**EXPLANATORY STATEMENT**

**Select Legislative Instrument 2012 No. 211**

Issued by Authority of the Attorney-General

*Family Law Act 1975*

*Family Law Amendment Regulation 2012 (No. 3)*

Subsection 125(1) of the *Family Law Act 1975* (Family Law Act) provides, in part, that the Governor‑General may make regulations, not inconsistent with the Family Law Act, prescribing all matters required or permitted by the Family Law Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Family Law Act.

Amendments relating to proceeds of crime orders

Parts VIII, VIIIA and VIIIAB of the Family Law Act provide for the distribution of property of parties to a marriage or de facto relationship following separation. These parts of the Family Law Act also contain provisions for the court to make orders regarding the maintenance of one of the parties to the marriage or de facto relationship.

Under subsections 79B(1), 90M(1) and 90VA(1) of the Family Law Act, parties who apply to the court for orders about the settlement of property or maintenance under Parts VIII, VIIIA or VIIIAB of the Family Law Act are required to notify the court in their application when they are aware that the property of the married or de facto parties or either of them is the subject of a proceeds of crime order or forfeiture application. Subsections 79B(3), 90M(3) and 90VA(3) provide that if a person is already a party to family law proceedings involving the settlement of property or maintenance they are required to notify the Registry Manager if they are notified by a proceeds of crime authority that a proceeds of crime order or forfeiture application covers the property of the parties to the marriage or de facto relationship or either of them.

It is an offence for a person not to disclose the proceeds of crime order or forfeiture application to the court or Registry Manager where the existence of the order is known by or notified to a person who applies for or is a party to proceedings involving property settlement or maintenance under Part VIII, VIIIA or VIIIAB. When a court in which property settlement or maintenance proceedings under these parts are pending is notified about the existence of a proceeds of crime order or forfeiture application, the Family Law Act requires, under subsections 79C(1), 90N(1) and 90VB(1), the court to stay those proceedings until the proceeds of crime order or forfeiture application ceases to be in effect or is resolved.

The Family Law Act also provides, under sections 79C, 79D, 79E, 90N, 90P, 90Q, 90VB, 90VC and 90VD, that a proceeds of crime authority may intervene, make submissions, apply for a stay or a lift of stay, or consent to a lift of a stay of family law proceedings if the court has been notified that a proceeds of crime order or forfeiture application applies to property that is the subject of family law proceedings. The court can also invite the proceeds of crime authority to make submissions in the proceedings. The court must notify the proceeds of crime authority when proceedings are stayed because of the notification of a proceeds of crime order or forfeiture application. The proceeds of crime authority must also notify the Registry Manager of the court when a relevant proceeds of crime order ceases to be in force or when a forfeiture application is finally determined.

The *Crimes Legislation Amendment Act (No. 2) 2011* (Amendment Act) amended the Family Law Act, to expand the types of proceeds of crime orders and forfeiture applications parties must disclose to the court to include proceeds of crime orders and forfeiture applications made under State and Territory proceeds of crime law that are prescribed by regulation. The Amendment Act also expands the class of proceeds of crime authority to include persons or bodies that are prescribed by regulation as a proceeds of crime authority, in relation to a provision of the Family Law Act, for the purposes of a class of proceeds of crime order or forfeiture application under a State or Territory proceeds of crime law.

The Regulation amends the *Family Law Regulations 1984* (Principal Regulations) to prescribe the State and Territory proceeds of crime orders, forfeiture applications and proceeds of crime authorities for the purposes of the Family Law Act.

States and Territories were consulted on the draft Regulation.

Amendments relating to the *Access to Justice (Federal Jurisdiction) Amendment Act 2012*

The Regulation amends the Principal Regulations to ensure that new provisions in Schedules 2 and 3 to the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Access to Justice Act) operate consistently across all four federal courts, and to remove a regulation which is rendered obsolete by Schedule 4 of the Access to Justice Act.

The Access to Justice Act contains provisions which:

* implement in all four federal courts the model Bill of the Standing Committee of Attorneys‑General (SCAG) concerning suppression orders and non-publication orders (Schedule 2)
* implement in all four federal courts the SCAG model Bill concerning vexatious proceedings (Schedule 3), and
* align the jurisdictional limit for matters heard by the Family Law Magistrates in Western Australia with the Federal Magistrates Court (Schedule 4).

The Family Court was consulted on the draft Regulation. The Family Law Act provisions on suppression and non-publication and vexatious proceedings orders, to which several of the proposed regulations relate, underwent significant consultation both in relation to the Access to Justice Act that introduced these provisions for the federal courts and through the SCAG model provision process. Submissions on these provisions were received from courts and tribunals, bar associations, media representative bodies and law enforcement and other government agencies.

Amendments relating to changes to Queensland domestic violence laws

The Regulation amends the Principal Regulations to ensure that the Family Law Act applies to Queensland domestic violence orders following the commencement of the *Domestic and Family Violence Protection Act 2012* (Qld) which replaces the repealed *Domestic and Family Violence Protection Act 1989* (Qld). The *Domestic and Family Violence Protection Act 2012* (Qld) nowprovides laws for domestic violence orders. The Regulation amends the list of legislation prescribed for Queensland for the purposes of section 114AB of the Family Law Act, and amends the list of legislation prescribed for Queensland for the purposes of the definition of ‘family violence order’ in the Family Law Act.

Amendments relating to changes to Queensland laws for the registration of relationships

Early in 2012, the *Family Law Amendment Regulation (No. 1) 2012* amended the Principal Regulations to prescribe the law that provides the framework for the Queensland relationship registration scheme, and also prescribes the type of relationships as a couple which may be entered into under the Queensland scheme. The regulation prescribed the *Civil Partnerships Act 2011* (Qld), and prescribed relationships as a couple between two adults who meet the eligibility criteria mentioned in section 5 of the *Civil Partnerships Act 2011* (Qld) for entry into a civil partnership for the purposes 4AA and 90SB of the Family Law Act.

On 27 June 2012, the *Civil Partnerships and Other Legislation Amendment Act 2012* (Qld) commenced. It amended the *Civil Partnerships Act 2011* (Qld) by changing the short title from the ‘*Civil Partnerships Act 2011’* to the ‘*Relationships Act 2011’* and the reference to types of relationships that can be entered into from ‘civil partnership’ to ‘registered relationship’.

Following the commencement of the *Civil Partnerships and Other Legislation Amendment Act 2012* (Qld), the Regulation updates the Principal Regulations so that references to the Queensland relationship registration scheme, and relationships as a couple which may be registered under that scheme, are consistent with the current law in that State.

In particular, the Regulation updates item 2A of the table in regulation 12BC and item 2A of the table in regulation 15AB of the Principal Regulations by replacing the reference to the ‘*Civil Partnerships Act 2011’* with ‘*Relationships Act 2011’* and changing the reference to ‘civil partnership’ with ‘registered relationship’.

The Queensland Government was consulted on the draft Regulation.

Amendments relating to the jurisdiction of the Family Court in Western Australia, the Territory of Christmas Island and the Territory of the Cocos (Keeling) Islands.

Subsection 40(1) of the Family Law Act provides that the Principal Regulations may provide that the jurisdiction of the Family Court under the Family Law Act in relation to all proceedings, or a specified class of proceedings, must not be exercised in a specified State or Territory, or in 2 or more specified States and Territories.

Paragraph 39BB(2)(g) of the Principal Regulations restricts the Family Court of Australia from exercising its jurisdiction in Western Australia, the Territory of Christmas Island and the Territory of the Cocos (Keeling) Islands to hear appeals against a decision of a judge of the Family Court of Western Australia to refuse to disqualify themselves from hearing a matter. The Regulation fixes this anomaly to allow the Family Court of Australia to exercise its jurisdiction in Western Australia, the Territory of Christmas Island and the Territory of the Cocos (Keeling) Islands to hear the above mentioned appeals.

The Western Australian Government, the Department of Regional Australia, Local Government, Arts and Sport, and the Family Court of Australia were consulted on the draft Regulation.

The Family Court of Australia was consulted on the full Regulation.

The Family Law Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Details of the Regulation are as follows:

Section 1 – Name of Regulation

This Regulation provides that the title of the Regulation is the *Family Law Amendment Regulation 2012 (No. 3)*.

Section 2 – Commencement

Section 2 provides for the commencement of the Regulation.

* Sections 1 to 3 and Schedule 1 to the Regulation (regarding Queensland relationship recognition scheme; the proceeds of crime amendments and the jurisdiction of the Family Court of Western Australia) would commence on the day after registration of the Regulation.
* Schedule 2 (regarding Queensland family violence orders) would commence on 17 September 2012, the same day as the *Domestic and Family Violence Protection Act 2012* (Qld).
* Schedule 3 (regarding Schedule 2 to the Access to Justice Act) would commence at the same time as Schedule 2 to the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (the Access to Justice Act) or the day after registration of the Regulation, whichever occurs later. The inclusion of the alternative commencement date is necessary as Schedule 2 to theAccess to Justice Actis to commence on receiving Royal Assent. The inclusion of the alternative commencement date will ensure that Schedule 3 to the Regulation will not commence and operate retrospectively if Schedule 2 to the Access to Justice Actcommences before the Regulation is made.
* Schedule 4 (regarding Schedule 3 to the Access to Justice Act) would commence at the same time as Schedule 3 to the Access to Justice Act. An alternative commencement date is unnecessary in this case as Schedule 3 to the Access to Justice Act is to commence by Proclamation rather than on Royal Assent.

Section 3 – Amendment of Family Law Regulations 1984

This section provides that the *Family Law Regulations 1984* (Principal Regulations) are amended as set out in Schedules 1 to 4.

Schedule 1 – Amendment commencing on day after registration

**Item [1] – Regulation 12BC, table, item 2A**

Item 1 of Schedule 1 substitutes item 2A of the table in regulation 12BC that prescribes the *Relationships Act 2011* (Qld), and relationships as a couple between 2 adults who meet the eligibility criteria mentioned in section 5 of the *Relationships Act 2011* (Qld) for entry into a de facto relationship for the purposes of section 4AA(2)(g) of the Family Law Act.

**Item [2] – Regulation 15AB, item 2A**

Item 2 of Schedule 1 omits the words ‘*Civil Partnerships’* and inserts ‘*Relationships’* to amend the name of the Queensland legislation prescribed for the purposes of paragraph 90SB(d) of the Family Law Act. The *Civil Partnerships and Other Legislation Amendment Act 2012* (Qld) changed the short title of the *Civil Partnerships Act 2011* (Qld)to the *Relationships Act 2011* (Qld).

**Item [3]: After regulation 17**

Item 3 of Schedule 1 inserts new regulations 17A, 17B, 17C and 17D.

Regulation 17A declares that the definition of ‘forfeiture order’ for the purposes of paragraph (b) of subsection 4(1) of the Family Law Act are the kind of orders declared by regulation 5 of the *Proceeds of Crime Regulations 2002* (POC Regulations) as interstate forfeiture orders.

Regulation 17B declares that the definition of ‘restraining order’ for the purposes of paragraph (b) of subsection 4(1) of the Family Law Act are the kind of orders declared by regulation 7 of the POC Regulations as an interstate restraining order.

Regulation 17C defines a ‘State or Territory proceeds of crime law’ for the purposes of subsection 4(1) of the Family Law Act as a law declared by regulation 4 of the POC Regulationsto be a law that corresponds to the *Proceeds of Crime Act 2002.*

Regulation 17D defines a ‘proceeds of crime authority’ for the purposes of subsection 4C(4) of the Family Law Act as each person or body mentioned in tables 17E.1, 17E.2 and 17E.3 as being a prescribed proceeds of crime authority in relation to sections 79C, 79D, 79E, 90N, 90P, 90Q, 90VB, 90VC and 90VD of the Family Law Act for the purposes of the class of proceeds of crime orders or class of forfeiture applications identified in each table.

Table 17E.1 prescribes the persons or bodies listed in each item of the table as proceeds of crime authorities in relation to sections 79C, 79D, 79E, 90N, 90P, 90Q, 90VB, 90VC and 90VD of the Family Law Act for forfeiture orders.

Table 17E.2 prescribes the persons or bodies listed in each item of the table as proceeds of crime authorities in relation to sections 79C, 79D, 79E, 90N, 90P, 90Q, 90VB, 90VC and 90VD of the Family Law Act for restraining orders.

Table 17E.3 prescribes the persons or bodies listed in each item of the table as proceeds of crime authorities in relation to sections 79C, 79D, 79E, 90N, 90P, 90Q, 90VB, 90VC and 90VD of the Family Law Act for forfeiture applications.

**Item [4] – Subregulation 39BB (2)**

Item 4 of Schedule 1 omits the reference to ‘(Cocos) Keeling’ and inserts ‘Cocos (Keeling)’ in subregulation 39BB(2). This fixes a drafting error to refer correctly to the Territory of the Cocos (Keeling) Islands.

**Item [5] – Paragraph 39BB (2) (g)**

Item 5 of Schedule 1 omits paragraph 39BB(2)(g) of the Principal Regulations. Paragraph 39BB(2)(g) restricted the Family Court of Australia from exercising its jurisdiction to hear appeals against a decision of a judge of the Family Court of Western Australia to refuse to disqualify themselves from hearing a matter in Western Australia, the Territory of Christmas Island and the Territory of the Cocos (Keeling) Islands. The omission of paragraph 39BB(2)(g) removes this restriction.

**Item [6] – Paragraphs 39BB (2) (h) and (i)**

Item 6 of Schedule 1 renumbers paragraphs(h) and (i) of subregulation 39BB(2) as paragraphs 39BB(2)(g) and (h) as a consequence of the omission of paragraph 39BB(2)(g) by item 4.

**Item [7] – Subregulation 39BB (3)**

Item 7 of Schedule 1 substitutes subregulation 39BB(3) as a consequence of the omission of paragraph 39BB(2)(g) by item 4.

New subregulation 39BB(3) provides that paragraph 39BB(2)(g) of the Principal Regulations applies only so far as proceedings under paragraph 93A(1)(aa) of the Family Law Act relate to appeals under subsection 94AAA(1) of the Family Law Act.

Schedule 2 – Amendments commencing on 17 September 2012

**Item [1] – Paragraph 19 (c)**

Item 1 of Schedule 2 omits ‘1989’ and inserts ‘2012’ to refer to the *Domestic and Family Violence Protection Act 2012* (Qld). The *Domestic and Family Violence Protection Act 2012* (Qld) replaced the repealed *Domestic and Family Violence Protection Act 1989* (Qld). As such, the *Domestic and Family Violence Protection Act 2012* (Qld) now provides laws for domestic violence orders.

**Item [2] – Schedule 8, item 4**

Item 2 of Schedule 2 omits ‘1989’ and inserts ‘2012’ to refer to the *Domestic and Family Violence Protection Act 2012* (Qld). The *Domestic and Family Violence Protection Act 2012* (Qld) replaced the repealed *Domestic and Family Violence Protection Act 1989* (Qld). As such, the *Domestic and Family Violence Protection Act 2012* (Qld) now provides laws for domestic violence orders.

Schedule 3 – Amendments commencing on commencement of Schedule 2 to Access to Justice Act

**Item [1]: Regulation 12AC**

Regulation 12AC prescribes the ‘ceiling amount’ for paragraph 46(1AA)(a) of the Family Law Act. Subsection 46(1AA) provides for a ‘ceiling amount’ as a limit on jurisdiction in property cases of the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia.

Item 1 of Schedule 3 omits regulation 12AC as a consequence of the repeal of subsection 46(1AA) of the Family Law Act, by item 2 of Schedule 4 to the Access to Justice Act, which removes the ‘ceiling amount’ limit on the jurisdiction of Family Law Magistrates of Western Australia.

**Item [2]: Subregulation 15A**

Item 2 of Schedule 3 amends subregulation 15A to prescribe an order under section 102PE of the Family Law Act as an order for which leave to appeal is required under subsection 94AA(1) of the Family Law Act.

Section 102PE gives relevant courts power under the Family Law Act to make a suppression or non‑publication order. An identical provision was inserted into the *Federal Court of Australia Act 1976, Federal Magistrates Act 1999* and *Judiciary Act 1903* by Schedule 2 of the Access to Justice Act. In relation to the *Federal Court of Australia Act 1976* and *Federal Magistrates Act* *1999*, the Access to Justice Act also amended subsection 24(1D) of the *Federal Court of Australia Act 1976* to clarify that the relevant orders made under either Act are interlocutory in nature and therefore require leave to appeal.

It was proposed to make a similar clarification in relation to the Family Law Act to maintain consistency. However, this was left to be implemented through regulatory amendments, in view of the existing mechanism for prescribing orders requiring leave to appeal in subsection 94AA of the Family Law Act.

Schedule 4 – Amendment commencing on commencement of Schedule 3 to Access to Justice Act

**Item [1]: Paragraph 15A (1) (b)**

Item 1 of Schedule 4 amends paragraph 15A(1)(b) to additionally prescribe an order under section 102QF or 102QG of the Family Law Act as an order for which leave to appeal is required under subsection 94AA(1) of that Act.

Section 102QF gives relevant courts power under the Family Law Act to make an order dismissing an application by a person subject to a vexatious proceedings order for leave to institute proceedings that are subject to the order. Section 102QG gives relevant courts power to make an order granting such an application. Identical provisions were inserted into the *Federal Court of Australia Act 1976, Federal Magistrates Act 1999* and *Judiciary Act 1903* by Schedule 3 of the Access to Justice Act. In relation to the *Federal Court of Australia Act 1976* and *Federal Magistrates Act* *1999*, the Access to Justice Act also amended subsection 24(1D) of the *Federal Court of Australia Act 1976* to clarify that the relevant orders made under either Act are interlocutory in nature and therefore require leave to appeal.

It was proposed to make a similar clarification in relation to the Family Law Act to maintain consistency. However, this was left to be implemented through regulatory amendments, in view of the existing mechanism for prescribing orders requiring leave to appeal in subsection 94AA of the Family Law Act

**STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Family Law Amendment Regulation 2012 (No. 3)***

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*.

**Overview of the Legislative Instrument**

The Regulation amends the *Family Law Regulations 1984* (Principal Regulations) to:

* finalise the new arrangements to enable courts to take account of State and Territory proceeds of crime orders when determining property settlement and spousal maintenance
* update references to the legislation prescribed in regulations 12BC and 15AB to continue to recognise the Queensland relationship recognition scheme for the purposes of the Family Law Act, following the enactment of the *Civil Partnerships and Other Legislation Amendment Act 2012* (Qld)
* amend the legislation prescribed for Queensland in regulation 19 and Schedule 8 of the Principal Regulations following the commencement of the *Domestic and Family Violence Protection Act 2012* (Qld). This will ensure that the Family Law Act applies to Queensland family violence orders.
* allow the Family Court of Australia to exercise its jurisdiction in Western Australia, the Territory of Christmas Island and the Territory of the Cocos (Keeling) Islands to hear appeals against a decision of a judge of the Family Court of Western Australia to refuse to disqualify themselves from hearing a matter
* support aspects of the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (the Access to Justice Act) by removing regulation 12AC, which is rendered obsolete by the Access to Justice Act, and clarifying, in regulation 15A, that suppression and non-publication orders, and orders granting or dismissing an application by a person subject to a vexatious proceedings order for leave to institute proceeding that are subject that the order, require leave to appeal.

**Human Rights Implications**

*Amendments to regulation 12BC and regulation 15AB of the Principal Regulations*

The Regulation regarding the amendments to regulation 12BC and regulation 15AB of the Principal Regulations engages articles 23 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR). Article 23 guarantees the right to respect for family and article 26 guarantees the right to equal protection of the law without discrimination. The amendments ensure that relationships registered under a prescribed scheme of relationship recognition are recognised for the purposes of the Family Law Act.

The United Nations Human Rights Committee (HRC) has made it clear that the definition of family is not confined by the concept of marriage. If countries recognise other arrangements that may constitute a family, those arrangements must be protected under article 23 of the ICCPR.

De facto couples registered under a relationship recognition scheme are recognised as conclusive evidence that two people are in a ‘de facto relationship’ for the purposes of the Family Law Act.

By ensuring that same‑sex couples are recognised and have the same entitlements as opposite-sex de facto couples for the purposes of the Family Law Act, the Regulation protects the right to respect for family and the right to non-discrimination.

*Amendments to regulation 39BB of the Principal Regulations*

The amendments to regulation 39BB engage Article 14 of the ICCPR. Article 14 states that ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’

The HRC has provided insight into the meaning of an ‘impartial tribunal’, stating that the requirement has two aspects. ‘First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.  Second, the tribunal must also appear to a reasonable observer to be impartial.  For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.’

The amendment to regulation 39BB will allow the Family Court of Australia to exercise its jurisdiction in Western Australia, the Territory of Christmas Island and the Territory of the Cocos (Keeling) Islands to hear appeals against a decision of a judge of the Family Court of Western Australia to refuse to disqualify themselves from hearing a matter. By allowing for appeals to the Family Court of Australia from the Family Court of Western Australia in cases where actual or perceived judicial impartiality may have occurred, the amendment will promote the right to a fair and public hearing by a competent, independent and impartial tribunal.

*Proceeds of crime amendments*

The aspects of the Regulation relating to the proceeds of crime do not engage any of the applicable rights and freedoms as it does not make any substantive changes to the law. The amendments made to the Family Law Act in 2011 expanded the scope of the definitions of ‘proceeds of crime order’, ‘forfeiture application’ and ‘proceeds of crime authority’ under the Act to include State and Territory regimes prescribed by the regulations. This regulation simply prescribes the relevant State and Territory regimes for the purposes of the Act.

*Other amendments*

The amendments to prescribe the *Domestic and Family Violence Protection Act 2012* (Qld) and the amendments supporting the Access to Justice Act do not affect any human rights as they are technical changes to reflect the current law.

**Conclusion**

The Regulation is compatible with human rights because the aspects of the Regulation that engage human rights advance the protection of human rights.

**The Hon Nicola Roxon MP**

**Attorney-General**