

***FAMILY LAW AMENDMENT (NOTICE OF CHILD ABUSE, FAMILY VIOLENCE OR
RISK) RULES 2020***

REPLACEMENT EXPLANATORY STATEMENT

FAMILY LAW AMENDMENT (NOTICE OF CHILD ABUSE, FAMILY VIOLENCE OR RISK) RULES 2020

EXPLANATORY STATEMENT

Issued by the authority of the Judges of the Family Court of Australia

Section 123 of the *Family Law Act 1975* (Cth) ('the Act') provides that the Judges of the Family Court of Australia ('the Family Court'), or a majority of them, may make Rules of Court providing for the practice and procedure to be followed in the Family Court and some other courts exercising jurisdiction under the Act. The Judges of the Family Court made the *Family Law Rules 2004* ('the Rules') which commenced on 29 March 2004. These amending Rules, the *Family Law Amendment (Notice of Child Abuse, Family Violence of Risk) Rules 2020* ('the amendments'), have now been made by the Judges to amend the Rules.

Subsection 123(2) of the Act provides that the *Legislation Act 2003* (Cth) (other than sections 8, 9, 10, 16 and Part 4 of Chapter 3) applies to rules of court. In this application, references to a legislative instrument in the Act are to be read as references to Rules and references to a rule-maker as references to the Chief Justice acting on behalf of the judges.

The Court has proceeded on the basis that a statement of compatibility with human rights is not required to be included in an explanatory statement to rules of court, as whilst the Act applies the *Legislation Act 2003* (Cth) to rules of court, it does not expressly translate a reference to a legislative instrument in legislation other than the *Legislation Act 2003* (Cth) into a reference to rules of court, such as in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

The Court notes that different views are held as to whether a statement of compatibility with human rights is formally required to be included in an explanatory statement to rules of court. However as an interim measure, and for the purposes of expediency so as to ensure the prompt finalisation of important rule amendments that facilitate the provision of information about risks including child abuse and family violence to the Court, on this occasion, a statement of compatibility with human rights is included below.

Statement of Compatibility with Human Rights

Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]

This 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* (Cth).

Human rights implications

This legislative instrument engages applicable human rights or freedoms, including the following:

- ***The best interests of the child:*** Article 3(1) of the *Convention on the Rights of the Child* (CRC) provides that in all actions concerning children, including by courts, the best interests of the child shall be a primary consideration. Article 7(2) of the *Convention on the Rights of Persons with Disabilities* (CRPD) provides for this right in relation to children with disabilities. Article 3(2) of the CRC requires all legislative, administrative and judicial bodies and institutions to systematically consider how children’s rights and interests are or will be affected directly or indirectly by their decisions and actions.
- ***The protection of children from exploitation, violence and abuse:*** Article 20(2) of the *International Covenant on Civil and Political Rights* (ICCPR) provides for the right to protection from exploitation, violence and abuse. Article 19(1) of the CRC provides for the right to protection of children from exploitation, violence and abuse and article 34 of the CRC provides for the right of protection of children against sexual exploitation. Article 24(1) of the ICCPR also provides for the protection of all children, without discrimination, by virtue of their status as minors. Article 16(1) of the CRPD provides the protection in relation to persons with disabilities. As stated in article 19(1) of the CRC, this right provides that States are required to ‘take all appropriate legislative, administrative, social and educational measures to protect the child or people 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’.

The provisions in the *Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020* broadly replicate existing provisions in the Rules. The Notice in the new form is filed at the commencement of family law parenting proceedings where parties must report any allegations of child abuse, family violence or other risks to children. Where allegations of child abuse, risk of child abuse, or family violence amounting to child abuse, are made in the Notice, the Courts must refer it to the relevant child welfare authority pursuant to subsection 67Z(2) or 67ZBA(2) of the *Family Law Act 1975* (Cth). The new form includes additional questions about a broader variety of risk factors, which will enable the Courts to better understand and respond to those risks.

The new form for the first time requires the provision of risk-related information at the earliest possible stage across both Courts to assist the Courts to respond to child abuse, family violence and other risk factors relevant to parenting proceedings, protect children from violence and abuse and to inform judicial decision-making in the best interests of the child.

It thereby further supports and enhances the treatment of the rights listed above.

Conclusion

This legislative instrument is therefore compatible with human rights as it does not raise any human rights issues.

1. General Outline

Schedule 1 – Amendments

Part 1 – Main amendments

The amendments provide that the prescribed form for a notice mentioned in subsection 67Z(2) or 67ZBA(2) of the Act is a new form called the Notice of Child Abuse, Family Violence or Risk ('the Notice'). This form replaces the Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case) and the Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders).

The amendments provide that the Notice must be filed with an Initiating Application (Family Law), Response to an Initiating Application or Application for Consent Orders in which a parenting order is sought under Part VII of the Act. This is a change to the procedure that was in place immediately before the commencement of these rules amendments, where the form being replaced only had to be filed where an allegation of child abuse, risk of child abuse, family violence, or risk of family violence was made.

The amendments also provide for the filing of another Notice when a person becomes aware of new facts or circumstances that would require them to file a Notice for the purposes of subsection 67Z(2) or 67ZBA(2) of the Act.

The amendments include transitional provisions in Part 27.4 which clarify when the new Notice comes into effect. In summary, where a Notice is required to be filed, the new Notice must be used from the commencement day of the Rules in relation to any proceeding filed on or after the commencement day, or in any proceeding that was instituted but not concluded before the commencement day.

The amendments, in conjunction with concurrent amendments to the *Federal Circuit Court Rules 2001*, have the effect of harmonising the Notice and relevant Rules of Court in relation to the Notice used in the Family Court of Australia and the Federal Circuit Court of Australia.

Part 2 – Prescribed form

The amendment provides that the Notice is the prescribed form in Schedule 2 of the Rules, and removes the Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case) and the Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders).

2. Consultation

The *Legislation Act 2003* (Cth) provides for certain consultation obligations when Rules are made.

The Court consulted on the Notice with the Family Law Section of the Law Council of Australia, State and Territory Law Societies and Bar Associations, Legal Aid organisations and child welfare agencies, amongst other stakeholders. Consultation occurred in relation to the requirement to file the Notice with every Initiating Application or Response seeking parenting orders, and in relation to the form and content of the Notice.

No further consultation was required. Consultation was not required in relation to the transitional provisions which are technical drafting amendments.

3. Summary of major changes

The major changes introduced by the amendments to the Rules are set out below in relation to Part 1 and Part 2 of Schedule 1.

Part 1 – Main amendments

- 1) To amend subrule 2.04D(1) to provide that the prescribed form for a notice mentioned in subsection 67Z(2) or 67ZBA(2) of the Act is the Notice of Child Abuse, Family Violence or Risk ('the Notice').
- 2) To amend table 2.2 to provide that the Notice must be filed with an Initiating Application (Family Law), Response to an Initiating Application or Application for Consent Orders seeking orders under Part VII of the Act.
- 3) To insert a definition of 'interested person' in rule 2.04 that adopts the definition in section 67Z or section 67ZBA where either of those sections applies.
- 4) To insert rule 2.04B to provide for another Notice to be filed where a person has filed a Notice, and becomes aware of new facts or circumstances that would require the person to file another Notice for the purposes of subsection 67Z(2) or 67ZBA(2) of the Act.
- 5) To amend rule 2.04D to provide that if a person files a Notice that includes one or more allegations of child abuse, family violence or risk of harm to a child, the person must file an affidavit stating the evidence on which each allegation set out in the Notice is based. This does not apply to a Notice filed with an Application for Consent Orders.
- 6) To insert a definition of the Notice in the Dictionary which refers to the form of the Notice in Schedule 2, with any variations that are necessary or as the Chief Justice directs.
- 7) To insert Part 27.4 in relation to transitional provisions.

Part 2 – Prescribed form

- 1) To provide the 'Notice of Child Abuse, Family Violence or Risk' as the prescribed form in Schedule 2 for the purposes of section 67Z(2) and section 67ZBA(2) of the Act.

4. Details of Amendments

Rule 1 Name of Rules

The name of the rules is the *Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020*.

Rule 2 Commencement

The whole of the Rules commence the day after the Rules are registered.

Rule 3 Authority

The Rules are made under the *Family Law Act 1975* (Cth).

Rule 4 Schedules

Schedule 1 amends the *Family Law Rules 2004*.

Schedule 1 – Amendments

Part 1 – Main amendments

[1] Subrule 2.02(1) (table 2.2, item 2A, column headed “Documents to be filed with application”, paragraph (a))

The amendment inserts the words ‘unless paragraph (b) applies’ at the beginning of paragraph (a), to make clear that only paragraphs (a) and (b) are alternatives, and that paragraphs (c) and (d) apply in either scenario.

[2] Subrule 2.02(1) (table 2.2, item 2A, column headed “Documents to be filed with application”, paragraph (a))

The amendment omits the word ‘or’ at the end of paragraph (a), as it is obsolete given that the words ‘unless paragraph (b) applies’ have been inserted at the beginning of paragraph (a).

[3] Subrule 2.02(1) (table 2.2, item 2A, column headed “Documents to be filed with application”, after paragraph (c))

The amendment inserts a new paragraph (d) in item 2A which requires a Notice of Child Abuse, Family Violence or Risk to be filed with an Initiating Application (Family Law) in which a parenting order is sought under Part VII of the Act.

[4] Subrule 2.02(1) (table 2.2, after item 2B)

The amendment inserts a new item 2C in table 2.2 which requires a Notice of Child Abuse, Family Violence or Risk to be filed with a Response to Initiating Application (Family Law) in which a parenting order is sought under Part VII of the Act.

[5] Subrule 2.02(1) (table 2.2, at the end of the cell at item 9, column headed “Documents to be filed with application”)

The amendment inserts a new paragraph (c) in item 9 which requires a Notice of Child Abuse, Family Violence or Risk to be filed with an Application for Consent Orders where an order is sought under Part VII of the Act.

[6] Rule 2.04 Definition

The amendment inserts a definition of ‘interested person’. Where section 67Z of the Act applies to the proceeding, the definition of ‘interested person’ given by subsection (4) of that section applies. Where section 67ZBA of the Act applies to the proceeding, the definition of ‘interested person’ given by subsection (4) of that section applies.

[7] After rule 2.04A

The amendment inserts a new rule 2.04B, which provides that if a person who is party to a proceeding, or an interested person in a proceeding, has filed a Notice in the proceeding and after that time the person becomes aware of new facts or circumstances that would require the person to file a Notice, they must file another Notice setting out those new facts or circumstances. They must also file an affidavit stating the evidence relied on to support each allegation set out in the Notice. This rule mirrors the equivalent rule in the *Federal Circuit Court Rules 2001* (rule 22A.04).

The amendment adds two notes to subrule 2.04B which remind the person filing the Notice that a true copy of the Notice must be served on the person to whom the allegations relate, and reiterate the obligation on the Registry Manager to notify a prescribed child welfare authority if the Notice alleges that a child has been abused or is at risk of being abused.

[8] Subrules 2.04D(1) and (2)

The amendment repeals subrule 2.04D(1) prescribing the form of the notice mentioned in subsection 67Z(2) or 67ZBA(2) of the Act to be the Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case) or the Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders) and substitutes provisions providing the form of the notice to be the Notice of Child Abuse, Family Violence or Risk. This form has been harmonised with the form used in the Federal Circuit Court of Australia, and is the same as the form inserted in Schedule 2 of the *Federal Circuit Court Rules 2001* by the *Federal Circuit Court (Notice of Child Abuse, Family Violence or Risk) Rules 2020*.

The amendment to subrule 2.04D(1) adds a note which provides that the Notice of Child Abuse, Family Violence or Risk is set out in Schedule 2.

The amendment also repeals subrule 2.04D(2) and substitutes a new subrule 2.04D(2) which sets out more expansively the requirement to file an affidavit that sets out the evidence on which any allegations of child abuse, family violence or risk of harm to a child in the Notice are based.

The amendment adds two notes to subrule 2.04D(2) which remind the person filing the Notice that a true copy of the Notice must be served on the person to whom the allegations

relate, and reiterate the obligation on the Registry Manager to notify a prescribed child welfare authority if the Notice alleges that a child has been abused or is at risk of being abused.

The amendment adds a new subrule 2.04D(3) which provides that subrule 2.04D(2) does not apply to a notice filed with an Application for Consent Orders.

[9] Subrules 10.15A(2), (3) and (4) (note)

The amendment repeals the notes to each of subrules 10.14A(2), (3) and (4). The notes are not required as a Notice will be filed with the Initiating Application (Family Law), Response to an Initiating Application or Application for Consent Orders, not only when an allegation of abuse, risk of abuse, family violence or risk of family violence is made.

[10] Paragraph 19.41(2)(b)

The amendment is a technical amendment, substituting ‘the form’ for ‘a form’ in paragraph 19.41(2), to change the indefinite article ‘a’ to the definite article ‘the’, because there is now only one form in Schedule 2 to the Rules.

[11] Paragraph 24.01(1)(g)

The amendment substitutes ‘Notice of Child Abuse, Family Violence or Risk’ for ‘a form in Schedule 2’ as there is only one form in Schedule 2 to the Rules.

[12] Subrule 24.04(2)

The amendment repeals subrule 24.04(2) providing that the Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case) or the Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders) is the form of that name in Schedule 2. It substitutes the name of the form to the ‘Notice of Child Abuse, Family Violence or Risk’, and provides that a reference to the Notice is a reference to the form of that name in Schedule 2, with any variations that are necessary or as the Chief Justice directs. This subrule is intended to facilitate any minor or technical changes that may need to be made to the hard copy form, such as changes required to facilitate an interactive version of the form, at the direction of the Chief Justice after consultation with the Judges of the Court.

[13] Subrule 24.04(3)

The amendment is a technical amendment, substituting ‘the form’ for ‘a form’ in subrule 24.04(3), to change the indefinite article ‘a’ to the definite article ‘the’, because there is now only one form in Schedule 2 to the Rules.

[14] In the appropriate position in Chapter 27

The amendment inserts Part 27.4 for transitional provisions relating to the *Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020*.

Rule 27.09 inserts definitions of ‘amending Rules’, ‘commencement day’, and ‘old format notice of risk’.

Rule 27.10 inserts a transitional provision that clarifies that the amended rule 2.02 applies to an application or response filed on or after the commencement day, even if it is a response to an application filed before the commencement day.

Rule 27.11 inserts a transitional provision that clarifies that rule 2.04B (in relation to filing an amended Notice) applies to a proceeding instituted on or after the commencement day, and to a proceeding that was instituted but not concluded before the commencement day, and that a reference to the new Notice in paragraph 2.04B(a) should be read as a reference to the old format notice of risk if a person had filed a notice before the commencement day.

Rule 27.12 inserts a transitional provision that clarifies that the amended subrule 2.04D(1) (the prescribed form) applies in relation to an allegation that is made on or after the commencement day, even if the proceeding in which the allegation is made was instituted before the commencement day.

[15] Paragraph 6.42(2)(b) of Schedule 6

The amendment is a technical amendment, substituting ‘the form’ for ‘a form’ in paragraph 6.42(2)(b) of Schedule 6, because there is now only one form in Schedule 2 to the Rules.

[16] Dictionary

The amendment inserts a definition of ‘Notice of Child Abuse, Family Violence or Risk’ into the Dictionary, which is defined as the form set out in Schedule 2, with any variations that are necessary or as the Chief Justice directs. This definition is intended to facilitate any minor or technical changes that may need to be made to the hard copy form, such as changes required to facilitate an interactive version of the form, at the direction of the Chief Justice after consultation with the Judges of the Court.

Part 2 – Prescribed form

[17] Schedule 2

The amendment repeals the schedule and substitutes ‘Schedule 2—Notice of Child Abuse, Family Violence or Risk’ and the Notice of Child Abuse, Family Violence or Risk.

The amendment adds a note to see Division 2.3.1 and subrule 24.04(2) of the Rules.