

FAMILY LAW REPEAL RULES 2021

EXPLANATORY STATEMENT

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Issued by the authority of the Chief Justice of the Federal Circuit and Family Court of Australia (Division 1)

Pursuant to subsection 123(1) of the *Family Law Act 1975* (Cth) ('Family Law Act'), the Chief Justice of the Federal Circuit and Family Court of Australia (Division 1) has the power to make rules of court not inconsistent with the Family Law Act providing for or in relation to the practice and procedure to be followed in a court exercising jurisdiction under the Family Law Act. This includes the power to make rules of court for and in relation to all matters and things incidental to any such practice and procedure, or necessary or convenient to be prescribed for the conduct of any business in the court.

These Rules, the *Family Law Repeal Rules 2021*, repeal the *Family Law Rules 2004* that currently apply to the exercise of the family law jurisdiction by the Family Court of Australia and other courts exercising jurisdiction under the Family Law Act.

The *Family Law Rules 2004* made under section 123 of the Family Law Act commenced on 29 March 2004. They have been regularly reviewed and amended since that date. The new Rules, the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* ('2021 Rules') have been made by the Chief Justice of the FCFCOA (Division 1), in consultation with the Judges of the Federal Circuit and Family Court of Australia (Division 1) ('FCFCOA (Division 1)'), to replace the *Family Law Rules 2004* with effect from the commencement day of the *Federal Circuit and Family Court of Australia Act 2021* ('FCFCOA Act'). The 2021 Rules are the harmonised family law rules that will apply to the FCFCOA (Division 1), the FCFCOA (Division 2), and other courts exercising jurisdiction under the Family Law Act from 1 September 2021, to align with the commencement of the Federal Circuit and Family Court of Australia ('FCFCOA').

Section 8 of the FCFCOA Act provides that, from the commencement day of the FCFCOA Act, the Family Court of Australia will be continued in existence as the FCFCOA (Division 1). The Federal Circuit Court of Australia will continue in existence as the FCFCOA (Division 2).

Section 5 of the FCFCOA Act provides that one of the objects of the FCFCOA Act is to provide a framework to facilitate cooperation between the FCFCOA (Division 1) and the FCFCOA (Division 2), with the aim of ensuring common rules of court and forms, common practices and procedures, and common approaches to case management. Relatedly, section 75 provides that for the purposes of ensuring the efficient resolution of family law or child

support proceedings, the Chief Justice of the FCFCOA (Division 1) must work cooperatively with the Chief Judge of the FCFCOA (Division 2) with the aim of ensuring common rules of court and forms, and common practices and procedures.

Subsection 123(2) of the Family Law 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, a reference to a legislative instrument is to be read as a reference to a rule of court.

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 FCFCOA 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 Repeal 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. Article 9(1) of the CRC provides that a child shall not be separated from their parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Article 12(1) of the CRC provides that a child capable of forming their own views has a right to express those views in matters affecting the child and that those views should be given due weight in accordance with the child's age and maturity.
- ***The right to protection 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 16(1) of the CRPD provides for the same protection in relation to persons with disabilities. Article 24(1) of the ICCPR provides for the protection of all children, without discrimination, by virtue of their status as minors. Article 19(1) of the CRC provides for the right of children to be protected from exploitation, violence and abuse, and requires States to 'take all appropriate legislative, administrative, social and educational measures to protect the child 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'. Article 34 of the CRC additionally provides for the right of children to be protected from all forms of sexual exploitation and sexual abuse.

- ***The rights of parents and children:*** Article 5 of the CRC provides that States shall respect the responsibilities, rights and duties of parents, legal guardians or other persons legally responsible for a child to provide direction and guidance in the child’s exercise of the rights recognised in the CRC. Article 18 of the CRC provides for the recognition of the principle that both parents (or legal guardians) have common responsibilities for the upbringing and development of a child.
- ***The right to respect for the family:*** Article 23 of the ICCPR provides that the family is entitled to the protection of the State and that States shall take appropriate steps to ensure the equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides that the widest possible protection and assistance should be accorded to the family. Article 17(1) of the ICCPR provides that a person has a right not to be subjected to arbitrary or unlawful interference with their family. Article 16(1) of the CRC provides for this right in relation to children. Article 23(3) of the CRPD provides that children with disabilities have equal rights with respect to family life.
- ***The right to a fair hearing:*** Article 9(2) of the CRC provides that in proceedings involving the separation of a child from their parents in the best interests of the child, all interested parties shall be given the opportunity to participate in the proceedings and make their views known. Article 14(1) of the ICCPR provides that all persons shall be equal before the courts and that where their rights or obligations are to be determined in legal proceedings they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 12(2) of the CRPD provides that persons with disabilities shall be recognised as enjoying legal capacity on an equal basis with others in all aspects of life and Article 12(3) provides that States shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

The effect of these Rules is to repeal the *Family Law Rules 2004* to allow for the harmonised family law rules to be made and applied to the courts exercising family law jurisdiction, being the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (‘2021 Rules’).

To that end, the considerations set out in the Statement of Compatibility with Human Rights in the Explanatory Statement to the 2021 Rules are instructive as to the effect on applicable human rights or freedoms of repealing the *Family Law Rules 2004* (‘FLR 2004’) and replacing them with the 2021 Rules.

The provisions in the 2021 Rules broadly replicate existing provisions in the FLR 2004 and the FCCR 2001, with some reorganisation and harmonisation to promote greater procedural efficiency and enhance access to justice for parties.

The 2021 Rules relate principally to proceedings under the Family Law Act. In proceedings in which a parenting order is sought in relation to a child, section 60CA of the Family Law Act provides that the court must regard the best interests of the child as the paramount consideration. The 2021 Rules provide mechanisms for the Court to receive information relevant to the consideration of a child's best interests, including through the Notice of Child Abuse, Family Violence or Risk, the Parenting Questionnaire and a family consultant's report. In addition, parties to parenting proceedings are generally required to comply with pre-action procedures, in which they must at all stages have regard to the best interests of the child.

The 2021 Rules broadly replicate existing provisions in the FLR 2004 and the FCCR 2001 providing for the Court and relevant child welfare authorities to be informed of allegations of child abuse, family violence or other risks to children and parties in parenting proceedings. Recent amendments to those provisions which are replicated in the 2021 Rules require the provision of risk-related information at the commencement of family law parenting proceedings through the Notice of Child Abuse, Family Violence or Risk. This form includes questions about a broad variety of risk factors, enabling the Court to better understand and respond to those risks, and protect children and vulnerable parties from violence and abuse.

The 2021 Rules additionally protect children and parties from exploitation, violence and abuse by providing for:

- exceptions to requirements for parties to comply with pre-action procedures or to attempt to settle interlocutory applications where proceedings involve allegations of, or a risk of, child abuse or family violence;
- requirements for parties to certain proceedings to file a copy of any relevant family violence order;
- a requirement for a party making an application without notice to disclose a history or allegation of child abuse or family violence;
- requirements for each party to consent parenting orders to inform the Court whether or not the party considers that the child in relation to whom the orders are sought has been, or is at risk of being, subjected to or exposed to abuse, neglect or family violence, and whether any party to the proceedings has been, or is at risk of being, subjected to family violence;
- exemptions from requirements to provide a physical address as an address for service where disclosing the address would compromise a person's safety;
- requirements for the Court to take account of the available facilities having regard to any safety concerns when considering whether to transfer a family law or child support proceeding between courts, or to another registry of the Court; and
- a process by which parties can seek to attend court events by electronic communication if they hold concerns about security, including family violence and intimidation.

The 2021 Rules provide that the parents or any other persons responsible for the care, welfare and development of a child must be parties to any application for parenting orders in relation to the child. This ensures that the rights of parents (and legal guardians) are respected and that all interested parties have an opportunity to participate in proceedings and make their views known.

Equality of access to the Court is promoted by the provision in the 2021 Rules for:

- the right of a person who has a right to be heard in a proceeding to conduct the proceeding on their own behalf or to be represented by a lawyer;
- the appointment of independent children’s lawyers to secure the independent representation of children’s interests; and
- the appointment of litigation guardians for persons who do not understand the nature or possible consequences of a proceeding or who are not capable of adequately conducting, or giving instruction for the conduct of, a proceeding.

The 2021 Rules further facilitate the conduct of fair hearings by setting out the practices and procedures to be followed in family law proceedings, such as:

- the procedures for parties to be served with court documents to ensure they receive and can respond to material the Court may take into account;
- the procedures for disclosure of documents to ensure parties have timely access to relevant material;
- the procedures governing the appointment of expert witnesses and the clarification and use of expert reports; and
- the provision for an interlocutory application to be determined in the absence of the parties without an oral hearing only if the parties consent to the application being determined in that way and the Court considers it appropriate to determine the application in that way.

The repeal of the FLR 2004 and the making of the 2021 Rules thereby support and enhance the treatment of the rights listed above.

Conclusion

This legislative instrument is compatible with human rights as it facilitates the making of procedures which improve the Court’s capacity to make substantive decisions in the best interests of children and to protect children and vulnerable parties from violence and abuse. The repeal of the FLR 2004 and the making of the 2021 Rules also provides procedures which facilitate equality of access to court proceedings, participation by parents and other interested parties, and the fair and safe conduct of hearings.

1. General Outline

The instrument sets out the name of these Rules, their commencement date and the enabling legislation under which they are made. These Rules are the *Family Law Repeal Rules 2004*. They commence on 1 September 2021, and they are made under the Family Law Act.

Schedule 1 - Repeals

Schedule 1 repeals the *Family Law Rules 2004*.

2. Consultation

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

The Family Court and Federal Circuit Court undertook extensive internal and external consultation on the harmonisation of the FLR 2004 and the FCCR 2001 and the creation of the 2021 Rules. Internally, consultation took place with Judges of both Courts, Registrars, and other staff. The Courts also consulted on the 2021 Rules with approximately 55 external stakeholders including the Family Law Section of the Law Council of Australia, the Commonwealth Attorney-General's Department, State and Territory Law Societies and Bar Associations, Legal Aid commissions and child welfare agencies, women's and men's legal groups, other Government departments and the Family Court of Western Australia, amongst other stakeholders. The consultation took the form of an opportunity to make submissions on an exposure draft of the 2021 Rules.

3. Details of rules

Rule 1 Name

Rule 1 states that these Rules are the *Family Law Repeal Rules 2021*.

Rule 2 Commencement

Rule 2 states that these Rules commence on 1 September 2021.

Rule 3 Authority

Rule 3 sets out the enabling legislation for these Rules, which is the *Family Law Act 1975*.

Rule 4 Schedules

Rule 4 states that each instrument that is specified in the Schedule to these Rules is amended or repealed as set out in the applicable items in the Schedule concerned.

Schedule 1 – Repeals

Schedule 1 lists the *Family Law Rules 2004* and repeals the whole of those Rules.