

Attorney-General Regulation 2021

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* (HR Act), I, Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, provide this human rights certificate with respect to the *Attorney-General Regulation 2021* (the Regulation) made under the *Attorney-General Act 1999* (the Act).

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

Overview of the Subordinate Legislation

The Attorney-General, as the State's first law officer, has the power to grant fiats to enable entities, that would not otherwise have standing, to start proceedings in the Attorney-General's name to enforce charitable and public trusts and to enforce and protect public rights. This power is stated in section 7(1)(g) of the Act. Under section 9A of the Act, an application for the Attorney-General's fiat under section 7(1)(g) must be made in the way prescribed under a regulation.

The purpose of the *Attorney-General Regulation 2010* is to provide the Attorney-General with sufficient information to make a decision about the merits of an application for a fiat, and to ensure the Attorney-General is fully indemnified for any costs incurred in relation to the proceeding if the fiat is granted.

It prescribes the information and documents that must accompany an application for the Attorney-General's fiat. For example, the application must contain the applicant's contact details and the reasons why the fiat is being sought, and be accompanied by documents such as an opinion from counsel as to the likelihood of success of the proceeding, and an undertaking by the applicant or their solicitor to indemnify the Attorney-General and to pay all of the Attorney-General's costs of the proceeding.

The *Attorney-General Regulation 2010* is due to expire on 31 August 2021 under the *Statutory Instruments Act 1992*.

While the *Attorney-General Regulation 2010* prescribes the requirements for an application for the Attorney-General's fiat for proceedings to enforce and protect public rights, the Regulation also prescribes the same requirements for an application for the Attorney-General's fiat to enforce charitable and public trusts.

The Regulation also omits the application of the prescribed requirements to an application to continue proceedings in the Attorney-General's name as this has been identified as beyond the regulation-making power under the Act. The requirements for such applications will be managed administratively.

Human Rights Issues

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

The Regulation engages the following human rights:

- right to recognition and equality before the law (section 15 of the HR Act); and
- property rights (section 24 of the HR Act).

Consideration of reasonable limitations on human rights (section 13 HR Act)

(a) the nature of the right

Right to recognition and equality before the law

This right is a stand-alone right that also permeates all human rights. It encompasses both the right to recognition as a person before the law and the right to enjoy human rights without discrimination.

The right to recognition and equality before the law is limited where the right to apply for a fiat to start proceedings in the Attorney-General's name is restricted to those who can afford to pay for legal services and indemnify the Attorney-General and to pay all of the Attorney-General's costs of the proceeding. This right may be limited by the Regulation as it requires an applicant for the Attorney-General's fiat to provide a certificate signed by counsel stating various matters about the proposed proceeding, an opinion from counsel as to the prospects of success of the proceeding, a certificate signed by the applicant's solicitor stating that the applicant is an appropriate person to act as relator in the proceeding, and an undertaking by the applicant or their solicitor to indemnify the Attorney-General and to pay all of the Attorney-General's costs of the proceeding.

Property rights

Property rights protect the right of all persons to own property (alone or with others) and provide that people have a right not to be arbitrarily deprived of their property.

The ability to own and protect property historically underpins many of the structures essential to maintaining a free and democratic society based on human dignity, equality and freedom. The right includes protection from being arbitrarily deprived of property. The term 'deprived' is not defined by the HR Act, however, deprivation in this sense is considered to include the substantial restriction on a person's use or enjoyment of their property to the extent it substantially deprives a property owner of the ability to use their property (including enjoying exclusive possession of it, disposing of it, transferring it or deriving profits from it). Property is likely to include all real and personal property interests, including money.

The right to property may be limited by the Regulation as a person who wishes to apply for the Attorney-General's fiat must pay for the services of a solicitor and counsel to provide the necessary documents in support of their application. The person must also undertake to indemnify the Attorney-General and to pay all of the Attorney-General's costs of the proceeding.

- (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 limitation on the right to recognition and equality before the law and the right to property is for the purpose of providing the Attorney-General with sufficient information to decide whether a fiat should be granted. The documents prescribed in the Regulation which must accompany an application, including those which must be provided by a solicitor or counsel, ensure that fiats are only granted for proceedings which are appropriate to be started in the Attorney-General's name, and that the Attorney-General is fully indemnified for any costs incurred in relation to the proceeding if a fiat is granted. This purpose is consistent with a free and democratic society based on human dignity, equality and freedom.

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

Prescribing the information and documents which must accompany an application for the Attorney-General's fiat, including those which must be provided by a solicitor or counsel, ensures that the Attorney-General can make a proper decision as to the merits of an application.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the Regulation.

- (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

On balance, the importance of ensuring that fiats are only granted for proceedings which are appropriate to be started in the Attorney-General's name and of ensuring that the State is not liable for any costs incurred in relation to the proceeding if a fiat is granted, outweigh any limitation on the right to recognition and equality before the law and the right to property.

Conclusion

I consider that the Regulation is compatible with the HR Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HR Act.

SHANNON FENTIMAN MP
Attorney-General and Minister for Justice,
Minister for Women and
Minister for the Prevention of Domestic and Family Violence