

# **Marriage Amendment (2021 Measures No. 1) Regulations 2021**

## **EXPLANATORY STATEMENT**

Made under the *Marriage Act 1961*

### **PURPOSE AND OPERATION OF THE INSTRUMENT**

The *Marriage Act 1961* (the Act) establishes the legal framework for marriage in Australia, including the requirements for marriages to be validly solemnised under Australian law. The Act also establishes the office of Registrar of Marriage Celebrants (the Registrar). This is a position occupied by an officer in the Attorney-General's Department, whose role is to administer the registration of marriage celebrants authorised under Subdivision C of Division 1 of Part IV of the Act, otherwise known as the Marriage Celebrants Program.

Section 120 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all 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 *Marriage Regulations 2017* (the Marriage Regulations) provide procedural and technical support for the marriage framework established by the Act.

The purpose of the *Marriage Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations) is to update the Marriage Regulations to ensure their clear and efficient operation. This includes: amendments to assist with the efficient administration of the Marriage Celebrants Program; consequential amendments to the Marriage Regulations arising from amendments to the Act made by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Marriage Amendment Act) which commenced on 9 December 2017 and by the *Civil Law and Justice Legislation Amendment Act 2018* (CLJLAA) on 26 October 2018; and amendments to address a recommendation made to Government about the operation of the Marriage Regulations by the Senate Standing Committee on Regulations and Ordinances in its *Delegated Legislation Monitors 1 and 3 of 2018*.

The Regulations amend section 53 of the Marriage Regulations to simplify ongoing professional development requirements (OPD) for marriage celebrants, to reduce regulatory burden and increase efficiency in the Attorney-General's Department administration of the Marriage Celebrants Program. The amendments also clarify that a statement made under subsection 53(3) of the Marriage Regulations is a legislative instrument for the purposes of the *Legislation Act 2003*. This addresses an issue identified by the Senate Standing Committee on Regulations and Ordinances, expressed in its *Delegated Legislation Monitors 1 and 3 of 2018*.

In 2017 the Marriage Amendment Act provided for marriage equality in Australia. The Marriage Amendment Act introduced a new subcategory of 'religious marriage celebrant' in Subdivision D of Division 1 of Part IV of the Act, and expanded the definition of 'authorised celebrant' in section 5 of the Act to include Australian Defence Force chaplains ('chaplains') and a new category of authorised celebrant known as a 'marriage officer'. A 'marriage officer' is an officer (within the meaning of the *Defence Act 1903*), other than a chaplain,

authorised by the Chief of the Defence Force to solemnise marriages of Defence Force members overseas in accordance with Division 3 of Part V of the Act.

The Regulations make consequential amendments to the Marriage Regulations to reflect definitions enacted by the Marriage Amendment Act, and to extend the record keeping and administrative obligations applying to chaplains who solemnise marriages of Defence Force members overseas so they also apply to marriage officers.

In addition to amendments arising from the marriage equality legislation, the Regulations make a number of consequential amendments to the Marriage Regulations as a result of minor and technical amendments made to the Act by the CLJLAA on 26 October 2018. These predominantly relate to the operation of the Marriage Celebrants Program. For example, these include amendments to clarify the type of information marriage celebrants need to provide the Registrar and what information the Registrar is required to publish on the register of marriage celebrants. The CLJLAA also re-established the Office of Registrar of Overseas Marriages. The function of that office is to register in Australia any marriages solemnised overseas under Part V of the Act. The Marriage Regulations need to be updated to support those CLJLAA amendments.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised. However, section 17 of the *Legislation Act 2003* requires the rule-maker to be satisfied that appropriate and reasonably practicable consultation has been undertaken, before making a legislative instrument.

The Attorney-General's Department has consulted the Department of Defence about the amendments relating to marriage officers. The amendments relating to the information the Registrar is required to publish on the register of marriage celebrants were developed following feedback from marriage celebrants. The amendments to OPD requirements were developed in response to feedback received from marriage celebrants and other stakeholder groups with an interest in OPD during an extensive consultation process in February and March 2021. Broader stakeholder consultation was not undertaken because the remaining amendments are minor or technical in nature, and either clarify existing provisions, amend the Marriage Regulations to reflect new terminology and requirements in the Act, or reflect a recommendation to Government.

The 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*. A Statement of Compatibility with Human Rights is set out in **Attachment A**.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. Details of the Regulations are set out in **Attachment B**.

The Office of Best Practice Regulation was consulted about the Regulations and advised that a Regulatory Impact Statement is not necessary (OBPR ID 25218).

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

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

### **Marriage Amendment (2021 Measures No. 1) Regulations 2021**

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 disallowable legislative instrument**

The *Marriage Act 1961* (the Act) establishes the legal framework for marriage in Australia, and the Marriage Regulations 2017 (the Marriage Regulations) provide procedural and technical support for the marriage framework established by the Act.

The Marriage Amendment (2021 Measures No. 1) Regulations 2021 (the Regulations) amend the Marriage Regulations to:

- assist with the efficient administration of the Marriage Celebrants Program;
- reflect certain amendments made to the Act by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* which commenced on 9 December 2017 and the *Civil Law Justice and Legislation Amendment Act 2018* (CLJLAA) on 26 October 2018; and
- address a recommendation made to Government by the Senate Standing Committee for the Scrutiny of Delegated Legislation (previously the Senate Standing Committee on Regulations and Ordinances) in its *Delegated Legislation Monitors 1 and 3 of 2018*.

#### **Human rights implications**

This disallowable legislative instrument engages the right to privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, or attacks on their reputation.

The Marriage Regulations provide for the lawful collection, storage, use, disclosure and publication of personal information by the Registrar of Marriage Celebrants (the Registrar). These measures are reasonably necessary in order to achieve the legitimate objectives of upholding the legal framework for marriage in Australia, regulating marriage celebrants, enabling registration of marriages by registering authorities and ensuring details of a marriage can be confirmed after the marriage has taken place.

The Regulations will promote marriage celebrants' right to privacy by giving the Registrar discretion to not publish certain information about a marriage celebrant if the Registrar considers that it is not appropriate to do so.

Under subsection 39B of the Act, the Registrar is required to maintain a register of marriage celebrants, and all information contained in the register must be made available on the internet. Section 43 of the Marriage Regulations specifies the details the Registrar needs to enter in the register of marriage celebrants when registering a person under subsection 39D(5) of the Act. These details include the celebrant's full name and title, contact details, date of registration and address. Subsection 43(1)(b) requires the person's address to include their suburb, town or locality, their postcode and their State or Territory.

The requirement to publish identifying information about marriage celebrants is intended to ensure members of the public can be certain the person they select to solemnise their marriage is an authorised marriage celebrant. It also assists couples to locate the services of, and contact, a marriage celebrant in their area. However, there may be circumstances where it is not appropriate for a celebrant's full address to be published, for example where their personal safety may be at risk. New subsection 43(1A) gives the Registrar discretion not to publish certain information if the Registrar considers that it is not appropriate to do so.

## **Conclusion**

This Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights.

**Details of the Marriage Amendment (2021 Measures No. 1) Regulations 2021**

**Section 1 – Name**

This section provides that this instrument is the *Marriage Amendment (2021 Measures No. 1) Regulations 2021*.

**Section 2 – Commencement**

This section provides for the instrument to commence on 1 January 2022.

**Section 3 – Authority**

This section provides that the instrument is made under the *Marriage Act 1961* (the Act).

**Section 4 – Schedules**

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

**Schedule 1 – Amendments**

**Item 1 – Section 5 – (definition of *listed professional development activities*)**

This item repeals the definition of *listed professional development activities*. This definition is no longer required as the amendments to subsection 53(1) remove this term from subsection 53(1). There are no further references to this term in the Marriage Regulations 2017 (the Regulations).

**Item 2 – Subsection 8(4)**

This item substitutes subsection 8(4) with a new provision to provide that, in relation to a marriage where one of the parties is a minor, if a person solemnising the marriage is a chaplain or marriage officer, the person must forward the order of a Judge or magistrate authorising the marriage to the Registrar of Overseas Marriages. The new provision broadens the application of subsection 8(4) from applying to chaplains to also applying to marriage officers.

This amendment reflects the reinstatement of the office of Registrar of Overseas Marriages following the enactment of the CLJLAA. The amendment also reflects the creation of the role ‘marriage officer’ arising from the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Marriage Amendment Act).

This item adds two notes at the end of subsection 8(4). Note 1 directs the reader to Division 3 of Part V of the Act, which deals with marriages of members of the Defence Force overseas. Note 2 directs the reader to the relevant requirement in

subparagraph 50(4)(a)(i) of the Act, that an authorised celebrant who solemnises a marriage in Australia is required to forward orders made under section 12 of the Act to the appropriate registering authority for the marriage within 14 days after the solemnisation. The note is not intended to have substantive effect.

This subsection relies on the necessary or convenient power in section 120 of the Act. This subsection is incidental to the requirement in subparagraph 50(4)(a)(i) of the Act for authorised celebrants to forward a copy of the order issued by a Judge or magistrate in relation to a marriage to the appropriate registering authority for the marriage. Additionally, this subsection minimises the risk of authorised celebrants solemnising a marriage in accordance with Division 3 of Part V of the Act engaging in offending conduct by solemnising a marriage where they have reason to believe—due to not having been given an order—there is a legal impediment to the marriage (paragraph 23B(1)(e) and section 100 of the Act).

### **Item 3 – After subsection 43(1)**

This item inserts a new subsection 43(1A) after subsection 43(1) to provide that any details mentioned in paragraph 43(1)(b) are not required to be entered on the register of marriage celebrants if the Registrar does not consider it appropriate.

Under section 39B of the Act, the Registrar is required to maintain a register of marriage celebrants, and all information contained in the register must be made available on the internet. Section 43 of the Regulations specifies the details the Registrar needs to enter in the register of marriage celebrants when registering a person under subsection 39D(5) of the Act. These details include the celebrant's full name and title, contact details, date of registration and address. Subsection 43(1)(b) requires the person's address to include their suburb, town or locality, their postcode and their State or Territory.

The requirement to publish identifying information about marriage celebrants is intended to ensure members of the public can be certain the person they select to solemnise their marriage is an authorised marriage celebrant. It also assists couples to locate the services of, and contact, a marriage celebrant in their area. However, there may be circumstances where it is not appropriate for a celebrant's full address to be published, for example where their personal safety may be at risk. The insertion of subsection 43(1A) gives the Registrar discretion to not publish certain information if the Registrar considers that it is not appropriate to do so.

This item also adds a note after subsection 43(1A) referring the reader to sections 39DC and 39DE of the Act. These sections outline how and when the Registrar must identify a person as a religious marriage celebrant on the register of marriage celebrants. The note is not intended to have substantive effect.

### **Item 4 – Subsection 44(1)**

This item removes the reference to subsection 44(3) from subsection 44(1), as it will be repealed (see item 5, below). Subsection 44(1) currently provides that for the purposes of paragraph 39FA(2)(b) of the Act, a notice of liability sent to a person must comply with subsections 44(2), (3) and (4).

### **Item 5 – Subsection 44(3)**

This item repeals subsection 44(3) of the Regulations. Section 39FA(2) of the Act requires the Registrar to send a notice to marriage celebrants who are liable to pay the celebrant registration charge in respect of a financial year, notifying them of the amount of celebrant registration charge that is payable by the person and when the payment is due.

Section 44 of the Regulations outlines additional information the Registrar must include in a notice of liability to marriage celebrants. Subsection 44(3) currently provides that, if at the time the notice is sent to the person, the person is exempt from liability to pay the celebrant registration charge in respect of the financial year under section 45 or 46, the notice may instead state that the person is so exempt. Item 5 repeals subsection 44(3) because it is no longer required. In accordance with section 39FA(2) of the Act, as amended by the CLJLAA, the Registrar is no longer required to send a liability notice to celebrants who are not liable to pay the celebrant registration charge. Previously, the Registrar was required to send notices to all celebrants who were registered on 1 July in the year of payment, regardless of whether they were exempt from liability to pay or not.

### **Item 6 – Paragraph 49(2)(b)**

This item amends paragraph 49(2)(b) to clarify that the Registrar may grant a celebrant an exemption from paying the celebrant registration charge in respect of a financial year if the celebrant can demonstrate that they will not reside in Australia at any time during the financial year.

The exemption in paragraph 49(2)(b) was not intended to be available to a celebrant if the celebrant lives for any part of the financial year in Australia. However, this was not clear on the face of the provision because the paragraph 49(2)(b) previously did not specify an exact time period. This amendment clarifies the intended operation of the exemption. It will make clear that if a celebrant resides in Australia at any time during the financial year, the exemption from liability to pay the annual charge on the basis that the celebrant resides overseas is not available.

### **Item 7 – Subsection 53(1)**

This item repeals and replaces subsection 53(1). The new subsection 53(1) provides that a marriage celebrant must, in each calendar year, undertake the professional development activity, or each of the professional development activities, determined to be compulsory for that year in a statement that is in force under subsection 53(3); and ensure that that professional development activity, or each of the professional development activities, is undertaken in the way and with a provider specified in the statement.

The amendments to section 53 in item 7 and in item 8 below change the existing professional development requirements that marriage celebrants need to complete every year. Section 53 has been redrafted so that OPD arrangements are simplified and that OPD consists of an annual compulsory activity or activities of one to two hours, available through the celebrant online portal (and other means for those celebrants who cannot access the online portal, for example, by email). Section 53 has also been redrafted for technical reasons, to make it clearer that the statement of professional development activities is a legislative instrument for the purposes of the *Legislation Act 2003*.

## **Item 8 – Subsections 53(3) to (7)**

This item repeals subsections 53(3) to (7) and replaces them with new subsections 53(3) to 53(6). The amendments to section 53 in this item and in item 7 above change the existing professional development requirements that marriage celebrants need to complete every year. Section 53 has been redrafted so that existing professional development requirements are reduced from a minimum of five hours, to a minimum one or two hour compulsory activity or activities. Section 53 has also been redrafted for technical reasons, to make it clearer that the statement of professional development activities is a legislative instrument for the purposes of the *Legislation Act 2003*.

New subsection 53(3) provides that, as soon as practicable after the start of each calendar year, the Registrar must, by legislative instrument, make a statement that lists professional development activities for the year (the listed activities), and determines one or more of the listed activities to be compulsory for the year.

New subsection 53(4) provides that the Registrar must not determine that an OPD activity is compulsory unless satisfied that a marriage celebrant would likely take between one and two hours to complete the compulsory activity or activities.

New subsection 53(5) provides that the statement may specify one or more ways in which a listed activity may be undertaken, and/or one or more providers of such a listed activity.

New subsection 53(6) recognises that the Registrar may vary the statement throughout the year to list additional professional development activities, however the Registrar will not be able to add a compulsory activity later in the year. The additional (non-compulsory) activities could include listed professional development activities which the Registrar can require a marriage celebrant to undertake as a disciplinary measure. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power has been construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

This item adds a note at the end of subsection 53(6) to explain that the Registrar may vary the statement to list additional, non-compulsory professional development activities for the year. This note is not intended to have substantive effect.

## **Item 9 – After section 58**

This item inserts section 58A. Section 58A provides that, for the purposes of subsection 39G(3) of the Act, a marriage celebrant must notify the Registrar of a change to any details that are entered in the register of marriage celebrants relating to the marriage celebrant, as well as a change to any of the following details provided by the marriage celebrant to the Registrar: an email address, a postal address and a telephone number.

The CLJLAA amended section 39G of the Act to provide that celebrants are required to ensure that information provided to the Registrar is kept up to date, and specific details required to be kept up to date may be prescribed in regulations.

In addition to the information about marriage celebrants which is published on the register of marriage celebrants, the Registrar retains other information about celebrants (such as their full postal address, email addresses and telephone numbers) which, although not required to be published, is necessary to enable the Registrar to effectively administer the Marriage Celebrants Program. For example, it is important that the marriage celebrant's email address is kept up to date, as this is the primary means of communicating with celebrants, including for the purposes of the annual celebrant registration charge (see, for example, paragraphs 44(4)(a) and 51(3)(a) of the Regulations). The consequence of not paying the charge is mandatory deregistration (section 39FB of the Act).

#### **Item 10 – Paragraph 60(a)**

This item replaces the words ‘published under subsection 53(3) for a specified calendar year’, with ‘in force under subsection 53(3)’. This technical amendment reflects that the statement of professional development activities made under subsection 53(3) is a legislative instrument.

#### **Item 11 – At the end of section 60**

This item adds a note at the end of section 60 to explain to the reader that, in accordance with paragraph 39G(1)(ba) of the Act, a marriage celebrant must comply with any disciplinary measures taken against the marriage celebrant under section 39I of the Act. This note is not intended to have substantive effect.

The CLJLAA amended the Act to provide that a marriage celebrant has an obligation to comply with all disciplinary measures imposed on them by the Registrar under section 39I of the Act.

#### **Item 12 – Subsection 73(5)**

This item amends subsection 73(5) to clarify that the record keeping requirements in this subsection only apply to authorised celebrants who solemnise marriages in Australia, under Part IV of the Act (that is, ministers of religion of recognised denominations, state and territory officers, marriage celebrants and religious marriage celebrants).

Subsection 73(5) sets out the record keeping requirements for authorised celebrants. Subsection 73(5) was drafted before the definition of ‘authorised celebrant’ in the Act was expanded by the Marriage Amendment Act to include celebrants authorised to solemnise marriages overseas in accordance with Division 3 of Part V of the Act. This item clarifies that these record keeping requirements only apply to authorised celebrants solemnising marriages in Australia.

#### **Item 13 – Subsection 77(1)**

This item amends subsection 77(1) to clarify that the record keeping requirements in this subsection only apply to authorised celebrants who solemnise marriages in Australia under Part IV of the Act (that is, ministers of religion of recognised denominations, state and territory officers, marriage celebrants and religious marriage celebrants).

Subsection 77(1) sets out how authorised celebrants should deal with retained official certificates. Subsection 77(1) was drafted before the definition of ‘authorised celebrant’ in the Act was expanded by the Marriage Amendment Act to include celebrants authorised to solemnise marriages overseas in accordance with Division 3 of Part V of the Act. This item clarifies that subsection 77(1) only applies to authorised celebrants solemnising marriages in Australia.

#### **Item 14 – Section 79 (heading)**

This item amends the heading of section 79 to replace ‘chaplain’ with ‘authorised celebrant’.

Since passage of the Marriage Amendment Act, overseas marriages of members of the Australian Defence Force under Part V of the Act can be solemnised by:

- a chaplain, or
- an officer (within the meaning of the *Defence Act 1903*), other than a chaplain, authorised by the Chief of the Defence Force under section 71A of the Marriage Act (a marriage officer).

Item 14 reflects this expanded definition of ‘authorised celebrant’.

#### **Item 15 – Section 79**

Section 79 of the Regulations, read with paragraph 74(1)(c) of the Marriage Act, requires each party to an intended marriage to make a declaration about their date of birth and age to their authorised celebrant.

Item 15 would replace the words ‘an intended marriage’ with the words ‘a marriage proposed to be solemnised under Part V of the Act’. The purpose of this amendment is to avoid any doubt, following the expansion of the term ‘authorised celebrant’ by the Marriage Amendment Act, that the declaration requirements in section 79 of the Regulations only apply in relation to marriages solemnised overseas, pursuant to Part V of the Marriage Act. For marriages proposed to be solemnised in Australia, the requirements for parties to declare their date of birth are located in subparagraph 42(1)(b)(iv) of the Marriage Act.

#### **Items 16 and 17 – Subsection 80(5)**

Item 16 replaces ‘a chaplain’ with ‘an authorised celebrant in relation to a marriage solemnised under Part V of the Act’.

Item 17 replaces ‘the chaplain’ (wherever occurring) with ‘the authorised celebrant’.

The definition of ‘authorised celebrant’ in the Act was amended by the Marriage Amendment Act to include chaplains and marriage officers. The amendments in items 16 and 17 ensure the record keeping requirements in subsection 80(5) apply to all celebrants authorised to solemnise marriages overseas in accordance with Division 3 of Part V of the Act (chaplains and marriage officers).

### **Items 18 and 19 – Paragraph 80(5)(c)**

Items 18 and 19 remove references to chaplains from paragraph 80(5)(c) and substitute the term ‘authorised celebrant’.

Paragraph 80(5)(c) currently requires a chaplain who transfers a certificate of marriage to another chaplain or authorised celebrant to record the date of the transfer, the full name of the other chaplain or authorised celebrant and the authorisation number (if any) of the authorised celebrant. These items remove the word ‘chaplain’ from paragraph 80(5)(c), and substitute ‘authorised celebrant’ because the definition of ‘authorised celebrant’ in the Act was expanded by the Marriage Amendment Act to include chaplains. These amendments also ensure that this requirement applies to marriage officers authorised to solemnise marriages overseas in accordance with Division 3 of Part V of the Act, who are also included in the definition of ‘authorised celebrant’.

### **Item 20 – Subsection 80(6)**

Item 20 replaces a reference to a chaplain with ‘authorised celebrant’. This amendment ensures that the record keeping requirements in subsection 80(6) apply to all celebrants authorised to solemnise marriages overseas in accordance with Division 3 of Part V of the Act (chaplains and marriage officers).

### **Item 21 – Paragraph 80(6)(b)**

Item 21 replaces a reference to a chaplain with ‘authorised celebrant’. This amendment ensures that the record keeping requirement in paragraph 80(6)(b) applies to all celebrants authorised to solemnise marriages overseas in accordance with Division 3 of Part V of the Act (chaplains and marriage officers).

### **Items 22 and 23 – Subsection 80(7)**

Items 22 and 23 replace references to chaplains with ‘authorised celebrant’. These amendments ensure that the requirement in subsection 80(7) to give records to a specified person upon request by the Minister applies to all celebrants authorised to solemnise marriages overseas in accordance with Division 3 of Part V of the Act (chaplains and marriage officers).

### **Item 24 – Subsection 82(2)**

This item replaces references to chaplains in subsection 82(2) to ‘an authorised celebrant in relation to a marriage solemnised under Part V of the Act’. This extends the requirements for dealing with retained official certificates under this section to marriage officers, in addition to chaplains.

### **Item 25 – Part 6 (after the heading)**

This item inserts a new heading of ‘Division 1 – The repeal of the old regulations’ after the Part 6 heading. This amendment is to assist the reader and reflects that Item 26 inserts a new division into Part 6.

## **Item 26 – At the end of Part 6**

This item inserts a new division at the end of Part 6, with the heading ‘Division 2 – Amendments made by the Marriage Amendment (2021 Measures No. 1) Regulations 2021. The division includes application and saving provisions for the amendments made by these Regulations.

Section 98 specifies that the amendment to subsection 8(4) made by these Regulations applies in relation to a marriage solemnised on or after the day that instrument commences.