

***FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(FAMILY LAW) AMENDMENT (2022 MEASURES NO.1) RULES 2022***

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)

Section 8 of the *Federal Circuit and Family Court of Australia Act 2021* (‘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 Federal Circuit and Family Court of Australia (Division 1) (‘the FCFCOA (Division 1)’) and that the Federal Circuit Court of Australia will continue in existence as the Federal Circuit and Family Court of Australia (Division 2) (‘the FCFCOA (Division 2)’).

Section 76 of the FCFCOA Act provides, among other things, that the Chief Justice of the FCFCOA (Division 1) may make Rules of Court providing for, or in relation to, the practice and procedure to be followed in the FCFCOA (Division 1), as well as for all matters and things incidental to any such practice or procedure, and in relation to any matter or thing in respect of which Rules of Court may be made under the *Family Law Act 1975* (Cth) (‘the Family Law Act’) for the purposes of their application to the FCFCOA (Division 1).

The Chief Justice made the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (‘the Rules’) on 26 August 2021. These amending rules, the *Federal Circuit and Family Court of Australia (Family Law) Amendment (2022 Measures No.1) Rules 2022* (‘the amendments’), have now been made to amend the Rules.

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. Common rules of court across the federal family law courts are achieved through the adoption of the Rules by the FCFCOA (Division 2) in Part 2 of the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021*.

Subsection 76(4) of the FCFCOA 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 in the *Legislation Act 2003* (Cth) is to be read as a reference to a rule of court and a reference to a rule-maker as a reference to the Chief Justice.

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

Federal Circuit and Family Court of Australia (Family Law) Amendment (2022 Measures No.1) Rules 2022

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 amendments relate 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 amendments assist in protecting children from violence and abuse by providing for a requirement that, where the parties seek an interlocutory or final parenting order made by consent, parties advise the court whether or not any allegations of child abuse, family violence or any risk of harm to a child have been made, and how the proposed orders attempt to deal with any allegation.

Equality of access to the Court is promoted by the provision in the amendments 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, and for a person or their legal representative to sign proposed consent orders.

The amendments further facilitate the conduct of fair hearings by setting out the practices and procedures to be followed in family law proceedings, such as clarifying the application of the rules in relation to service to service overseas, removing the necessity to file the Parenting and Financial Questionnaires in all cases, and allowing for certain orders to be made in Chambers by consent.

Otherwise, as these amendments are minor and procedural only, they do not have any significant effect on human rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it provides 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 legislative instrument 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

Schedule 1 – General Amendments

Schedule 1 contains the general amendments to the Rules, including the following:

- Amending the form filed to make an application for rescission of a divorce order from an Application for Review to an Application in a Proceeding;
- Amending the application of Part 2.6 from service of documents in Australia to service generally;
- Allowing the signing of consent orders by a party or their legal representative;
- Inserting Part 5.6 in relation to interim consent orders;
- Inserting a presumption that where an assessor is directed by the court to prepare a report, whilst the court is not bound by the opinion of the assessor, the court will adopt the opinion or finding of an assessor unless there are exceptional circumstances;
- Removing the necessity to file a Parenting Questionnaire or Financial Questionnaire with an Initiating Application where an affidavit is also filed;
- Requiring an approved form to be filed where consent parenting orders are to be considered in Chambers;
- Allowing an Application for Review to be considered in Chambers where the parties consent and the Court considers it appropriate;
- Making provision for a police officer to search the court record with leave of the court; and
- Correcting some typographical matters, and amending references to ‘Queen’s Counsel’ to ‘King’s Counsel’.

Schedule 2 – Scale of costs

Schedule 2 is the updated scale of costs that may be applied in family law and child support proceedings in the FCFCOA (Division 1) from 1 January 2023.

It includes schedules of costs allowable for lawyer’s and counsel’s work done and services performed, costs for an undefended divorce, and costs for an enforcement warrant or third party debt notice.

Schedule 3 – delegated powers

Schedule 3 contains a table of additional powers that have been delegated to Senior Judicial Registrars and/or Judicial Registrars, or amendments to existing delegated powers. Those powers are detailed below.

2. Consultation

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

The Court undertook both internal and external consultation on the amendments. Internally, consultation took place with Judges of both Courts, and some other staff. Externally, consultation took place with each of the National, State and Territory Law Societies and Bar Associations, as well as National Legal Aid.

3. Details of rules

Preliminary items

Item 1 states the name of the amendments.

Item 2 indicates the commencement of each Schedule. All of the amendments commence the day after registration, with the exception of the costs schedule, which commences 1 January 2023.

Item 3 indicates that the amendments are made under Chapter 3 of the *Federal Circuit and Family Court of Australia Act 2021*.

Item 4 states that each Schedule has effect according to its terms.

Schedule 1 – general amendments

Item 1 Subparagraph 1.09(a)(i)

This item amends the form used to make an application to rescind a divorce order under section 57 or 58 of the Family Law Act from an Application for Review to an Application in a Proceeding, to properly reflect that such applications can be considered by a registrar and are not a review of a registrar's decision.

Item 2 After subrule 2.01(5)

This item inserts new subrule (5A) which states that an application must concisely state the orders sought. This item is intended to ensure that the orders sought in an application are properly particularised and stated as succinctly as possible.

Item 3 Subrule 2.04(3) (note)

This item replaces the note to subrule 2.04(3) to clarify that there are additional obligations both where an application is made for an interlocutory parenting order by consent and an application for a final parenting order by consent. New rule 5.29 and existing rule 10.05 require the filing of an approved form identifying whether allegations of child abuse, family violence or risk have been made in relation to a child about whom the orders are sought, and if so, how the orders attempt to deal with those allegations, if any.

Item 4 Part 2.6 (heading)

This item removes the words ‘documents in Australia’ and replaces them with ‘documents – general’ to make clear that the rules of court in Part 2.6 apply both to service within Australia and service overseas, including rules relating to substituted service, dispensing with service or finding that service has been effected.

Item 5 Subrule 3.13(2) (note 3)

This item amends note 3 to subrule 3.13(2) to clarify that there are additional obligations on a litigation guardian both where an application is made for an interlocutory order by consent and an application for a final order by consent.

Item 6 Subrule 4.09(3) (notes 1 and 2)

Item 6 replaces the notes to subrule 4.09(3) (how to accept an offer) to set out what should be done to prepare a draft interlocutory or final consent order pursuant to subrules 5.28(2) and 10.04(2), and also to note the additional obligations on a litigation guardian pursuant to subrules 5.28(3) and 10.04(3).

Item 7 addition of Part 5.6 at the end of Chapter 5

Item 7 inserts new rules 5.28 and 5.29 which relate to interlocutory consent orders. Rules 5.28 and 5.29 largely mirror rules 10.04 and 10.05 in relation to final consent orders.

Rule 5.28 sets out how the parties to an agreement reached about a matter in dispute in the proceeding can apply for an interlocutory consent order, which may be lodged and considered in Chambers, tendered during a court event, or made orally during a hearing. The rule provides for a draft consent order to be signed by each party or their legal representative. This was requested during the external consultation to account for situations such as in an electronic hearing where a party may not be available to sign or have the provision to electronically sign a consent order, but instructs their legal representative to do so.

Rule 5.29 requires parties seeking an interlocutory consent parenting order to advise the court whether or not any allegations have been made in the proceeding of child abuse, family violence, or any risk of harm to a child in relation to whom the order is sought, and if so, explain to the court how the proposed parenting order attempts to deal with the allegation or concern. This may be done through the use of the approved form (Annexure to proposed consent parenting orders) or where the application is made orally during a court event, advising of the required matters orally during a court event.

Item 8 Paragraph 6.06(5)(b)

Item 8 changes the requirement to file a Financial Questionnaire, such that if an affidavit is filed with an Initiating Application seeking financial orders, a Financial Questionnaire is not required to be filed.

Item 9 Paragraph 7.01(1)(d)

Item 9 amends paragraph 7.01(1)(d) to clarify that Part 7.1 does not apply to evidence from a family consultant employed or engaged by the Court or the Family Court of a State by inserting the words ‘or engaged’.

Item 10 Subrule 7.07(3)

Item 10 amends subrule 7.07(3) to insert the words ‘unless otherwise ordered’ so that where a single expert witness is appointed by the court, the expert witness must give the report to the Registry Manager unless otherwise ordered.

Item 11 Subrule 7.22(2)

Item 11 corrects a typographical error in the spelling of ‘expert’ which currently reads ‘export’.

Item 12 At the end of subrule 7.35(4)

Item 12 inserts a presumption into subrule 7.35(4) that the court will adopt an opinion or finding of an assessor unless there are exceptional circumstances.

Item 13 rule 8.09

Item 13 changes the requirement to file a Parenting Questionnaire, such that if an affidavit is filed with an Initiating Application seeking parenting orders, a Parenting Questionnaire is not required to be filed.

Item 14 Paragraph 8.15(3)(e)

Item 14 requires that each document that a party intends to rely upon in conjunction with an affidavit must be separately tendered.

Item 15 At the end of subrule 10.04(2)

Item 15 makes provision for a draft consent order to be signed by a party’s legal representative as an alternative to being signed by the party. This was requested during the external consultation to account for situations such as in an electronic hearing where a party may not be available to sign or have the provision to electronically sign a consent order, but instructs their legal representative to do so.

Item 16 Paragraph 10.05(6)(a) and Item 17 At the end of subrule 10.05(6)

These items add a requirement for the Annexure to proposed consent parenting orders to be attached by each party to a proposed consent parenting order where it is to be considered in Chambers. This is in order to advise the court whether or not any allegations have been made in the proceeding of child abuse, family violence, or any risk of harm to a child in relation to

whom the order is sought, and if so, explain to the court how the proposed parenting order attempts to deal with the allegation or concern.

Item 18 Rule 12.28 and Item 19 Subrule 12.30(2)

These items amend references to ‘Queen’s Counsel’ in these rules to ‘King’s Counsel’.

Item 20 Paragraph 14.07(2)(b)

This item introduces a requirement for leave should a party seek to file any additional affidavit in support of an Application for Review. Of relevance to the granting of leave are considerations such as whether the evidence that is sought to be filed was available at the time of the original hearing.

Item 21 At the end of rule 14.07

Item 21 adds a new subrule to rule 14.07 that states that the court may determine an application for review in the absence of the parties without an oral hearing where the parties consent and the court considers it appropriate. This will assist the court to hear applications for review in a timely way where it is appropriate for the application to be considered on the papers.

Item 22 Paragraph 15.13(1)(c)

New paragraph 15.13(1)(c) inserts the ability for a police officer of a State or Territory to search the court file if a proceeding affects, or may affect, the welfare of a child, if leave of the court is granted to do so. This is intended to further the information sharing initiatives between the Court and other stakeholders and agencies.

Schedule 2 – scale of costs

Schedule 2 to the amendments repeals the four tables that comprise the scale of costs in family law and child support matters that is Schedule 3 to the Rules. Each table has been updated with an amount for each line item that has been increased in accordance with the recommendations of the Joint Costs Advisory Committee. These amendments commence on 1 January 2023 and apply to work done or services performed on or after 1 January 2023.

Schedule 3 – delegated powers

Schedule 3 inserts a number of additional items into the delegations table in Schedule 4 to the Rules, as well as, for certain delegated powers, amending the conditions or circumstances in which a Senior Judicial Registrar or Judicial Registrar can exercise the power. This may include on a limited basis only.

For Judicial Registrars, where a particular item in the delegations table does not have a tick in the relevant Judicial Registrar column, the power can still be exercised by consent by virtue of the specific delegation of the consent power, which is in table items 2.1, 2.1A and 2.2.

The following powers are inserted into the delegations table:

- To deal with an application for an interlocutory consent order;
- To make a finding of fact, determine a matter or make an order in relation to an issue before final orders are made pursuant to subsection 69ZR(1) of the Family Law Act, but only on a limited basis for both Senior Judicial Registrars and Judicial Registrars;
- To order a party to undergo a drug or alcohol screen or test without consent;
- To make a property order, and to vary or set aside a property order, but only if the gross value of the property pool, inclusive of superannuation, is less than \$2 million, to Senior Judicial Registrars who are approved to exercise the power;
- To make various spousal or de facto maintenance orders, to Senior Judicial Registrars, and only on a limited basis to Judicial Registrars;
- To make an order for child maintenance, including in relation to an adult child, to Senior Judicial Registrars;
- To make orders preserving or adjusting the rights of persons who were parties to a terminated financial agreement, and to set aside a financial agreement, but only if the gross value of the property pool, inclusive of superannuation, is less than \$2 million, and only to Senior Judicial Registrars who are approved to exercise the power;
- To make an injunction under section 114 of the Family Law Act binding a third party, to Senior Judicial Registrars;
- To make orders in relation to costs, the provision of costs estimates and the assessment of costs, but only in relation to section 117 of the Family Law Act;
- To make certain orders in relation to applications in an appeal pursuant to subsection 32(3) of the FCFCOA Act, and rules 13.45 and 13.54, but only if the Senior Judicial Registrar or Judicial Registrar is approved to exercise the power;
- To grant leave to institute proceedings out of time, to Senior Judicial Registrars;
- To grant leave to a party to add a party to a proceeding after the first court date;
- To issue a subpoena, order production and inspection of documents, and hear objections to a subpoena;
- To make an order applying mandatory protections for parties in certain cases under subparagraph 102NA(1)(c)(iv) of the Family Law Act, to Senior Judicial Registrars;
- To give a witness a certificate in relation to certain evidence pursuant to section 128 of the *Evidence Act 1995*, but only for Senior Judicial Registrars who are approved to exercise the power and in relation to a hearing before a Senior Judicial Registrar;
- To summarily dismiss an application with no reasonable prospects of success, to Senior Judicial Registrars and on a limited basis to Judicial Registrars;
- To make summary orders if a party claims that:
 - (a) an application or response is frivolous, vexatious or an abuse of process; or

(b) there is no reasonable likelihood of success

To Senior Judicial Registrars and on a limited basis to Judicial Registrars;

- To make certain case management orders or directions under rule 10.11 of the Rules, to Senior Judicial Registrars and on a limited basis to Judicial Registrars;
- To make orders varying or setting aside orders under the slip rule, where those orders were made by a Senior Judicial Registrar or Judicial Registrar;
- To make a declaration that a person should, or should not, be assessed in respect of the costs of a child, and to amend an administrative assessment that is more than 18 months old, pursuant to the *Child Support (Assessment) Act 1989* to Senior Judicial Registrars and on a limited basis to Judicial Registrars; and
- To grant a stay under section 111C of the *Child Support (Registration and Collection) Act 1988*, to Senior Judicial Registrars and on a limited basis to Judicial Registrars.