

FAMILY LAW AMENDMENT (WESTERN AUSTRALIA FAMILY COURT RULES)
RULES 2021

EXPLANATORY STATEMENT

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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 (Western Australia Family Court Rules) Rules 2021* ('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.

This rule amendment has the effect that the *Family Court Rules 2021* (WA) apply to the exercise of family law jurisdiction by the Family Court of Western Australia and the Magistrates Court of Western Australia to the exclusion of any inconsistent provision in the Rules. The *Family Court Rules 2021* (WA) are an amalgamation of the existing *Family Court Rules 1998* (WA), Case Management Guidelines and parts of the *Family Law Rules 2004*, as well as ensuring compliance with obligations under the *Courts and Tribunals (Electronic Processes Facilitation) Act* (WA), and so do not represent a significant departure from the current rules and procedures in place. In particular, certain changes between the existing *Family Court Rules 1998* (WA) and the *Family Court Rules 2021* (WA) were required to facilitate the Family Court of Western Australia's migration to a new electronic case management system and State eCourts Portal.

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 for the avoidance of doubt, a statement of compatibility with human rights is included below.

Statement of Compatibility with Human Rights

Family Law Amendment (Western Australia Family Court Rules) Rules 2021

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'.
- ***Equality before courts and tribunals:*** Article 14 of the ICCPR provides for equality of all persons before courts and tribunals, and the right to a fair and public hearing before a competent, independent and impartial decision maker established by law.

This rule amendment makes clear that the *Family Court Rules 2021* (WA) apply to the exercise of family law jurisdiction by the Family Court of Western Australia and the Magistrates Court of Western Australia to the exclusion of any inconsistent provision in the Rules.

The *Family Court Rules 2021* (WA) are an amalgamation of existing *Family Court Rules 1998* (WA), Case Management Guidelines and parts of the *Family Law Rules 2004*. The relevant parts of these instruments have been combined into an updated set of rules of court to ensure that the practice and procedure of the court is clear and facilitates access to justice as well as where applicable, the legislative mandate of making decisions in the best interests of the child.

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

The rule amendment inserts a new rule 1.03A into these Rules to make clear that the *Family Court Rules 2021* (WA) apply to the exercise of jurisdiction under the Act by the Family Court of Western Australia and the Magistrates Court of Western Australia, and that the *Family Court Rules 2021* (WA) prevail to the extent of any inconsistency with these Rules.

2. Consultation

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

Whilst the Court did not undertake consultation directly on this rule amendment, consultation was undertaken by the Family Court of Western Australia on the outcome of the rule amendment, that is, the creation of an amalgamated set of rules of court in relation to its federal and non-federal family law jurisdiction. This included consultation with the Family Law Practitioners' Association of the Law Society of Western Australia, the main stakeholder body for family law in Western Australia. Further extensive consultation was not deemed necessary given the *Family Court Rules 2021* (WA) only reflect an amalgamation of the current Rules with the existing practice and procedure followed in the Family Court of Western Australia, and ensure compliance with obligations under the *Courts and Tribunals (Electronic Processes Facilitation) Act 2013* (WA).

3. Summary of major changes

- 1) To insert a new rule 1.03A to make clear that the *Family Court Rules 2021* (WA) as in force at 23 August 2021 apply to the exercise of jurisdiction under the Act by the Family Court of Western Australia and the Magistrates Court of Western Australia, and that a provision of the *Family Court Rules 2021* (WA) prevails over a provision of these Rules to the extent of any inconsistency.

4. Details of Amendments

Rule 1 Name of Rules

The name of the rules is the *Family Law Amendment (Western Australia Family Court Rules) Rules 2021*.

Rule 2 Commencement

The whole of the Rules commence on 23 August 2021.

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

[1] at the end of Part 1.1

The amendment inserts a new rule 1.03A which states that the *Family Court Rules 2021* (WA) as in force at 23 August 2021 apply to the exercise of jurisdiction under the Act by the Family Court of Western Australia and the Magistrates Court of Western Australia, and that a provision of the *Family Court Rules 2021* (WA) prevails over a provision of these Rules to the extent of any inconsistency.