therefore includes a

provision based on section 62A of the *Family Law Act 1975* providing that the court may direct a court counsellor or welfare officer to furnish to the court a report on such matters relevant to the proceedings as the court thinks desirable.

Regulation 26 also inserts a new regulation 27 consequential upon the re-arrangement of the regulations into 5 Parts. Provisions in existing subregulation 19(2) are now relocated in new regulation 27. Regulation 26 also inserts a new regulation 28 to deal with the situation in which proceedings are started in one Registry of the Family Court by one Central Authority, the child is located in another State and new proceedings have to be started in that State by another Central Authority.

Regulation 26 also inserts a new regulation 29 consequential upon the re-arrangement of the Regulations into 5 Parts. Provisions in existing regulation 23 are now relocated in new regulation 29 with minor changes. New paragraph 29(1)(b) is a new provision allowing the affidavit evidence of overseas applicants and other witnesses to be admitted in evidence while leaving the court to determine the weight to be given to that evidence. New paragraph 29(3)(b) implements Article 14 of the Convention which provides courts may take judicial notice of judicial and administrative decisions in the country of the child's habitual residence.

Regulation 26 also inserts a new regulation 30 consequential upon the re-arrangement of the regulations into 5 Parts. Existing regulation 22 is replaced by new regulation 30.

Regulation 27 amends the forms of application in Schedule 1 to the regulations for the purpose of ensuring consistency with Article 8 of the Convention (which refers to both removal and retention of a child as being grounds for an application under the Convention), and Article 28 (which provides for an applicant to give a written authorisation to an overseas Central Authority to act on his or her behalf). The forms are also amended to make clear that applications under new regulation 14 are made by the responsible Central Authority.