

***FEDERAL CIRCUIT COURT AMENDMENT (NOTICE OF CHILD ABUSE, FAMILY
VIOLENCE OR RISK) RULES 2020***

REPLACEMENT EXPLANATORY STATEMENT

FEDERAL CIRCUIT COURT AMENDMENT (NOTICE OF CHILD ABUSE, FAMILY VIOLENCE OR RISK) RULES 2020

EXPLANATORY STATEMENT

Issued by the authority of the Judges of the Federal Circuit Court of Australia

Section 81 of the *Federal Circuit Court of Australia Act 1999* (Cth) ('the Act') provides that the Judges of the Federal Circuit Court of Australia ('the Federal Circuit Court'), or a majority of them, may make Rules of Court making provision for or in relation to the practice and procedure to be followed in the Federal Circuit Court. The Judges of the Federal Magistrates Court (as the Federal Circuit Court was then called) made the *Federal Magistrates Court Rules 2001* which commenced on 18 April 2002. On 12 April 2013 the *Federal Magistrates Court Rules 2001* were amended to the *Federal Circuit Court Rules 2001* ('the Rules'). These amending Rules, the *Federal Circuit Court 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 81(3) 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 Judge 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

Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01362]

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* and the *Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020* broadly replicate existing provisions in the respective 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 risk’ in the Rules.

The amendments include transitional provisions in Part 47 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 *Family Law Rules 2004*, 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 risk’.

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 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 2.04(1B) to remove reference to the notice of risk and to provide that a reference in the Rules to the Notice is a reference to the form in Schedule 2, with any variations that are necessary or as the Chief Judge directs.

- 2) To remove all references to the ‘notice of risk’ and replace them with ‘Notice of Child Abuse, Family Violence or Risk’.
- 3) To amend subrule 22A.02(2) 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 affidavit the person files with their application or response, in accordance with rule 4.05, must state the evidence on which each allegation set out in the Notice is based.
- 4) 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 Judge directs.
- 5) 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 *Federal Circuit Court 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 *Federal Circuit Court of Australia Act 1999* (Cth).

Rule 4 Schedules

Schedule 1 amends the *Federal Circuit Court Rules 2001*.

Schedule 1 – Amendments

Part 1 – Main amendments

[1] Subrule 2.04(1B)

The amendment repeals subrule 2.04(1B), and substitutes a new subrule that provides that a reference in these Rules to the Notice is a reference to the form in Schedule 2, with any variations that are necessary or as the Chief Judge 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 Judge after consultation with the Judges of the Court.

[2] Subrule 4.01(4) (note)

The amendment omits the words ‘notice of risk’ and substitutes ‘Notice of Child Abuse, Family Violence or Risk’ when referring to the Notice.

[3] Subrule 4.03(3) (note)

The amendment omits the words ‘notice of risk’ and substitutes ‘Notice of Child Abuse, Family Violence or Risk’ when referring to the Notice.

[4] Part 22A (heading)

The amendment omits the word ‘risk’ and substitutes ‘Child Abuse, Family Violence or Risk’ when referring to the Notice.

[5] Division 1 of Part 22A (heading)

The amendment omits the word ‘risk’ and substitutes ‘Child Abuse, Family Violence or Risk’ when referring to the Notice.

[6] Rule 22A.02 (heading)

The amendment omits the word ‘risk’ and substitutes ‘Child Abuse, Family Violence or Risk’ when referring to the Notice.

[7] Subrule 22A.02(1)

The amendment omits the words ‘notice of risk’ and substitutes ‘Notice of Child Abuse, Family Violence or Risk’ when referring to the Notice.

[8] Subrule 22A.02(1) (note 1)

The amendment repeals note 1, and substitutes a new note 1 that provides that the Notice must be in accordance with the form in Schedule 2, with any variations that are necessary or as the Chief Judge directs, with a reference to see subrule 2.04(1B).

[9] Subrule 22A.02(2)

The amendment repeals subrule 22A.02(2) and substitutes a new subrule 22A.02(2) which sets out more expansively the requirement that the affidavit filed with the application or response, in accordance with rule 4.05, must state the evidence on which any allegations of child abuse, family violence or risk of harm to a child in the Notice are based.

[10] Subrule 22A.02(2) (notes 1 and 2)

The amendment omits the words ‘notice of risk’ and substitutes ‘Notice of Child Abuse, Family Violence or Risk’ when referring to the Notice in notes 1 and 2.

[11] Rule 22A.03 (heading)

The amendment omits the word ‘risk’ and substitutes ‘Child Abuse, Family Violence or Risk’ when referring to the Notice.

[12] Paragraph 22A.03(a)

The amendment omits the words ‘notice of risk’ and substitutes ‘Notice of Child Abuse, Family Violence or Risk’ when referring to the Notice.

[13] Paragraph 22A.03(b)

The amendment omits the words ‘of risk’ when referring to the Notice.

[14] Rule 22A.03

The amendment omits the third occurrence of the words ‘of risk’ when referring to the Notice.

[15] Rule 22A.04 (heading)

The amendment omits the words ‘notice of risk’ and substitutes ‘Notice of Child Abuse, Family Violence or Risk’ when referring to the Notice.

[16] Paragraphs 22A.04(a) and (b)

The amendment omits the words ‘notice of risk’ and substitutes ‘Notice of Child Abuse, Family Violence or Risk’ when referring to the Notice in paragraphs (a) and (b).

[17] Paragraph 22A.04(b)

The amendment omits the words ‘those facts’ and substitutes ‘those new facts’, to make clear that the requirement to file an amended Notice is due to new facts or circumstances of which the person has become aware.

[18] Paragraph 22A.04(c)

The amendment omits the word ‘new’ before the Notice and substitutes ‘Notice of Child Abuse, Family Violence or Risk setting out those new’, to make clear that it is the same form of notice that must be filed, but in relation to new facts or circumstances.

[19] Rule 22A.04 (notes 1 and 2)

The amendment omits the words ‘notice of risk’ and substitutes ‘Notice of Child Abuse, Family Violence or Risk’ when referring to the Notice in notes 1 and 2.

[20] Paragraph 22A.05(2)(a)

The amendment omits the words ‘notice of risk’ and substitutes ‘Notice of Child Abuse, Family Violence or Risk’ when referring to the Notice.

[21] Subrule 22A.05(3)

The amendment omits the words ‘notice of risk’ and substitutes ‘Notice of Child Abuse, Family Violence or Risk’ when referring to the Notice.

[22] Rule 22A.06 (heading)

The amendment omits the words ‘notice of risk’ and substitutes ‘Notice of Child Abuse, Family Violence or Risk’ when referring to the Notice.

[23] Rule 22A.06

The amendment omits the words ‘notice of risk’ and substitutes ‘Notice of Child Abuse, Family Violence or Risk’ when referring to the Notice.

[24] Rule 22A.07 (heading)

The amendment omits the word ‘risk’ and substitutes ‘Child Abuse, Family Violence or Risk’ when referring to the Notice.

[25] Rule 22A.07

The amendment omits the words ‘notice of risk’ wherever occurring and substitutes ‘Notice of Child Abuse, Family Violence or Risk’ when referring to the Notice.

[26] In the appropriate position in Chapter 9

The amendment inserts Part 47 for transitional provisions relating to the *Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020*.

Rule 47.01 inserts definitions of ‘amending Rules’, ‘commencement day’, and ‘old format notice of risk’.

Rule 47.02 inserts a transitional provision that clarifies that the amended rule 22A.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 47.03 inserts a transitional provision that clarifies that the amended rule 22A.03 applies to a proceeding instituted on or after the commencement day, and a proceeding that was instituted but not concluded before the commencement day.

Rule 47.04 inserts a transitional provision that clarifies that the amended rule 22A.04 (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 22A.04(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 47.05 inserts a transitional provision that clarifies that the amended rule 22A.05 applies in relation to a proceeding that is transferred to the Federal Circuit Court on or after the commencement day.

Rule 47.06 inserts a transitional provision that clarifies that the amended subrule 22A.07(1) 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, and that the amended subrule 22A.07(2) applies to a proceeding instituted on or after the commencement day, and a proceeding that was instituted but not concluded before the commencement day.

[27] 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 Judge 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 Judge after consultation with the Judges of the Court.

Part 2 – Prescribed form

[28] 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 subrule 2.04(1B) and Division 1 of Part 22A of the Rules.