

***FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(FAMILY LAW) AMENDMENT (2024 MEASURES NO.1) RULES 2024***

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 Judges of the FCFCOA (Division 1), or a majority of them, 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 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* ('the Rules') were made on 26 August 2021. These amending rules, the *Federal Circuit and Family Court of Australia (Family Law) Amendment (2024 Measures No.1) Rules 2024* ('the amendments'), have now been made to amend the Rules. The amendments comprise changes to the Rules of Court necessary to align the practice and procedure of the Court with the legislative amendments contained in the *Family Law Amendment Act 2023* and the *Family Law Amendment (Information Sharing) Act 2023*, as well as some broader updates.

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. Subsection 76(1A) of the FCFCOA Act provides that proposed Rules of Court are not to be made if the Chief Justice considers they are not consistent with the aim mentioned in paragraph 75(a) of the Act of ensuring common rules of court and forms.

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 acting on behalf of the Judges of the 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

Federal Circuit and Family Court of Australia (Family Law) Amendment (2024 Measures No.1) Rules 2024

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 inserting new rules in relation to harmful proceedings orders, which are established by the *Family Law Amendment Act 2023*.

The amendments also include necessary changes to reflect other amendments in the *Family Law Amendment Act 2023* and the *Family Law Amendment (Information Sharing) Act 2023*, including amendments to the rules relating to contravention applications.

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 rules in relation to

when a document is taken to be filed, attendance at dispute resolution events, and undefended hearings when a party is in default.

Otherwise, as these amendments are minor and procedural only, such as updating references to sections of the Family Law Act that have changed in number, 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. 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 –Amendments

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

- Amending the definitions of child welfare record, conciliation and dispute resolution
- Amending rules 1.33 and 10.27 to remove uncertainty and duplication when a party is in default
- Amending the rules to clarify that an application to vary or set aside a final order on the basis of fraud must be made by way of an Initiating Application, but that otherwise an application to vary or set aside an order may be made by way of an Application in a Proceeding
- Amending the rule in relation to a report after court-ordered dispute resolution to better reflect current case management practices
- Inserting rules for harmful proceedings, including a definition of a harmful proceedings order
- Amending Part 11.2 to remove the rules in relation to enforcement of parenting orders
- Amending Part 11.2 to update references to the Family Law Act to the new contravention sections as amended by the *Family Law Amendment Act 2023*
- Amending Schedule 1 to refer to the amended section 60CC factors in the pre-action procedures
- Amending Schedule 4 with consequential changes to the powers delegated to Senior Judicial Registrars and Judicial Registrars

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 the Family Law Section of the Law Council of Australia and the Australian Bar Association.

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 on 6 May 2024.

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 –amendments

Item 1 Subrule 1.05(1) (definition of *child welfare record*)

This item amends the definition of child welfare record to reflect a change in the *Family Law Regulations 1984*.

Item 2 and Item 3 Subrule 1.05(1) (definition of *conciliation* and definition of *conciliation conference*)

These items repeal the definition of conciliation and insert a definition of conciliation conference, being a dispute resolution process in which a judicial officer or an impartial third person assists the parties to the dispute to reach an agreement in the dispute.

Item 4 Subrule 1.05(1) (definition of *dispute resolution*)

This item removes unnecessary punctuation (a comma).

Item 5 Subrule 1.05(1)

This item inserts a definition of harmful proceedings order, which has the meaning given by subsection 102QAC(1) of the Family Law Act.

Item 6 Rule 1.06 (Table 1.1, table item 1, column headed “Power”, subparagraph (a)(ii))

This item clarifies that the conference referred to in Table 1.1, table item 1, is a conciliation conference, as defined by the definition in subrule 1.05 inserted by these amendments.

Item 7 Rule 1.33

This item has the effect of removing existing subrule (2) from rule 1.33, such that the rule only relates to failure to comply with a specified time limit. The rules in relation to default and the steps the court may take if a party does not comply with the Rules, the Family Law Regulations or an order, are now found in rule 10.27.

Item 8 Rule 1.34 (heading) and Item 9 Subrule 1.34(1) and Item 10 Paragraph 1.34(2)(h)

These items amend rule 1.34, which sets out relief from rule 1.33, which are consequential amendments given the narrower scope of rule 1.33 as a result of these amendments.

Item 11 subrule 2.01(3)(c)

This item adds a new paragraph (c) to subrule 2.01(3) which clarifies that a person may file an application for interlocutory orders where it is permitted by rule 5.02, but otherwise not unless

an application for final orders is current in the proceeding or the application includes an application for final orders.

Item 12 Subrule 2.01(6) (Table 2.1, item 2A)

This item inserts item 2A into the table which state that an application to vary or set aside a final order on the basis of fraud under paragraph 10.13(1)(b) of the Rules must be made by way of an Initiating Application (Family Law) and not an Application in a Proceeding.

Item 13 Subrule 2.01(6)

This item removes the words ‘parenting order’ from Table item 4. This reflects the decision to remove parenting enforcement applications from the Rules.

Item 14 Rule 2.16(3)

This item inserts a new subrule 2.16(3) which clarifies that when written notice of a change of name is filed, the title of the proceeding is taken to have been amended accordingly.

Item 15 Subrule 2.18(2) (note 3)

This item omits reference to 1.33(2)(d) and inserts reference to paragraph 10.27(1)(d) in note 3, which is a consequential change necessary given the change to the rules regarding default explained above.

Item 16 Subrules 2.23(3) and (4)

This item amends the rules regarding when a document is taken to have been filed. The amendments ensure that a party is not prejudiced by any delay between when a document is lodged for filing and the time it is sealed, if manual sealing is required. Under the rule, a document is taken to be filed on the day it is lodged, if it is accepted by the Registry Manager by affixing the seal of the court or a court stamp, provided it is received before 4:30pm legal time in the location of the filing registry on a business day.

Item 17 Subrule 2.23(6) (note)

This item corrects a reference to the fee regulations, which are the *Family Law (Fees) Regulations 2022*.

Item 18 Paragraph 3.10(1)(b)

This item replaces the words ‘court’s permission’ with ‘leave of the court’.

Item 19 subrule 3.10(1A)

This item inserts a new subrule 3.10(1A) that restricts a lawyer from filing a Notice of Intention to Withdraw within 14 days before the day fixed for a final hearing without leave of the court, which must be sought in writing. This is intended to ensure that the court has sufficient notice

of a lawyer seeking to withdraw from proceedings proximate to a final hearing, so that appropriate case management steps can be considered. Seeking leave in writing (which may be by written correspondence or by Application) allows the court to consider whether the matter ought to be listed for a procedural hearing.

Item 20 Rule 3.11 (at the end of note 1)

This item adds a clarification to note 1 that the role of an Independent Children’s Lawyer is set out in section 68LA of the Family Law Act.

Item 21 Rule 4.05

This item repeals rule 4.05 and inserts a new rule regarding dispute resolution events, which sets out that the court may order a party to attend a dispute resolution event and that a dispute resolution event may be conducted by a judicial officer. Dispute resolution and judicial officer are defined in the Rules.

Item 22 Subrule 4.11(3) (note 2)

This item substitutes a reference to rule 1.33 for rule 10.27 in note 2 which is a consequential change necessary given the change to the rules regarding default explained above.

Item 23 Paragraph 5.02(2)(c)

This item adds a new paragraph (c) which clarifies that an application for an interlocutory order may be sought if it does not relate to a current proceeding if a person is seeking to vary or set aside an order under rule 10.13 (other than a final order under paragraph 10.13(1)(b)).

Item 24 Rule 5.27 (note)

This item replaces the note to refer to the replacement for section 121 of the Family Law Act, which in this instance is section 114Q of the Family Law Act.

Item 25 subparagraph 8.11(5)(a)(vi)

This item inserts a new subparagraph (vi) which clarifies that the court may provide a family consultant’s report to a member of the police force of a State or Territory.

Item 26 rule 8.12

This item repeals and replaces rule 8.12 with respect to a report after dispute resolution so that the rule better reflects the reporting process as it is undertaken in practice. The rule clarifies that a Judge is not required to prepare or file a report after a dispute resolution event, such as a judicial settlement conference.

Item 27 rule 10.13

This item adds a new subrule (3) which states that An application to vary or set aside a final order on the basis of fraud under paragraph 10.13(1)(b) must be made by filing an Initiating Application (Family Law) and not by way of an Application in a Proceeding.

Item 28 Rule 10.24 (at the end of the heading)

This item amends the heading to rule 10.24 to clarify that it contains provisions that relate to each of vexatious proceedings orders and harmful proceedings orders.

Item 29 rule 10.24

This item inserts a subheading for vexatious proceedings orders within rule 10.24 to indicate the subrules that apply to those orders.

Item 30 Paragraph 10.24(2)(b)

This item corrects a numbering error in the existing rule.

Item 31 rule 10.24

This item inserts procedural rules for applications for harmful proceedings orders, which have been inserted into the Family Law Act by the *Family Law Amendment Act 2023*.

Item 32 Paragraphs 10.26(1)(d) and (2)(f)

This item includes references to a failure to do anything required by the Family Law Regulations as well as the Rules as to when a party may be in default, which reflects what rule 1.33 previously included.

Item 33 Subrules 10.27(1) and (2)

This item sets out more comprehensively what the court may do if a party is in default. It includes provision for how an undefended hearing may be conducted in (1)(g) and (h). It adopts some of the provisions of previous rule 1.33.

Item 34 Subrule 10.27(3) and Item 35 Subrule 10.27(3)

These items make consequential changes to rule 10.27 given a change in numbering of the subrules.

Item 36 – Chapter 11 outline

This item omits the diagram of Chapter 11 and replaces it with an updated diagram of the amended structure of the Chapter.

Item 37 Part 11.2 (heading), Item 38 Division 11.2.1 (heading), Item 39 Rule 11.63 (not including the notes), Item 42 Subrule 11.64(1) (Table 11.1, table heading), Item 43 Subrule 11.64(1) (Table 11.1, table item 1), Item 45 Subrule 11.64(1) (example), Item 46 Paragraph 11.64(2)(b), Item 47 Paragraph 11.64(2)(b)

These items all remove references to the enforcement of a parenting order, which has been removed from the Rules, as a result an Application – Enforcement will no longer be able to be filed in relation to a parenting order.

Items 40-41, Item 44, Items 48-52, Items 54-61

These amendments are consequential changes required due to the renumbering of Division 13A of the Family Law Act which relate to contraventions. These rules reference specific sections of the Family Law Act and so the section references have been updated accordingly.

Item 53 Subrule 11.71(4)

This item amends subrule (4) such that the Marshal may consider making an application for contempt rather than being required to make an application for contempt.

Item 62 Subrule 13.02(1) (note 2)

This item omits a reference to the rule regarding how a document may be filed that has changed due to the redrafting of rule 2.23.

Item 63 Rule 15.13 (note 1)

This item replaces the note to refer to the replacement for section 121 of the Family Law Act, which in this instance are sections 114Q, 114R and 114S of the Family Law Act.

Item 64 Subrule 15.19(2)

This item removes a reference to subrule 10.27(2) which has been amended due to the redrafting of rule 10.27.

Item 65 subrule 15.23(1) (note) and Item 66 Subrule 15.24(1) (note)

These items replace the notes to refer to the replacement for section 121 of the Family Law Act, which in this instance are sections 114Q, 114R and 114S of the Family Law Act.

Item 67 Paragraph 1(5)(b) of Part 1 of Schedule 1 and Item 69 Paragraph 1(5)(b) of Part 2 of Schedule 1

These items amend the pre-action procedures to refer in general terms to the new section 60CC factors.

Item 68 Subclause 2(3) of Part 1 of Schedule 1 and Item 70 Subclause 2(3) of Part 2 of Schedule 1

These items substitute a reference to subrule 1.33(2) for rule 10.27 which is a consequential change necessary given the change to the rules regarding default explained above.

Item 71 Clause 2 of Schedule 4 (after table item 3.8)

To the extent that it is necessary, this item delegates power to a Senior Judicial Registrar to reconsider a final parenting order as set out in new section 65DAAA of the Family Law Act, if that Senior Judicial Registrar is approved to do so or if the order is made with the agreement or consent of all of the parties to the final parenting order.

Item 72 and 73 Clause 2 of Schedule 4 (table item 10.1 and table item 10.2)

These items make consequential amendments to the powers delegated to Senior Judicial Registrars and Judicial Registrars due to the renumbering of Division 13A of the Family Law Act which relate to contraventions. These table items reference specific sections of the Family Law Act and so the section references have been updated accordingly.

Item 74 Clause 2 of Schedule 4 (table item 14.7)

This item reflects a consequential change necessary given the change to the rules regarding default explained above, such that power under rule 10.27 is delegated rather than rule 1.33.

Item 75 Clause 2 of Schedule 4 (table item 14.8, column 2)

This item reflects a consequential change necessary given the change to the rules regarding default explained above. The description relates to rule 1.33 rather than subrule 1.33(1).

Item 76 Clause 2 of Schedule 4 (after table item 19.3)

This item delegates power to determine whether exceptional circumstances exist that justify an independent children's lawyer not performing a duty, and to make an order requiring the independent children's lawyer to perform a duty, pursuant to both limbs of subsection 68LA(5D) of the Family Law Act.

Item 77 Clause 2 of Schedule 4 (table item 24.1)

This item delegates power to make information sharing orders under Subdivision DA of Division 8 of Part VII of the Family Law Act.

Item 78 Clause 2 of Schedule 4 (table item 31.1, column 1)

This item reflects the repeal of section 45A of the Family Law Act and its replacement with section 102QAB of the Family Law Act.

Item 79 Clause 2 of Schedule 4 (table item 32.1)

This item removes the restriction on a Senior Judicial Registrar only being able to vary or set aside an order if it was made by a Senior Judicial Registrar or Judicial Registrar.

Item 80 Clause 2 of Schedule 4 (table item 33.1, column 2)

This item corrects an error in table item 33.1, which referred to 1 year instead of 6 months in accordance with rule 10.22.

Item 81 Clause 2 of Schedule 4 (at the end of the table)

This item delegates power to Senior Judicial Registrars and Judicial Registrars to give a direction about, or approve, a communication to the public of an account of proceedings or a list of proceedings.