AUSTRALIAN SENATE

Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

4 February 2021

The Hon Justice William Alstergren
Chief Justice, Family Court of Australia
Chief Judge, Federal Circuit Court of Australia
GPO Box 9991
MELBOURNE VIC 3001

Via email: Associate.ChiefJudgeAlstergren@federalcircuitcourt.gov.au

CC: The Hon Christian Porter MP, Attorney-General
attorney@ag.gov.au; DLO@ag.gov.au

Dear Chief Justice,

Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]

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

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and the committee has resolved to request your advice in relation to these matters.

Compliance with legislative requirements

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. These include the requirements prescribed by the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Human Rights Act) in relation to statements of compatibility with human rights, and the requirements of an instrument's enabling legislation.

The Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361] and the Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01362] (the instruments) facilitate the use of consistent Notices of Child Abuse, Family Violence or Risk in the Family Court of Australia and the Federal Circuit Court.

The explanatory statement to each instrument explains that the instruments are rules of court and that paragraph 8(8)(d) of the *Legislation Act 2003* (the Legislation Act) provides that rules of court are not legislative instruments for the purposes of that Act. As a result of this, each explanatory statement suggests that the requirements of the Human Rights Act in relation to the inclusion of a statement of compatibility with human rights do not apply to the instruments.

However, the committee notes that subsection 123(2) of the *Family Law Act 1975* provides that the Legislation Act applies to Rules of the Family Court as if a reference to a legislative instrument were a reference to a rule of court, including section 42 of the Legislation Act in relation to disallowance. Subsection 81(3) of the *Federal Circuit Court of Australia Act 1999* provides for the same in relation to Rules of the Federal Circuit Court. A note to subsection 8(8) of the Legislation Act confirms that rules of court may, despite the general provisions of that subsection, be registered under the Legislation Act and may be otherwise treated as if they were legislative instruments by their enabling legislation.

The committee notes that the requirement for a statement of compatibility with human rights arises from section 9 of the Human Rights Act, which provides that a statement of compatibility must be prepared in relation to a legislative instrument to which section 42 (disallowance) of the Legislation Act applies. The committee is therefore of the view that, due to the operation of subsection 123(2) of the *Family Law Act 1975* and subsection 81(3) of the *Federal Circuit Court of Australia Act 1999*, it appears that a statement of compatibility with human rights is required for both instruments.

In light of the above, the committee would appreciate your advice as to whether, as a result of their enabling legislation, each instrument is required to comply with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* and therefore be accompanied by a statement of compatibility with human rights.

Retrospective effect

Senate standing order 23(3)(h) requires the committee to scrutinise each instrument as to whether it trespasses unduly on personal rights and liberties.

Both instruments appear to provide for the retrospective application of specified provisions of each instrument. Rules 27.10, 27.11 and 27.12 of the Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361] set out transitional provisions in relation to rules 2.02, 2.04B and subrule 2.04D(1), respectively. Rules 47.02, 47.03, 47.04, and 47.06 of the Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 set out transitional provisions in relation to rules 22A.02, 22A.03, 22A.04 and 22A.07, respectively.

Where an instrument may have a retrospective effect or application the committee considers that the explanatory statement should explain whether the retrospective effect or application may disadvantage any person. In this regard, the committee notes that neither explanatory statement addresses whether the relevant instrument may apply retrospectively nor whether any such retrospective application may disadvantage any person.

In light of the above, the committee would appreciate your advice as to whether the instruments may apply retrospectively and, if so, whether this retrospective application would disadvantage any person.

Please note that the committee's expectation is to receive a response in time for it to consider and report on the instruments while they are still subject to disallowance. Noting that the 15th sitting day after both instruments were tabled in the Senate is 15 February 2021, the committee has resolved to give notices of motion to disallow the instruments on that day as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **18 February 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation

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12 February 2021

Senator the Hon. Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
Canberra ACT 2600

By email: sdlc.sen@aph.gov.au

Dear Senator

RE: Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]

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

I refer to your letter of 4 February 2021 in relation to recent amendments to the *Family Law Rules 2004* and the *Federal Circuit Court Rules 2001*, made by a majority of Judges in each of the Family Court of Australia and Federal Circuit Court of Australia respectively, to introduce the Notice of Child Abuse, Family Violence or Risk.

The Notice of Child Abuse, Family Violence or Risk is the form that is filed at the commencement of parenting proceedings in family law where parties must report any allegations of child abuse, family violence or other risks to children. If certain allegations are made, the courts are obliged under the *Family Law Act 1975* (Cth) to report the allegations contained in the Notice to child welfare authorities in the relevant State or Territory.

Prior to the rule amendments, the form was different in each court, and whilst compulsory upon filing in the Federal Circuit Court, was only filed in the Family Court if an allegation of child abuse or family violence was made. The new form is also an improvement on previous versions, as it asks questions about a broader variety of risk factors, including substance misuse, mental ill-health, threats of harm, safety at court and wellbeing, and allows the courts to capture data about these risk factors for the first time which will enable to court to better understand and respond to those risks. The form was developed in consultation with external stakeholders including child welfare agencies and legal professional bodies and has been positively received.

The new form ensures that in both courts, the same, enhanced information is available to Judges with respect to risk, at the earliest possible stage in the proceedings, to inform their decision making in the best interests of the child. To that end, it is a critical document for the courts in identifying and responding to child abuse, family violence and other risk factors that may be present in parenting proceedings.

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In relation to the first question that is posed in your letter of 4 February 2020, given the time constraints in which a reply was necessary, the Courts are unable to provide a considered response and will answer in due course. However it should be noted that, pursuant to subsection 9(4) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), a failure to provide a statement of compatibility with human rights does not affect the validity, operation or enforcement of a legislative instrument.

Further, it should be noted that rules of court are critical for the administration of justice and the effective operation of each court. Rules of court can only be made by a majority of judges of the relevant court, and are a manifestation of the judges' collective intention for the court's practice and procedure. It is fundamental that they are able to be amended, modernised and improved as willed by the Judges, in a timeframe appropriate to the urgency or importance of the amendment.

In relation to the second question, the courts can advise that the transitional provisions contained in each amending instrument do not have a retrospective effect, and therefore the Committee does not need to consider whether there would be any disadvantage faced by any person by their retrospective application.

The transitional provisions are designed to ensure that regardless of the stage of proceedings the parties are up to, if they are required to file a risk notification form from the commencement day of the amendment onwards, the form to be used is the Notice of Child Abuse, Family Violence or Risk, and not one of the superseded risk notification forms.

Rule 27.10 of the *Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020* simply requires that the new Notice be filed with an Initiating Application filed on or after the commencement day, or a Response to an Initiating Application filed on or after the commencement day, even if the Initiating Application was filed before the commencement day. The rule applies to an action to be taken in the future, after the commencement day, by either the Applicant or Respondent.

Similarly, rule 27.11 is dealing with the situation where, in an existing proceeding, an updated form needs to be filed, the form now to be used is the new Notice of Child Abuse, Family Violence or Risk rather than the old form.

Rule 27.12 is dealing with the situation where in an existing proceeding, after the commencement day a party makes an allegation of risk, the form to be filed is the new Notice of Child Abuse, Family Violence or Risk, rather than the old version of the form.

The transitional provisions in the *Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020* are for the same purpose and to similar effect.

Given the rule amendments do not have any retrospective application, the importance of the Notice for assessing risk and the safety of children and vulnerable persons, and the fact that the Notice has been in effect since 31 October 2020, the Courts expect that the Committee's consideration of the instruments will be finalised without delay.

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However should you have any further queries in relation to these rule amendments, please contact my Chambers via email to Ms Jordan Di Carlo, Executive Legal and Policy Adviser: jordan.dicarlo@familycourt.gov.au.

Yours sincerely

The Honourable Justice Alstergren
Chief Justice
Family Court of Australia
Chief Judge
Federal Circuit Court of Australia

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18 February 2021

The Hon Justice William Alstergren
Chief Justice, Family Court of Australia
Chief Judge, Federal Circuit Court of Australia
GPO Box 9991
MELBOURNE VIC 3001

Via email: Associate.ChiefJudgeAlstergren@federalcircuitcourt.gov.au

CC: The Hon Christian Porter MP, Attorney-General
attorney@ag.gov.au; DLO@ag.gov.au

Dear Chief Justice,

Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]

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

Thank you for your letter of 12 February 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instruments. The committee considered your letter at a private meeting on 17 February 2021.

On the basis of the advice set out in your letter, the committee has concluded its examination of the instruments in relation to the retrospective effect matter.

In relation to the matter of compliance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee acknowledges your advice that the courts are unable to provide a considered response within the timeframe outlined by the committee and that an answer will be provided in due course. The committee takes this opportunity to thank you for your ongoing consideration of this matter.

As advised in my letter of 4 February 2021, the committee gave notices of motion to disallow the instruments on 15 February 2021. This is a precautionary measure to allow additional time for the committee to consider information received in relation to the matters set out in my original letter. Based on the current Senate sitting calendar, the giving of these notices of motion to disallow would allow the committee to finalise its consideration of these instruments by the sitting week commencing 11 May 2021 at the latest.

However, in the interests of finalising the committee's consideration of these instruments as quickly as possible, the committee would appreciate receiving further advice in relation to the matter of compliance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* by 11 March 2021, although please contact the committee's secretariat to discuss this timeframe if required.

Once the committee has satisfactorily concluded its consideration of both matters raised in relation to these instruments, the committee will be in a position to give notice of its intention to withdraw the disallowance notices.

Please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
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15 March 2021

Senator the Hon. Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
Canberra ACT 2600

By email: sdlc.sen@aph.gov.au

Dear Senator

RE: Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]

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

I refer to your letter of 18 February 2021 in relation to recent amendments to the *Family Law Rules 2004* and the *Federal Circuit Court Rules 2001*, to introduce the Notice of Child Abuse, Family Violence or Risk, which responded to my letter of 12 February 2021.

I understand that, on the basis of the advice in my letter of 12 February 2021, the Committee has concluded its examination of the instruments in relation to the retrospective effect matter. I appreciate your prompt consideration of that matter given the significance of the harmonised Notice of Risk.

The Committee has sought further advice from the Family Court of Australia and the Federal Circuit Court of Australia ('the Courts') in relation to the remaining issue of compliance of the instruments with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

The Family Court and the Federal Circuit Court, together with the Federal Court of Australia, have always proceeded on the basis that a statement of compatibility with human rights is not required in respect of amendments to each Court's rules of court. Accordingly, a paragraph to that effect is included in Explanatory Statement relating to each rule amendment.

The consistent approach adopted by the Courts is based on advice from the Office of Parliamentary Counsel that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) does not require a statement of compatibility to be prepared in respect of rules of court made under relevant Court legislation. In the case of the Family Court and Federal Circuit Court, the *Family Law Act 1975* (Cth) or the *Federal Circuit Court of Australia Act 1999* (Cth) respectively. This is because the enabling provisions for the rules of court, which in this case

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are section 123 of the *Family Law Act 1975* (Cth) and section 81 of the *Federal Circuit Court of Australia Act 1999* (Cth), only provide that the *Legislation Act 2003* (Cth) (other than particular specified provisions of that Act) applies in relation to rules of court as if a reference to a legislative instrument were a reference to rules of court. As a result, the enabling provisions do not have the effect of translating a reference to a legislative instrument in legislation other than the *Legislation Act 2003* (Cth) into a reference to rules of court.

While this is the basis upon which we have not included a statement, for the benefit of the Committee we have **attached** details of how the amendments to the *Family Law Rules 2004* and the *Federal Circuit Court Rules 2001* are not only compatible with human rights, but would enhance human rights **(Attachment A)**.

As detailed in my letter of 12 February 2021, the Courts are concerned that a disallowance will result in a delay to implementation, impacting on the ability of the Courts to more fully identify risks in parenting proceedings directly relevant to the welfare of children, as well as resulting in disruption and costs to amend data systems.

Rules of court are critical for the proper administration of justice and the effective operation of each court. Rules of court can only be made by a majority of judges of the relevant court, and are a manifestation of the Judges' collective intention for the court's practice and procedure. It is fundamental that they are able to be amended, modernised and improved as considered necessary and appropriate by the Judges, in a timeframe appropriate to the urgency or importance of the amendment.

Notwithstanding the matters noted above, the Courts have provided information so as to allow the Committee to be confident that there are no negative human rights consequences and for the issue to be swiftly resolved. I trust that the information provided will enable the Committee to satisfactorily conclude its consideration of this matter, such that it will be in a position to give notice of its intention to withdraw the disallowance notices.

Should you have any further queries in relation to these rule amendments, please contact my Chambers via email to Ms Jordan Di Carlo, Executive Legal and Policy Adviser: jordan.dicarlo@familycourt.gov.au

Yours sincerely

The Honourable Justice Alstergren
Chief Justice
Family Court of Australia
Chief Judge
Federal Circuit Court of Australia

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Attachment A

Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]

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

These legislative instruments are 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).

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 to 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

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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.

These legislative instruments are therefore compatible with human rights as they do not raise any human rights issues.

AUSTRALIAN SENATE

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15 April 2021

The Hon Justice William Alstergren
Chief Justice, Family Court of Australia
Chief Judge, Federal Circuit Court of Australia
GPO Box 9991
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Via email: Associate.ChiefJudgeAlstergren@federalcircuitcourt.gov.au

CC: Senator the Hon Michaelia Cash, Attorney-General
attorney@ag.gov.au; DLO@ag.gov.au

Dear Chief Justice,

Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]

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

Thank you for your letter of 15 March 2021 in relation to the above rules. The committee considered your letter at its private meeting on 13 April 2021.

The committee thanks you for your advice that the Family Court and the Federal Circuit Court (the Courts) consider that statements of compatibility with human rights are not required for rules of court and that this approach is in line with the advice provided by the Office of Parliamentary Counsel in relation to the operation of section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Human Rights Scrutiny Act).

Your letter refers to the advice that because the enabling provisions for the rules of court in section 123 of the *Family Law Act 1975* and section 81 of the *Federal Circuit Court of Australia Act 1999* (the enabling provisions) only provide that the *Legislation Act 2003* (the Legislation Act) applies in relation to rules of court as if a reference to a legislative instrument were a reference to rules of court, they do not have the effect of translating a reference to a legislative instrument in legislation other than the Legislation Act into a reference to rules of court.

While accepting that the provisions may appear to have this effect, the committee's view is that it is arguable that the enabling provisions, when read with relevant provisions of the Legislation Act and section 9 of the Human Rights Scrutiny Act, do have the effect of applying the requirement for a statement of compatibility to rules of court.

While it is correct to say that the enabling provisions do not have the effect of translating the reference to "legislative instruments" in section 9 of the Human Rights Scrutiny Act to a reference to "rules of court" arguably this does not mean that there is no requirement for a statement of compatibility. This is because section 9 can only be understood by referring to how section 42 of the Legislation Act operates, and it is the effect of the enabling provisions on section 42 that brings rules of court within the requirement. By virtue of the enabling provisions, when a reference to "legislative instrument" in section 42 is read as if it were a reference to "rules of court", rules of court become subject to disallowance and attract all of the obligations related to that process (unless specific exemptions are identified).

This includes the requirement in paragraph 15J(2)(f) of the Legislation Act that provides that the explanatory statements for disallowable legislative instruments must contain a statement of compatibility with human rights prepared under section 9 of the Human Rights Scrutiny Act. The enabling provisions provide that paragraph 15J(2)(f) applies in relation to rules of court as if the reference to "legislative instrument" in this provision were a reference to a rule of court.

In the committee's view, not only is the above a better interpretation of the technical operation of the various provisions, it is also commensurate with the purpose of the Human Rights Scrutiny Act and the particular function of statements of compatibility.

The committee also thanks you for the information provided in your letter setting out how the amendments to the rules are compatible with human rights. While this committee is only concerned with the technical scrutiny matter of whether the rules comply with legislative requirements, this information illustrates the importance of statements of compatibility to the scrutiny functions of the Senate and the Parliamentary Joint Committee on Human Rights.

Noting the different interpretations, and that this appears to be a broader issue in relation to rules of court generally, the committee feels that it would be appropriate to raise the matter with the Commonwealth Attorney-General in order to potentially find a coordinated resolution to the matter. Please find attached the committee's correspondence to the Attorney-General for your information.

In the meantime, the committee would be pleased to receive any further views the Courts may have in relation to this matter, including whether the Courts, as an interim measure, would be open to amending the explanatory statements to the rules to include a statement along the lines of Attachment A to your letter dated 15 March 2021.

As the committee is not yet in a position to conclude its consideration of the technical scrutiny matter of whether the rules comply with legislative requirements, in accordance with its usual practice, the committee is unable at this time to give notice of its intention to withdraw the disallowance notices. However, I take this opportunity to provide reassurance that the committee will seek to resolve this matter as expeditiously as possible prior to the expiry of the disallowance period on 15 June 2021. Noting this, the committee would appreciate receiving further advice in relation to this matter by 30 April 2021, although please contact the committee's secretariat to discuss this timeframe if required.

Please note that in the interests of transparency this correspondence and your response will be published on the committee's website.

Should you have any queries, please do not hesitate to contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you again for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation

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15 April 2021

Senator the Hon Michaelia Cash
Attorney-General
Parliament House
CANBERRA ACT 2600

Via email: attorney@ag.gov.au

CC: DLO@ag.gov.au

The Hon Justice William Alstergren
Chief Justice, Family Court of Australia
Chief Judge, Federal Circuit Court of Australia

Dear Attorney-General,

Rules of court and statements of compatibility with human rights

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23.

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. These include the requirements prescribed by the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Human Rights Scrutiny Act) in relation to statements of compatibility with human rights.

Since February 2021, the committee has been corresponding with the Family Court of Australia and the Federal Circuit Court of Australia (the Courts) in relation to the Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361] and the Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01362]. In particular, the committee has advised the Courts of its view that there is a persuasive argument that rules of court are required to comply with the requirements of the Human Rights Scrutiny Act in relation to the preparation of a statement of compatibility with human rights.

The Courts advised the committee that its view is that statements of compatibility with human rights are not required for rules of court and that this approach is in line with the advice provided by the Office of Parliamentary Counsel in relation to the operation of section 9 of the Human Rights Scrutiny Act.

As set out in the attached letter, the Courts have been advised that because the enabling provisions for the rules of court in section 123 of the *Family Law Act 1975* and section 81 of the *Federal Circuit Court of Australia Act 1999* (the enabling provisions) only provide that the *Legislation Act 2003* (the Legislation Act) applies in relation to rules of court as if a reference to a legislative instrument were a reference to rules of court, they do not have the effect of translating a reference to a legislative instrument in legislation other than the Legislation Act into a reference to rules of court.

While accepting that the provisions may appear to have this effect, the committee's view is that it is arguable that the enabling provisions, when read with relevant provisions of the Legislation Act and section 9 of the Human Rights Scrutiny Act, do have the effect of applying the requirement for a statement of compatibility to rules of court.

While it is correct to say that the enabling provisions do not have the effect of translating the reference to "legislative instruments" in section 9 of the Human Rights Scrutiny Act to a reference to "rules of court" arguably this does not mean that there is no requirement for a statement of compatibility. This is because section 9 can only be understood by referring to how section 42 of the Legislation Act operates, and it is the effect of the enabling provisions on section 42 that brings rules of court within the requirement. By virtue of the enabling provisions, when a reference to "legislative instrument" in section 42 is read as if it were a reference to "rules of court", rules of court become subject to disallowance and attract all of the obligations related to that process (unless specific exemptions are identified).

This includes the requirement in paragraph 15J(2)(f) of the Legislation Act that provides that the explanatory statements for disallowable legislative instruments must contain a statement of compatibility with human rights prepared under section 9 of the Human Rights Scrutiny Act. The enabling provisions provide that paragraph 15J(2)(f) applies in relation to rules of court as if the reference to "legislative instrument" in this provision were a reference to a rule of court.

In the committee's view, not only is the above a better interpretation of the technical operation of the various provisions, it is also commensurate with the purpose of the Human Rights Scrutiny Act and the importance of statements of compatibility to the scrutiny functions of the Senate and the Parliamentary Joint Committee on Human Rights.

However, noting the different interpretations, and that this appears to be a broader issue in relation to rules of court generally, the committee considers that it would be appropriate to raise the matter with you in order to potentially find a coordinated resolution to the matter.

In light of this, the committee would appreciate your advice in relation to the interpretation of the above provisions and, additionally, the desirability of preparing statements of compatibility for rules of court.

On 15 February 2021, in accordance with its usual practice, the committee gave notices of motion to disallow the rules as a precautionary measure to allow additional time for the committee to consider this matter. Noting this, and to facilitate the committee's timely consideration of this matter, the committee would appreciate receiving your response by **30 April 2021**.

Please note that in the interests of transparency this correspondence and your response will be published on the committee's website.

Should you have any queries, please do not hesitate to contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation

CHIEF JUSTICE'S CHAMBERS
FAMILY COURT OF AUSTRALIA
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29 April 2021

Senator the Hon. Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
Canberra ACT 2600

By email: sdlc.sen@aph.gov.au

CC: Senator the Hon Michaelia Cash, Attorney-General for Australia and Minister for Industrial Relations: attorney@ag.gov.au; DLO@ag.gov.au

Dear Senator

RE: Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]

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

I refer to your letter of 15 April 2021 in relation to recent amendments to the *Family Law Rules 2004* and the *Federal Circuit Court Rules 2001* to introduce the Notice of Child Abuse, Family Violence or Risk, which responded to my letter of 15 March 2021.

I understand that the Committee's view is that the effect of section 42 and paragraph 15J(2)(f) of the *Legislation Act 2003* (Cth) in relation to disallowance and explanatory statements respectively is to require a statement of compatibility with human rights to be included in each explanatory statement to rules of court.

The Courts can only reiterate that the approach adopted by the Courts is based on advice from the Office of Parliamentary Counsel that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) does not require a statement of compatibility to be prepared in respect of rules of court made under the *Family Law Act 1975* (Cth) or the *Federal Circuit Court of Australia Act 1999* (Cth). The advice received was that the enabling provisions for rules of court, section 123 of the *Family Law Act 1975* (Cth) and section 81 of the *Federal Circuit Court of Australia Act 1999* (Cth), only provide that the *Legislation Act 2003* (Cth) (other than particular specified provisions of that Act) applies in relation to rules of court as if a reference to a legislative instrument were a reference to rules of court, but do not have the effect of translating a reference to a legislative instrument in legislation other than the *Legislation Act 2003* (Cth) into a reference to rules of court.

As detailed in my letter of 12 February 2021 and again in my letter of 15 March 2021, the Courts are concerned about the impact of this process on the implementation of an important

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rule amendment. The rule amendments currently under scrutiny facilitate the filing of a new court form that more fully identifies risks to children and other vulnerable parties in parenting proceedings, such as family violence, child abuse, substance abuse, mental health concerns and threats of harm or abduction. This is critical information in family law proceedings.

The Courts are not seeking to avoid the preparation of a statement of compatibility with human rights per se, rather the Courts are concerned more generally about the application of the disallowance process to rules of court. In the Courts' view, this is at odds with rules of court being an instrument made by a majority of Judges to regulate the practice and procedure of the relevant Court and incidental to the exercise of judicial power, each being a Chapter III court and collectively a separate arm of Government.

As previously stated, rules of court are critical for the proper administration of justice and the effective operation of each court. It is fundamental that they are able to be amended, modernised and improved as considered necessary and appropriate by the Judges, in a timeframe appropriate to the urgency or importance of the amendment.

Notwithstanding this, as an interim measure to resolve the technical scrutiny matter relevant to these rule amendments, in this instance the explanatory statements have been amended to each include a statement of compatibility with human rights (amended explanatory statements **enclosed**).

Noting that the Committee has referred the broader issue of the technical operation of the various provisions to the Attorney-General, a copy of this correspondence will also be forwarded to the Attorney-General. Further, the Courts may provide more fulsome submissions on the broader topic of the operation of the relevant provisions to the Attorney-General and the Committee in due course.

In the meantime, I look forward to receiving confirmation from the Committee that this matter has been resolved as soon as possible.

Should you have any further queries in relation to these rule amendments, please contact my Chambers via email to Ms Jordan Di Carlo, Executive Legal and Policy Adviser: jordan.dicarlo@familycourt.gov.au

Yours sincerely

The Honourable Justice Alstergren
Chief Justice
Family Court of Australia
Chief Judge
Federal Circuit Court of Australia

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Enclosures:

Family Law 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 – Replacement Explanatory Statement

FAMILY LAW AMENDMENT (NOTICE OF CHILD ABUSE, FAMILY VIOLENCE OR RISK) RULES 2020

REPLACEMENT EXPLANATORY STATEMENT

FAMILY LAW AMENDMENT (NOTICE OF CHILD ABUSE, FAMILY VIOLENCE OR RISK) RULES 2020

EXPLANATORY STATEMENT

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 (Notice of Child Abuse, Family Violence of Risk) Rules 2020* ('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.

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

Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]

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* broadly replicate existing provisions in the 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 Child Abuse, Family Violence or Risk of Family Violence (Current Case) and the Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders).

The amendments provide that the Notice must be filed with an Initiating Application (Family Law), Response to an Initiating Application or Application for Consent Orders in which a parenting order is sought under Part VII of the Act. This is a change to the procedure that was in place immediately before the commencement of these rules amendments, where the form being replaced only had to be filed where an allegation of child abuse, risk of child abuse, family violence, or risk of family violence was made.

The amendments also provide for the filing of another Notice when a person becomes aware of new facts or circumstances that would require them to file a Notice for the purposes of subsection 67Z(2) or 67ZBA(2) of the Act.

The amendments include transitional provisions in Part 27.4 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 *Federal Circuit Court Rules 2001*, 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 Child Abuse, Family Violence or Risk of Family Violence (Current Case) and the Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders).

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 requirement to file the Notice with every Initiating Application or Response seeking parenting orders, and 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 2.04D(1) to provide that the prescribed form for a notice mentioned in subsection 67Z(2) or 67ZBA(2) of the Act is the Notice of Child Abuse, Family Violence or Risk ('the Notice').
2) To amend table 2.2 to provide that the Notice must be filed with an Initiating Application (Family Law), Response to an Initiating Application or Application for Consent Orders seeking orders under Part VII of the Act.
3) To insert a definition of 'interested person' in rule 2.04 that adopts the definition in section 67Z or section 67ZBA where either of those sections applies.
4) To insert rule 2.04B to provide for another Notice to be filed where a person has filed a Notice, and becomes aware of new facts or circumstances that would require the person to file another Notice for the purposes of subsection 67Z(2) or 67ZBA(2) of the Act.
5) To amend rule 2.04D 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 person must file an affidavit stating the evidence on which each allegation set out in the Notice is based. This does not apply to a Notice filed with an Application for Consent Orders.
6) 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 Justice directs.
7) 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 *Family Law 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 *Family Law Act 1975* (Cth).

Rule 4 Schedules

Schedule 1 amends the *Family Law Rules 2004*.

Schedule 1 – Amendments

Part 1 – Main amendments

[1] Subrule 2.02(1) (table 2.2, item 2A, column headed "Documents to be filed with application", paragraph (a))

The amendment inserts the words 'unless paragraph (b) applies' at the beginning of paragraph (a), to make clear that only paragraphs (a) and (b) are alternatives, and that paragraphs (c) and (d) apply in either scenario.

[2] Subrule 2.02(1) (table 2.2, item 2A, column headed "Documents to be filed with application", paragraph (a))

The amendment omits the word 'or' at the end of paragraph (a), as it is obsolete given that the words 'unless paragraph (b) applies' have been inserted at the beginning of paragraph (a).

[3] Subrule 2.02(1) (table 2.2, item 2A, column headed "Documents to be filed with application", after paragraph (c))

The amendment inserts a new paragraph (d) in item 2A which requires a Notice of Child Abuse, Family Violence or Risk to be filed with an Initiating Application (Family Law) in which a parenting order is sought under Part VII of the Act.

[4] Subrule 2.02(1) (table 2.2, after item 2B)

The amendment inserts a new item 2C in table 2.2 which requires a Notice of Child Abuse, Family Violence or Risk to be filed with a Response to Initiating Application (Family Law) in which a parenting order is sought under Part VII of the Act.

[5] Subrule 2.02(1) (table 2.2, at the end of the cell at item 9, column headed "Documents to be filed with application")

The amendment inserts a new paragraph (c) in item 9 which requires a Notice of Child Abuse, Family Violence or Risk to be filed with an Application for Consent Orders where an order is sought under Part VII of the Act.

[6] Rule 2.04 Definition

The amendment inserts a definition of 'interested person'. Where section 67Z of the Act applies to the proceeding, the definition of 'interested person' given by subsection (4) of that section applies. Where section 67ZBA of the Act applies to the proceeding, the definition of 'interested person' given by subsection (4) of that section applies.

[7] After rule 2.04A

The amendment inserts a new rule 2.04B, which provides that if a person who is party to a proceeding, or an interested person in a proceeding, has filed a Notice in the proceeding and after that time the person becomes aware of new facts or circumstances that would require the person to file a Notice, they must file another Notice setting out those new facts or circumstances. They must also file an affidavit stating the evidence relied on to support each allegation set out in the Notice. This rule mirrors the equivalent rule in the *Federal Circuit Court Rules 2001* (rule 22A.04).

The amendment adds two notes to subrule 2.04B which remind the person filing the Notice that a true copy of the Notice must be served on the person to whom the allegations relate, and reiterate the obligation on the Registry Manager to notify a prescribed child welfare authority if the Notice alleges that a child has been abused or is at risk of being abused.

[8] Subrules 2.04D(1) and (2)

The amendment repeals subrule 2.04D(1) prescribing the form of the notice mentioned in subsection 67Z(2) or 67ZBA(2) of the Act to be the Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case) or the Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders) and substitutes provisions providing the form of the notice to be the Notice of Child Abuse, Family Violence or Risk. This form has been harmonised with the form used in the Federal Circuit Court of Australia, and is the same as the form inserted in Schedule 2 of the *Federal Circuit Court Rules 2001* by the *Federal Circuit Court (Notice of Child Abuse, Family Violence or Risk) Rules 2020*.

The amendment to subrule 2.04D(1) adds a note which provides that the Notice of Child Abuse, Family Violence or Risk is set out in Schedule 2.

The amendment also repeals subrule 2.04D(2) and substitutes a new subrule 2.04D(2) which sets out more expansively the requirement to file an affidavit that sets out the evidence on which any allegations of child abuse, family violence or risk of harm to a child in the Notice are based.

The amendment adds two notes to subrule 2.04D(2) which remind the person filing the Notice that a true copy of the Notice must be served on the person to whom the allegations

relate, and reiterate the obligation on the Registry Manager to notify a prescribed child welfare authority if the Notice alleges that a child has been abused or is at risk of being abused.

The amendment adds a new subrule 2.04D(3) which provides that subrule 2.04D(2) does not apply to a notice filed with an Application for Consent Orders.

[9] Subrules 10.15A(2), (3) and (4) (note)

The amendment repeals the notes to each of subrules 10.14A(2), (3) and (4). The notes are not required as a Notice will be filed with the Initiating Application (Family Law), Response to an Initiating Application or Application for Consent Orders, not only when an allegation of abuse, risk of abuse, family violence or risk of family violence is made.

[10] Paragraph 19.41(2)(b)

The amendment is a technical amendment, substituting 'the form' for 'a form' in paragraph 19.41(2), to change the indefinite article 'a' to the definite article 'the', because there is now only one form in Schedule 2 to the Rules.

[11] Paragraph 24.01(1)(g)

The amendment substitutes 'Notice of Child Abuse, Family Violence or Risk' for 'a form in Schedule 2' as there is only one form in Schedule 2 to the Rules.

[12] Subrule 24.04(2)

The amendment repeals subrule 24.04(2) providing that the Notice of Child Abuse, Family Violence or Risk of Family Violence (Current Case) or the Notice of Child Abuse, Family Violence or Risk of Family Violence (Application for Consent Orders) is the form of that name in Schedule 2. It substitutes the name of the form to the 'Notice of Child Abuse, Family Violence or Risk', and provides that a reference to the Notice is a reference to the form of that name in Schedule 2, with any variations that are necessary or as the Chief Justice 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 Justice after consultation with the Judges of the Court.

[13] Subrule 24.04(3)

The amendment is a technical amendment, substituting 'the form' for 'a form' in subrule 24.04(3), to change the indefinite article 'a' to the definite article 'the', because there is now only one form in Schedule 2 to the Rules.

[14] In the appropriate position in Chapter 27

The amendment inserts Part 27.4 for transitional provisions relating to the *Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020.*

Rule 27.09 inserts definitions of 'amending Rules', 'commencement day', and 'old format notice of risk'.

Rule 27.10 inserts a transitional provision that clarifies that the amended rule 2.02 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 27.11 inserts a transitional provision that clarifies that rule 2.04B (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 2.04B(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 27.12 inserts a transitional provision that clarifies that the amended subrule 2.04D(1) (the prescribed form) 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.

[15] Paragraph 6.42(2)(b) of Schedule 6

The amendment is a technical amendment, substituting 'the form' for 'a form' in paragraph 6.42(2)(b) of Schedule 6, because there is now only one form in Schedule 2 to the Rules.

[16] 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 Justice 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 Justice after consultation with the Judges of the Court.

Part 2 – Prescribed form

[17] 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 Division 2.3.1 and subrule 24.04(2) of the Rules.

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.

AUSTRALIAN SENATE

Senate Standing Committee for the Scrutiny of Delegated Legislation
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12 May 2021

The Hon Justice William Alstergren
Chief Justice, Family Court of Australia
Chief Justice, Federal Circuit Court of Australia
GPO BOX 9991
MELBOURNE VIC 3001

Via email: Associate.ChiefJudgeAlstergren@federalcircuitcourt.gov.au

CC: Senator the Hon Michaelia Cash, Attorney-General
attorney@ag.gov.au; DLO@ag.gov.au

Dear Chief Justice,

Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]

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

Thank you for your letter of 29 April 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above rules. The committee considered your letter at its private meeting earlier today.

The committee appreciates your advice that, as an interim measure to resolve the current technical scrutiny matter relevant to these rules, replacement explanatory statements which include statements of compatibility with human rights have been registered on the Federal Register of Legislation. As this resolves the committee's technical scrutiny concerns, I will today advise the Senate of the committee's intention to withdraw the notices of motion to disallow the rules. The committee takes this opportunity to thank you for your constructive engagement on this matter.

At this stage, the committee also notes the broader issues that you have raised and appreciates your willingness to further engage on the matters that the committee has raised with the Commonwealth Attorney-General in relation to the technical operation of the relevant provisions. In this regard, the committee may write again once it has had an opportunity to consider correspondence received from the Attorney-General.

Please note that in the interests of transparency this correspondence will be published on the committee's website.

Thank you again for your continued assistance to the committee with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation