

Explosives (Security Clearances and Other Matters) Amendment Regulation 2020

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, Dr Anthony Lynham MP, Minister for Natural, Resources Mines and Energy provide this human rights certificate with respect to the Explosives (Security Clearances and Other Matters) Amendment Regulation 2020 (the Amendment Regulation) made under the *Explosives Act 1999* (the Explosives Act).

In my opinion, the Amendment Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

The Amendment Regulation amends the Explosives Regulation 2017 (the Explosives Regulation) as authorised under section 135 of the Explosives Act.

The Explosives Act provides a framework for regulating the handling of, and access to, explosives to protect public health and safety, property and the environment. The Explosives Act also establishes an authorisation framework, which requires a licence or permit (collectively referred to as an ‘authority’) for most explosives related activities in Queensland (e.g. import, export, manufacturing, sale, storage, transport, use, fireworks, etc.).

On 1 February 2020, a new security clearance regime came into effect under the Explosives Act to ensure only those persons who are assessed as suitable to have access to certain types of explosives do so. Under the regime, applicants for, or holders of, an authority associated with security sensitive explosives (referred to as a ‘security sensitive authority’) are required to hold a security clearance.

A security clearance is valid for up to five years. The chief inspector of explosives issues successful security clearance applicants with a security clearance card as confirmation of the person’s security clearance status. A security clearance card is a printed plastic card similar to that used for explosives occupational licences. Existing security sensitive authority holders may be ‘taken to hold’ a security clearance under transitional arrangements for up to five years. A card is not issued for a security clearance under transitional arrangements.

A security clearance can only be held by an individual, so the following applies in relation to security sensitive authority applicants and holders:

- for an individual—the individual must hold a security clearance
- for a listed corporation—a responsible person must be appointed, and that person must hold a security clearance
- for a corporation, other than a listed corporation—each executive officer must hold a security clearance
- for a partnership—each partner must hold a security clearance.

Security clearances must also be held by all employees of security sensitive authority holders who have, or will have, unsupervised access to explosives in the course of their employment. Employers have an obligation to ensure this requirement is complied with.

Failure of a security sensitive authority holder to ensure the relevant persons associated with their authority (outlined above) hold a current security clearance is grounds for suspension or cancellation of the authority. It is also an offence for a security sensitive authority holder to permit an employee who does not hold a security clearance to have unsupervised access to an explosive.

The security clearance regime is in line with the Queensland Government's *Not Now Not Ever* policy and ensures persons subject to domestic violence orders, police protection notices or release conditions are prohibited under the legislation from holding an authority or having unsupervised access to security sensitive explosives.

The chief inspector of explosives is kept informed by Queensland Police regarding any changes to the criminal history or domestic violence status of a security clearance applicant or holder. Security clearance holders are also required to notify the chief inspector of a change in circumstance which effects, or may effect, the security clearance (e.g. if the holder is named as the respondent in a domestic violence order or police protection notice) and must return their card within 14 days if their clearance is suspended or cancelled.

However, a security clearance holder is currently not required to notify other persons (e.g. their employer) if their security clearance has been suspended, cancelled or surrendered. Further, while the legislation ensures the chief inspector is kept informed regarding a change in a security clearance holder's circumstances or change in clearance status; there are two matters that prevent the chief inspector informing applicable security sensitive authority holders. Firstly, the chief inspector does not keep security clearance holder employment records, so it is not known which security sensitive authority holder a security clearance holder is associated with. Secondly, the chief inspector is limited under the legislation to release such information unless it meets current disclosure requirements under the Explosives Act (e.g. such as in the public interest). The chief inspector may consider making a public statement under the Explosives Act regarding the suspension or cancellation of a holder's authority or security clearance; however, this approach is not considered an appropriate use of this power in these circumstances.

Given security sensitive authority holders have obligations to ensure certain persons associated with their authority (e.g. employees) hold a security clearance, it is essential that security sensitive authority holders are able to be informed regarding changes in the security clearance status of relevant persons associated with their authority.

The Amendment Regulation addresses this issue by amending the Explosives Regulation to:

- require security clearance holders to take all reasonable steps to notify the following persons as soon as practicable after becoming aware their security clearance has been suspended, cancelled or surrendered, unless the security clearance holder has a reasonable excuse:
 - for a holder who is an employee of a security sensitive authority holder—notify the employer
 - for a holder who is a responsible person for a listed corporation holding a security sensitive authority—notify each executive officer of the corporation

- for a holder who is an executive officer of a non-listed corporation holding a security sensitive authority—notify each other executive officer of the corporation
- for a holder who is a partner in partnership holding a security sensitive authority—notify each other partner; and
- require the chief inspector to keep a register of each authority and security clearance issued by the chief inspector, specifying the information to be kept in the register about each authority and security clearance, and clarifying that information kept in the register, other than restricted information (i.e. an individual’s contact details and the circumstances surrounding the suspension, cancellation or surrender of an authority or security clearance) may be disclosed or published by the chief inspector, including online.

These amendments ensure security sensitive authority holders are informed if the security status of a security clearance holder associated with their authority changes and enables independent verification of key information (e.g. status) relating to authorities and security clearances.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

I consider the following human rights to be relevant to the Amendment Regulation:

- right to life (section 16 of the *Human Rights Act 2019*); and
- privacy and reputation (section 25 of the *Human Rights Act 2019*).

Right to life

The sections of the Amendment Regulation that are relevant to this right are:

- Insertion of new pt 3, div 1AA (Security clearances) – section 5.
- Insertion of new pt 3, div 7 (Register of authorities and security clearances) – section 8.

Sections 5 and 8 engage the right to life by imposing notification obligations on holders of a security clearance requiring them to inform prescribed persons if the holder’s clearance is suspended, cancelled or surrendered; and by establishing a register of authority and security clearance holders, with new powers enabling the chief inspector to disclose and publish certain register information. The right to life is not restricted by these sections; rather, the effect of these sections is to help promote and protect the right to life of persons, including those involved in the explosives industry and the wider community by improving the effective operation of the explosives authorisation and security clearance frameworks under the Explosives Act.

Privacy and reputation

The sections of the Amendment Regulation that are relevant to this right are:

- Insertion of new pt 3, div 1AA (Security clearances) – section 5.
- Insertion of new pt 3, div 7 (Register of authorities and security clearances) – section 8.

Sections 5 and 8 also engage the human right relating to privacy and reputation, by potentially impacting this right by requiring a security clearance to notify certain person’s (e.g. their employer) if the holder’s clearance is suspended, cancelled or surrendered; and by providing a

legislative mechanism whereby certain information about a holder's authority or security clearance (e.g. status) may be disclosed or published, including online.

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

Section 13 of the *Human Rights Act 2019* provides that a human right may be subject to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

(a) the nature of the right

Everyone has the right to life and has the right not to be arbitrarily deprived of life (section 16). The right imposes substantive and procedural obligations on the State to take appropriate steps and adopt positive measures to protect life, including, for example effective criminal law and law enforcement provisions. This protective obligation extends to requiring authority holders to put in place measures that would protect an individual whose life is being put at risk by another's criminal activity. The Explosives Act addresses this right by regulating the handling of, and access to, explosives via the explosives authorisation and security clearance frameworks to protect public health and safety, property and the environment. This protects the right to life of persons, including those involved in the explosives industry and the wider community.

Everyone also has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and not to have their privacy unlawfully or arbitrarily interfered with and not to have the person's reputation unlawfully attacked (section 25). The right to privacy protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation.

The right protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. For example, the right to privacy protects the individual against interference with their physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home, and individual identity (including appearance, clothing and gender). Only lawful and non-arbitrary intrusions may occur upon privacy, family, home, correspondence and reputation. The Explosives Act addresses the right to privacy by generally limiting the disclosure of information obtained in the administration of this Act unless certain criteria are met (e.g. with consent, in the administration of the Explosives Act, in the interests of public safety, etc.).

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The Amendment Regulation engages the right to life; it does not limit it. The Amendment Regulation does impose a minor limitation relating to privacy and reputation by requiring security clearance holders to notify prescribed person(s) (e.g. their employer) if the holder's clearance is suspended, cancelled or surrendered. The Amendment Regulation also limits privacy and reputation by allowing the chief inspector to disclose and publish authority and security clearance information kept in the register.

The purpose of the limitation is to ensure persons with explosives safety and security obligations have access to the key information they need to comply with their obligations under

the Explosives Act. For example, so security sensitive authority holders are informed about, and are able to verify, whether the security clearance of a person associated with their authority is valid. Appropriate access to key authority and security clearance information is required to ensure the safety and security of explosives and promote public safety. Further, these provisions will help ensure persons subject to domestic violence orders, police protection notices or release conditions are prevented from having unsupervised access to security sensitive explosives, which is consistent with the values of a free and democratic society.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The security clearance regime under the Explosives Act is aimed at ensuring only persons assessed as suitable to have unsupervised access to explosives do so (e.g. a person who is the subject of a domestic violence order is prohibited from holding a security clearance or an explosives authority). To achieve this intent, the regime imposes obligations on security sensitive authority holders to ensure certain persons associated with their authority (including employees who have unsupervised access to explosives) hold a valid security clearance. A failure to do so is an offence and grounds for suspension or cancellation of the holder's authority.

The privacy and reputation limitation imposed by the Amendment Regulation is necessary to ensure persons with explosives safety and security obligations have access to the key information they need to comply with their obligations under the Explosives Act (e.g. to ensure that only an employee that holds a security clearance has unsupervised access to an explosive).

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

The security clearance holder notification requirements and register provision, which authorises the disclosure and publication of register information by the chief executive, are necessary to achieve the intended purpose of ensuring persons with explosives safety and security obligations have access to the key information they need to comply with their obligations under the Explosives Act.

The Amendment Regulation provisions have been drafted in a way to ensure the limitation on privacy and reputation is engaged only to the extent necessary. The notification requirement only relates to giving notice of the change in security clearance status, which is the key information required by security sensitive authority holders. The requirement does not extend to providing the reasons for, or circumstances surrounding, the suspension, cancellation or surrender of the clearance, as this information is not critical. Similarly, the register provision explicitly prohibits the disclosure or publication of contact details of an individual and the circumstances surrounding the suspension, cancellation or surrender of an authority or security clearance. The safeguards included in the Amendment Regulation restrict the impact of the limitation on privacy and reputation and ensure the purpose of the amendments is achieved whilst ensuring the least possible impact on human rights.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The Amendment Regulation promotes the right to life; however, also limits a person's right to privacy and reputation, but only to the degree necessary. The preservation of a person's right to privacy and reputation is important; however, the preservation of a person's right to life is

arguably a more fundamental human right that needs to be preserved. While the Amendment Regulation does limit a person's right to privacy and reputation, the limitation has been restricted by including appropriate protections as outlined above to minimise the impact. Further, the potential limitation on a person's right to privacy and reputation needs to be considered on balance with the greater right to life and community expectations.

The changes made by the Amendment Regulation, support the effective operation of the explosives authorisation and security clearance frameworks under the Explosives Act and take a fair and reasonable approach to how they affect an individual's human rights for the broader benefit of the community. On balance, it is considered that any potential impact that the Amendment Regulation makes upon the rights and liberties of individuals in this context is reasonable and justified, given the amendments are aimed at helping to protect the right to life of explosives industry workers and the wider community. Further, the Amendment Regulation limits an individual's right to privacy and reputation only to the extent necessary to achieve the improved public safety outcomes, considered necessary to safeguard the community and workplaces from the misuse of explosives.

(f) any other relevant factors

Nil.

Conclusion

I consider that the Explosives (Security Clearances and Other Matters) Amendment Regulation 2020 is compatible with the *Human Rights Act 2019* because it does limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

DR ANTHONY LYNHAM MP
MINISTER FOR NATURAL RESOURCES, MINES AND ENERGY

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