

# **Proclamation – *Information Privacy and Other Legislation Amendment Act 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*, I, Yvette D’Ath MP, 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 Proclamation – *Information Privacy and Other Legislation Amendment Act 2023* (IPOLA Act 2023) made under section 2 of the IPOLA Act 2023.

In my opinion, the Proclamation, 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**

Section 2 of the IPOLA Act 2023 requires certain provisions to commence on a day to be fixed by proclamation.

This Proclamation fixes 1 March 2024 as the date of commencement of certain sections that amend the *Right to Information Act 2009* (RTI Act) to:

- ensure that the public interest immunity in proceedings and processes is not altered by the publication of information by Cabinet, or decisions by Cabinet to officially publish Cabinet information.
- provide protection from civil liability for Ministers disclosing information under a publication scheme or other administrative scheme in good faith; and
- provide clarity for applicants and decision makers under the RTI Act concerning the exempt status of information in Cabinet submissions and Cabinet decisions, and other Cabinet related documents, in view of the official publishing of information by decision of Cabinet under the proactive release scheme.

## **Human Rights Issues**

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

The IPOLA Act 2023 engages and limits human rights. The Statement of Compatibility that accompanied the *Information Privacy and Other Legislation Amendment Bill 2023* detailed how the provisions are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom under section 13 of the *Human Rights Act 2019* (HR Act).

In my opinion, the human rights under the HR Act that are relevant to the Proclamation, and outlined in the previous Statement of Compatibility, are:

- freedom of expression (section 21 of the HR Act); and
- fair hearing (section 31 of the HR Act).

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

#### ***Amendments to the RTI Act concerning public interest immunity***

The Proclamation of section 87 of the IPOLA Act 2023 inserts a new section 18A into the *Right to Information Act 2009*. New section 18A provides that the publication by Cabinet of any information or a decision to officially publish Cabinet information on a regular basis must be disregarded when a decision is being made in a proceeding or process about whether a common law or statutory rule prevents the production or disclosure of information in connection with Cabinet because the production or disclosure would be contrary to the public interest.

The amendment arises from observations on the operation of New Zealand's proactive release scheme, where the existence of a proactive release scheme has led courts to place less weight on Cabinet confidentiality in considering public interest immunity. The amendment requires courts, tribunals or other bodies conducting extra-curial, inquisitorial or investigative proceedings or processes to ignore the existence of the proactive release scheme when considering such applications.

The amendment does not seek to create a restriction. Rather, it seeks to maintain the status quo in terms of how the public interest immunity operated prior to the introduction of the proactive release scheme.

The amendment does not materially affect the operation of the courts, nor does it impinge on the independence of the judicial process.

The amendments to the RTI Act limit freedom of expression (section 21 of the HR Act) and the right to a fair hearing (section 31 of the HR Act).

#### a) the nature of the right

The right to freedom of expression includes the right to seek and receive information, which includes a right of access to information held by government, and an obligation on government to disclose such information.

The right to fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It provides a right for parties to be heard and to respond to allegations made against them.

The amendments limit the right to a fair hearing and the right to freedom of expression by limiting what can be taken into account when assessing whether production or disclosure would be contrary to the public interest. This may in turn increase the possibility that disclosure in a proceeding or process may be considered contrary to the public interest. This would operate to limit the disclosure of information in the context of proceedings and processes, and result in such information being withheld on the ground that the public interest in its disclosure is

outweighed by a competing public interest in its suppression. This information may also be material in a party responding to allegations made against them.

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 purpose of the limitation is to ensure that the publication of Cabinet information does not lead to courts, tribunals and other entities placing less weight on the considerations underpinning the convention of Cabinet confidentiality when assessing a claim for public interest immunity in processes or proceedings. It is intended to clarify that the publication of information by Cabinet does not derogate from the public interest privilege that previously attached to Cabinet documents.

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

The limitation will assist in achieving the purpose of the Bill, by expressly disregarding information officially published by Cabinet where claims of public interest immunity arise.

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

There are no less restrictive means of achieving the purpose.

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

On balance, the measure strikes a fair balance between the benefits arising from preserving public interest immunity of information, and the possible limitation of rights of individuals in limited circumstances. That is, the limit imposed on these rights is outweighed by the importance of preserving public interest immunity.

f) any other relevant factors

Not applicable.

***Amendments to the RTI Act concerning exempt Cabinet information***

The Proclamation of section 136 of the IPOLA Act 2023 amends Schedule 3, section 2 to insert new subsection (3A) into the RTI Act which provides that Cabinet briefing notes, Cabinet agendas, notes of discussion in Cabinet, Cabinet minutes, and drafts of these things as well as drafts of Cabinet submissions and Cabinet decisions continue to be taken to be comprised exclusively of exempt information despite any publication of a Cabinet submission or Cabinet decision.

An agency or Minister may refuse access to all or part of a document pursuant to an RTI access application to the extent the document comprises exempt information. The amendments to the RTI Act limit freedom of expression (section 21 of the RTI Act).

(a) the nature of the right

The right to freedom of expression includes the right to seek and receive information, this includes a right to access information held by government, and an obligation on government to disclose such information. The amendments limit the right to freedom of expression by removing any doubt that despite any publication of a Cabinet submission or Cabinet decision, associated Cabinet briefing notes, Cabinet agendas, notes of discussion in Cabinet, Cabinet minutes, and drafts of these things as well as drafts of Cabinet submissions and Cabinet decisions are exempt information under the RTI Act to which an agency or Minister may refuse access following an access application.

The amendment ensures that the status quo is maintained whereby specified types of documents are taken to be comprised exclusively of exempt information, and this is not affected by any publication of a Cabinet submission or Cabinet decision.

Proactive release of Cabinet documents is a significant step towards increased transparency in government decision-making.

(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 purpose of these amendments is to maintain the confidentiality of Cabinet deliberations thereby supporting the principle of collective responsibility of Cabinet as a cornerstone of an effective and efficient Cabinet system.

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

To the extent that information has been officially published by decision of Cabinet, including under the proactive release scheme, it will be available under the RTI Act, but other information in the same document (including information redacted under the proactive release scheme) will not be available. The amendments provide that the entirety of any Cabinet briefing notes, Cabinet agendas, notes of discussion in Cabinet, Cabinet minutes, and drafts of these things as well as drafts of Cabinet submissions and Cabinet decisions will be exempt information despite any information being officially published by decision of Cabinet. Continuing the exempt status of the entirety of these documents under the RTI Act will help to ensure confidentiality of deliberations of Cabinet.

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

There are no less restrictive means of achieving the purpose of maintaining Cabinet confidentiality.

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

On balance, the fundamental importance of maintaining the confidentiality of Cabinet deliberations and supporting the principle of collective responsibility of Cabinet means the minor limitation on the right to freedom of expression is justified. The amendments will also

support efficiencies for decision-makers under the RTI Act. The documents referred to that will continue to be exempt in their entirety will remove any need for decision-makers to consider whether information within them should be released.

(f) any other relevant factors

Not applicable.

***Technical amendments to the RTI Act***

Amendments to commence Part 5, heading (Amendment of *Right to Information Act 2009*); and section 78 (which provides for part 5 to amend the *Right to Information Act 2009*) are required for sections 87, 89 and 136 to operate. These provisions are of a machinery nature only.

**Conclusion**

I consider that the Proclamation is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

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ATTORNEY-GENERAL AND MINISTER FOR JUSTICE  
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