

Family Law (Child Protection Convention) Regulations 2003 2003 No. 66

EXPLANATORY STATEMENT

Statutory Rules 2003 No. 66

Issued by the Authority of the Attorney-General

Subject: *Family Law Act 1975*

Family Law (Child Protection Convention) Regulations 2003

The *Family Law Amendment (Child Protection Convention) Act 2002* (the Convention Act) implements in Australia the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children 1996 (the Convention).

The Convention Act received Royal Assent on 3 September 2002 but will not commence until the Convention enters into force after it is ratified.

Subsection 125(1) of the *Family Law Act 1975* (the Act) empowers the Governor-General to make regulations prescribing all matters necessary to be prescribed for the purposes of the Act. Section 111CZ of the Act, which was inserted by the Convention Act, provides that the regulations may make such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention. Sub-section 111CZ(3) of the Act provides that the regulations may confer jurisdiction on Federal, State or Territory courts.

Subsection 4(1) of the *Acts Interpretation Act 1901* provides that where an Act amends another Act so that the amended Act will confer power to make regulations, but the amended Act does not come into operation immediately upon its enactment, such regulations may be made under the amended Act as if it had come into operation. However, those regulations can only take effect from the day on which the amended Act comes into effect.

The purpose of these Regulations is to make provisions as necessary or convenient to enable Australia to perform its obligations under the Convention. The Regulations provide for:

- Central Authorities to carry out Australia's obligations under the Convention (Part 3 of the Regulations);
- the sending of Australian protection measures for registration and enforcement in other Convention countries (Part 4 of the Regulations);
- procedures for the registration in Australia of protection measures from other Convention countries (Part 5 of the Regulations);
- the issuing and recognition of certificates as to the parental responsibility of parents (Part 6 of the Regulations);
- implementation of the Convention in relation to State and Territory matters (Part 7 of the Regulations); and
- forms for use in court proceedings under the Convention (Part 8 of the Regulations).

The details of the Regulations are set out in the Attachment.

The Regulations commence on commencement of the Convention Act, which under section 2 of that Act is the date of the Convention's entry into force for Australia. Ratification of the Convention is expected to occur in time for entry into force on 1 August 2003.

ATTACHMENT

Details of the Family Law (Child Protection Convention) Regulations 2003

Regulation 1 is formal.

Regulation 2 provides that the Regulations commence on the date that the Convention enters into force for Australia. It is expected that the Convention will be ratified in time for the Convention to enter into force on 1 August 2003. Regulation 2 ensures consistency with section 2 of the *Family Law Amendment (Child Protection Convention) Act 2002* which provides that that Act does not come into force until the day the Convention enters into force for Australia.

Regulation 3 defines certain expressions for the purposes of the Regulations, including:

- Act;
- Bureau;
- Commonwealth measure;
- document that is a foreign measure;
- protection measure;
- recognised foreign measure;
- special medical treatment;
- State;
- State central authority;
- State court; and
- State measure.

Regulation 3(2) provides that words and expressions defined in section 111CA of the Act have the same meaning in the Regulations.

Regulation 3(3) provides that Convention countries are listed in Schedule 1 to the Regulations. The meaning of Convention country is defined in section 111CA of the Act and a list of Convention countries is included in the Regulations for the information of legal practitioners and other users of the legislation.

Regulation 4 provides that Parts 6, 7 and 8 of the Regulations do not apply in a State which passes a law having the same or comparable effect as the Regulations. Regulation 4 ensures that, where a State chooses to pass its own legislation to give effect to the Convention, there will be no conflict between the State law and the Regulations. The regulation implements a decision made by the Standing Committee of Attorneys-General in November 2002 that Regulations be made by the Commonwealth to implement the Convention subject to a roll back clause under which the Regulations would cease to apply in any State or Territory which passes its own legislation to implement the Convention.

Regulation 5 sets out the functions of the Commonwealth Central Authority. Section 111CA of the Act provides that the Commonwealth Central Authority is the Secretary to the

Commonwealth Attorney-General's Department. Regulation 5(3) requires the Commonwealth Central Authority to consult before exercising any of its functions which would affect the exercise of the functions of State Central Authorities.

Regulation 6 requires the name, address and functions of the Commonwealth Central Authority to be notified to the Permanent Bureau of the Hague Conference on Private International Law.

Regulation 7 provides that the State Central Authority for an Australian State is a person designated by the Commonwealth Attorney-General under regulation 8, by the State under paragraph 7(1)(a) or by the State under State legislation referred to in regulation 4.

Regulation 8 provides that the Commonwealth Attorney-General may designate a person to be a State Central Authority for a State.

Regulation 9 provides that a State must notify the Commonwealth as soon as possible after the State designates a person to be a State Central Authority for the State. Regulation 9 also requires the name, address and functions of the State Central Authority to be notified to the Permanent Bureau of the Hague Conference on Private International Law.

Regulation 10 implements articles 23.1, 24 and 28 of the Convention by providing for court registrars and the Commonwealth Central Authority to send Family Law Act orders to other Convention countries for registration and enforcement.

Regulations 11 and 12 implement articles 23.1, 24 and 28 of the Child Protection Convention by providing for the registration and enforcement, in courts exercising jurisdiction under the Act, of family law protection measures made by the authorities in other Convention countries. Where the foreign measure is more appropriately dealt with by State authorities (for example where the measure relates to action by government authorities for the protection of a child from abuse or neglect) it is sent to a State central authority to be dealt with in accordance with the Convention or a comparable State law. Under regulation 12(4) a parent may initiate proceedings in a court exercising jurisdiction under the Act to enforce a recognised foreign measure.

Regulation 13 provides that a foreign measure must not be registered under regulation 12 if it is a measure relating to special medical treatment of a child. Regulation 3 defines special medical treatment as treatment that a parent may not consent to (for example sterilisation of a child which under Australian law may require approval by a court or a tribunal).

Regulation 14 provides for State child protection authorities to be notified where a court, which is exercising jurisdiction under the Act in proceedings relating to a foreign measure registered under regulation 12, becomes aware that the measure involves action by authorities to protect a child from abuse.

Regulation 15 implements article 23 of the Convention by providing for limits on the variation, or cancellation of the registration of, a foreign measure registered under regulation 12. Regulation 15(4) gives effect to an undertaking given to the Senate Legal and Constitutional Committee that the Regulations would provide that the Family Court, in implementing article 23(d) of the Convention, must have regard to any prior decision of an Australian court refusing to order the return of a child to another country under the Hague Convention on Child Abduction.

Regulation 16 implements articles 25 and 27 by providing that in proceedings involving a measure taken by an authority in a Convention country, a court exercising jurisdiction under the Act is bound by findings of fact by the foreign authority and (subject to regulation 15) may not review the merits of the foreign measure. Regulations 16(4) and 16(5) mirror provisions in the *Family Law (Child Abduction Convention) Regulations 1986* relating to admission of foreign evidence in proceedings.

Regulation 17 provides for a court exercising jurisdiction under the Act to notify authorities in another Convention country where a foreign measure is varied (or its registration cancelled) under regulation 15.

Regulation 18 provides that a person may seek the assistance of the Commonwealth Central Authority to request authorities in another Convention country to vary or cancel a measure registered under regulation 15.

Regulations 19 and 20 implement article 40 of the Convention by providing for courts exercising jurisdiction under the Act to issue certificates, or recognise foreign certificates, stating the parental responsibility of a parent.

Regulation 21(1) provides in effect that the Convention has effect in each State as if it is a law of that State. Along with regulation 4, the regulation implements a decision made by the Standing Committee of Attorneys-General in November 2002 that Regulations be made by the Commonwealth to implement the Child Protection Convention subject to a roll back clause under which the Regulations would cease to apply in any State or Territory which passes its own legislation to implement the Convention. Under regulation 4, regulation 21(1) ceases to apply in a State if a State passes its own legislation implementing the Convention. To resolve any doubt, regulation 21(2) provides in effect that the private international law rules in the Convention (as implemented by regulation 21(1)) apply despite any private international law rules applying under the State laws listed in Schedule 2 or under common law (eg relating to the *parens patriae* jurisdiction of courts).

Regulation 22, in accordance with paragraph 111CZ(3)(b) of the Act, invests jurisdiction in State courts to hear proceedings in relation to requests to transfer jurisdiction to or from overseas authorities and to hear proceedings under regulation 25.

Regulation 23 provides that a State court may make rules as to the practice and procedure in relevant proceedings.

Regulations 24 and 25 implement articles 23.1, 24 and 28 of the Convention by providing for the registration and enforcement, in State courts, of child protection measures made by the authorities in other Convention countries.

Regulation 26 implements article 23 of the Convention by providing for limits on the variation, or cancellation of the registration of, a foreign measure registered under regulation 25.

Regulation 27 implements articles 25 and 27 of the Convention by providing that in proceedings involving a measure taken by an authority in a Convention country, a State court is bound by findings of fact by the foreign authority and (subject to regulation 26) may not review the merits of the foreign measure. Regulations 27(4) and 27(5) mirror provisions in the *Family Law (Child Abduction Convention) Regulations 1986* relating to admission of foreign evidence in proceedings.

Regulation 28 provides for a State court to notify authorities in another Convention country where a foreign measure is varied (or its registration cancelled) under regulation 25.

Regulation 29 provides that a person may seek the assistance of the Commonwealth Central Authority to request authorities in another Convention country to vary or cancel a measure registered under regulation 25.

Regulation 30 provides that forms set out in Schedule 3 shall be used in proceedings under the Convention.

Schedule 1 to the Regulations lists Convention countries.

Schedule 2 to the Regulations lists State legislation.

Schedule 3 to the Regulations sets out forms for the purposes of regulation 30.