

Criminal Proceeds Confiscation Regulation 2023

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, Yvette D'Ath, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, provide this human rights certificate with respect to the *Criminal Proceeds Confiscation Regulation 2023* (the Regulation) made under the *Criminal Proceeds Confiscation Act 2002* (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 main object of the Act is to remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity. Other important objects include ensuring orders of other States restraining or forfeiting property under corresponding laws may be enforced in Queensland.

There are three principal and separate civil confiscation schemes within the Act which seek to achieve its objectives: the non-conviction-based scheme in Chapter 2; the serious drug offender confiscation scheme in Chapter 2A; and the conviction-based scheme in Chapter 3.

The Act provides for various matters to be prescribed by regulation. The Regulation sets out those matters, which include:

- offences that fall under the meaning of 'serious criminal offences' for the purpose of section 17 in Chapter 2 of the Act;
- offences that fall under the meaning of 'confiscation offences' for the purpose of section 99 in Chapter 3 of the Act; and
- proceeds of crime orders made in other Australian jurisdictions that, when properly filed, are capable of being recognised as enforceable legal orders in Queensland.

The Regulation provides for the same matters as the current Regulation, which is due to expire under the *Statutory Instruments Act 1992* on 1 September 2023, subject to some updates, including amendments to recognise additional interstate orders in Queensland, and other minor and clarifying changes.

The Regulation is made pursuant to section 267 of the Act.

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 Regulation:

- Property rights (section 24);
- Privacy and reputation (section 25);
- Protection of families and children (section 26);
- Fair hearing (section 31); and
- Not to be tried or punished more than once (section 34).

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

(a) the nature of the right

Property rights

Section 24 of the HR Act protects the right of all persons to own property (alone or with others) and provides that people have a right not to be arbitrarily deprived of their property. Property includes all real and personal property interests recognised under general law and may include some statutory rights. In the human rights context, ‘arbitrariness’ refers to conduct that is capricious, unpredictable, unjust or unreasonable, in the sense of not being proportionate to the legitimate aim that is sought. If a deprivation of property is proportionate under section 13 of the HR Act, it will not be arbitrary. Accordingly, whether the deprivations of property which may result from the Regulation are arbitrary will be addressed by considering the factors in section 13.

Schedule 1 of the Regulation prescribes ‘serious criminal offences’. Under the Act, a ‘serious criminal offence’ is defined as including an indictable offence for which the maximum penalty is at least five years and an offence prescribed under a regulation.

The court makes a finding of fact in relation to offending behaviour on the civil standard of proof. The prescription of these offences limits property rights by enabling property to be restrained or confiscated on the basis of suspected commission or derivation of property from those offences without the person being charged or convicted of that offence. A respondent, their dependants or a third party challenging an application for confiscation must show they lawfully acquired the property, or they had no knowledge of the relevant illegal activity.

Schedule 2 of the Regulation prescribes ‘confiscation offences’. Under the Act, a ‘confiscation offence’ is defined as: a serious criminal offence; another indictable offence, whether dealt with on indictment or summarily; an offence against the Act for which an offender is liable to imprisonment; or an offence prescribed under regulation.

A person’s property may be restrained and forfeited when they are convicted. The prescription of these offences limits property rights by expanding the offences in relation to which property may be restrained and confiscated under the Act.

Under Schedules 4, 5 and 6 of the Regulation, equivalent interstate orders are prescribed as recognised interstate forfeiture, pecuniary penalty or restraining orders. This limits property rights by allowing Queensland courts to recognise and enforce, when properly filed, an equivalent interstate order which requires the restraint or forfeiture of property held within Queensland.

Privacy and reputation

Section 25(a) of the HR Act protects the right to not have a person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with. This right protects against any interference with the 'home', and eviction and confiscation of the home would amount to the ultimate interference. The HR Act only protects against interference that is not 'unlawful' or 'arbitrary'. If the interference with privacy is proportionate under section 13 of the HR Act, it will not be arbitrary. Accordingly, whether the interference with privacy which may result from the Regulation is arbitrary will be addressed by considering the factors in section 13.

The prescription of serious criminal offences, confiscation offences and interstate orders under the Regulation limits a person's right to privacy by allowing for the confiscation of property, which may include a person's home, on the basis of a person's involvement in criminal activity even when a person has not been charged with or convicted of a prescribed offence.

Protection of families and children

The right to the protection of families and children recognises that families are the fundamental group unit of society and entitles families to protection by the society and the State. The right also protects the right of every child, without discrimination, to the protection that is needed by the child and is in the child's best interests. This recognises the special vulnerability of children and is a right that is only held by children. The right requires the State to ensure the survival and development of every child to the maximum extent possible.

The right to the protection of families and children is limited if the family home or other assets are confiscated and may impact a respondent's dependants, including their partner or children. The right is limited where it is not proportionate to a legitimate end.

The prescription of serious criminal offences, confiscation offences and interstate orders under the Regulation limits the right to the protection of families and children by allowing for the confiscation of property, which may include the family home or other property, including in circumstances where a person has not been charged with or convicted of the relevant offence.

Fair hearing

Section 31 of the HR Act includes that a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court after a fair and public hearing. This right is concerned with the procedural fairness of a decision and the protection of natural justice. What fairness requires will depend on all the circumstances of the case. Broadly, it ensures a party has a reasonable opportunity to have their case heard in conditions that do not place them at a substantial disadvantage to their opponent (equality of arms), and also embraces principles of unimpeded access to courts, a reasonably expeditious hearing, rights to legal advice and representation and the privilege against self-incrimination. What constitutes a 'fair' hearing will depend on the

facts of the case and will require the weighing of a number of public interest factors including the rights of all parties in a civil proceeding.

A respondent, their dependants or a third party challenging an application for confiscation of property under the Act must show that they lawfully acquired the property or that they had no knowledge of the relevant illegal activity (for example, in the case of an unexplained wealth order, hardship order or exclusion order). The reversal of the onus to the respondent or other party in proving the same limits the right to a fair hearing. The Regulation expands the circumstances in which a respondent, and associated parties, are subject to this reversed onus by prescribing additional serious criminal offences under the Act.

Right not to be tried or punished more than once

Section 34 upholds the rule against double jeopardy – that is, a person should not be tried or punished more than once for an offence of which they have already been convicted or acquitted. This right provides fairness for people accused of crimes and is an important aspect of the rule of law.

By prescribing certain offences as ‘serious criminal offences’ and ‘confiscation offences’, the Regulation enables the court to make forfeiture orders in respect of a person who is convicted of one of those offences. If forfeiture orders are punitive in nature, it may be argued that the Regulation limits the right of people not to be punished more than once for an offence in relation to which they have been convicted. However, I consider that the Regulation does not limit the right not to be punished more than once as the purpose of forfeiture orders for confiscation offences is not to punish offenders pursuant to section 9 of the Act. In line with the objects of the Act, the purpose of forfeiture orders is to undermine the profitability of criminal enterprises, deprive persons of illegally acquired property, and prevent reinvestment of the proceeds in further criminal activity. The characterisation of forfeiture orders as non-punitive is supported by a Supreme Court case from the Australian Capital Territory, which considered an equivalent right protected by the *Human Rights Act 2004* (ACT).¹ Nonetheless, if the Regulation is seen to limit section 34, I consider that this limitation is justified under section 13 of the HR Act in accordance with the analysis below.

(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 Regulation supports the objects of the Act to disrupt, deter and reduce crime by undermining the profitability of criminal enterprises, depriving persons of the benefits derived from crime, and preventing reinvestment of the proceeds in further criminal activity. Depriving persons of illegally acquired property, deterring offenders by increasing the financial risk associated with offending and removing funding for further criminal activity is a proper purpose consistent with a free and democratic society.

The purpose of prescribing equivalent interstate provisions in the Regulation is to ensure equivalent confiscations orders in other jurisdictions can be recognised and enforced in Queensland when relevant property is located in Queensland. This ensures mutual recognition and cooperation between jurisdictions can work effectively and achieve its purpose.

¹ *DPP (ACT) v Nikro* [2017] ACTSC 15 [59].

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

The prescription of offences in the Regulation as serious criminal offences and confiscation offences helps achieve the policy objective of facilitating the forfeiture of property acquired through illegal activity, to deny profiteering from illegal activity and the reinvestment of such financial gain into further illegal activity. These offences have been identified as relevant offences for which it is appropriate to confiscate proceeds of crime including, in the case of serious criminal offences, where no charge or conviction is required.

Offences such as tainted property offences (section 252 of the Act and section 10A of the *Drugs Misuse Act 1986*), are prescribed as serious criminal offences, to allow the State to recover illegal property, including large sums of cash. The other prescribed serious criminal offences are prostitution offences (sections 229H, 229I and 229K of the Criminal Code) and an offence when a prohibited brothel is used as a brothel (section 70 of the *Prostitution Act 1999*).

All prescribed offences do not meet the threshold under the Act (section 17(1) of the Act) of having a maximum penalty of at least five years imprisonment and have been prescribed under the Regulation as serious criminal offences to achieve the purpose of removing financial gain and increasing financial loss associated with illegal activity.

The prescribed confiscation offences under the Regulations are an offence against section 73 (Public soliciting for purposes of prostitution) of the *Prostitution Act 1999* and an offence against the *Racing Act 2002*, for example offences disclosing confidential information or copying background document, forge or utter Act documents, or interfering with licence holder or official a control body, or an offence against the repealed *Racing and Betting Act 1980*. If a person is convicted of one of these prescribed confiscation offences, any property or benefits derived from and anything used for, or in the commission of, the offence, can be recovered through confiscation proceedings.

The prescription of offences under the Regulation increases the financial risk associated with committing offences and acts to deter criminal offending and disrupt and combat serious and organised crime, consistent with the main object of the Act, and ensures consistency with other jurisdictions.

The prescription of equivalent interstate provisions under the Regulation facilitates mutual recognition and cooperation across Australian jurisdictions. This ensures that property cannot escape confiscation merely because it is located outside of the jurisdiction in which the person has engaged in illegal activity. It also removes the risk for forum shopping to avoid confiscation of illegally obtained property. While provisions in each jurisdiction are not uniform and use different terminology, the equivalent interstate orders prescribed are broadly similar in nature and achieve the purposes of the Act to remove financial gain and increase financial loss associated with criminal activity.

Under the Regulation, equivalent interstate orders are prescribed as interstate forfeiture orders (where property is forfeited to the State), interstate pecuniary penalty orders (where a person is liable to pay a debt to the State) or interstate restraining orders (where a person is prevented from dealing with property except as provided by the court). Once properly filed, equivalent interstate orders are enforceable subject to the restrictions under Chapter 7 of the Act.

The reversal of the onus only occurs once the State has satisfied the Supreme Court that the person has been involved in some criminal activity of a specified kind within the previous six years. To remove the property from the operation of the scheme the person must show it was lawfully obtained. The owner is considered best tasked with establishing this information. In that context it is not unfair to place the onus of proving property has been lawfully acquired on the person who has the best or exclusive knowledge of the source of the property.

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

An alternative way to achieve the purpose of the Regulation would be to prescribe a more limited set of offences as ‘serious criminal offences’ and ‘confiscation offences’ and to prescribe a more limited set of interstate provisions as interstate orders. While this would limit the circumstances in which people are subject to confiscation orders, it would not be as effective in achieving the Regulation’s purpose to prevent the financial gain and increase the financial loss associated of those engaged in illegal activity, so would not be reasonably available as an alternative approach.

To not prescribe the full suite of serious criminal offences, confiscation offences and equivalent interstate orders would create gaps that could be exploited by people engaged in criminal activity to escape confiscation of proceeds of crime. Therefore, it is appropriate to prescribe serious criminal offences and confiscation offences to achieve the objects of the Act and to also prescribe the current suite of equivalent interstate orders to facilitate mutual recognition and cooperation across Australian jurisdictions.

The Act contains a range of appropriate safeguards designed to protect the individual rights of persons who may be subject to the scheme which ensures the restrictions on the rights identified above are considered to be the less restrictive and reasonably available way to achieve the aims of preventing financial gain and increasing the financial loss associated with illegal activity and deterring involvement in illegal activity for the prescribed offences.

When an application for restraint or forfeiture is made under the Act, the State must give reasonable notice to the respondent and any person who may have an interest in the property or may be affected by any order under the Act; the court may also direct the State to give notice to a stated person or class of persons. Any person given notice may appear at the hearing of the application.

Following the making of an order, except for forfeiture following conviction, notice must also be given to anyone who may be affected by the order.

Further, providing a person with the ability to seek exclusion of property or a hardship order is an entirely protective provision that grants innocent parties a right to seek retention of property. Hearings under the Act are conducted by the Supreme Court, under its civil jurisdiction. The Supreme Court is an independent and impartial body vested with discretion to determine whether an order should be made in the circumstances of a particular case. The threshold for making a confiscation order under the Act, without conviction, is a finding that it is more probable than not that the respondent engaged in a serious crime related activity or that the relevant property is derived from serious crime.

The Act also explicitly permits the court to refuse to make a confiscation order if it is not in the public interest to do so. Of particular note, in *State of Queensland v Deadman*², the Queensland Court of Appeal (QCA) upheld the decision to dismiss an application for a serious drug offender confiscation order (under Chapter 2A of the Act) on public interest grounds.

The QCA held that the primary judge ‘was entitled to take into account matters personal to the respondent as well as the objects, scope and purpose of the Act, in determining that making the order was not in the public interest’ and, noted remarks of the primary judge that ‘it must be accepted that the legislature contemplated there would arise factual circumstances where, notwithstanding the offender was liable to have their property confiscated, and that that confiscation would be of financial benefit to the State, it would not be in the public interest to make a confiscation order’.

The Regulation facilitates the mutual recognition of equivalent interstate orders. Chapter 7 of the Act provides for oversight of the filing of interstate orders by the Supreme Court, which will not be recognised and enforced in Queensland without being properly filed and expressly applying to stated property in Queensland.

These safeguards collectively ensure that there is active consideration of the particular circumstances of each case and each individual, and that families, children and third parties who may otherwise be affected by the confiscation regime are protected.

(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 limitations on the rights to property, privacy, the protection of families and children and fair hearing through the confiscation of property, whether or not a person has been convicted of an offence, is outweighed by the importance of deterring criminal activity and removing the financial gain and increasing the financial loss associated with illegal activity.

The limitation on these rights is justified as people who commit crimes should not be entitled to enjoy the benefits of their criminal activity. The safeguards under the Act (listed above) provide innocent parties and those affected by confiscation proceedings to seek the protection of their individual rights from the court.

Importantly, the matters prescribed in the Regulation are set out sufficiently clearly and, having regard to the matters noted above, operate in a way that is proportionate, so that any deprivation of property occurs in accordance with the law and is not arbitrary. I consider the benefit of the provision in achieving the objective of confiscating ill-gotten property outweighs any limitation on the right to property, privacy, the protection of families and children or fair hearing.

Additionally, the confiscation of property obtained through illegal means potentially supports the protection of families and children by ensuring protection for all Queensland families from the effects of criminal activity, including drug trafficking, by increasing the financial loss associated with illegal activity and removing the ability to fund further criminal enterprise.

² *State of Queensland v Deadman; Thompson v State of Queensland* [2016] QCA 218

(f) any other relevant factors

Not applicable.

Conclusion

In my opinion, the *Criminal Proceeds Confiscation Regulation 2023* is compatible with human rights under the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the *Human Rights Act 2019*.

YVETTE D'ATH MP

Attorney-General and Minister for Justice
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Family Violence

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