

# ***Justice Legislation Amendment Regulation 2024***

## **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, the Honourable 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 *Justice Legislation Amendment Regulation 2024* (the Amendment Regulation).

In my opinion, the Amendment 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 purpose of the Amendment Regulation is to reflect the commencement of the National Anti-Corruption Commission (NACC) on 1 July 2023 in certain Queensland regulations.

Relevantly, the *National Anti-Corruption Commission Act 2022* (Cwlth) (the NACC Act) established the NACC from 1 July 2023. The Australian Commission for Law Enforcement Integrity (ACLEI) was also subsumed into the NACC when the NACC Act commenced, with the *National Anti-Corruption Commission (Consequential and Transitional Provisions) Act 2022* (Cwlth) repealing the *Law Enforcement Integrity Commissioner Act 2006* (Cwlth) (the LEIC Act).

#### *Crime and Corruption Regulation 2015* (CC Regulation)

The *Crime and Corruption Act 2001* (CC Act) establishes the Crime and Corruption Commission (CCC) as an independent statutory body to combat and reduce the incidence of major crime, and continuously improve the integrity of, and to reduce the incidence of corruption in, the public sector.

The CC Regulation prescribes a number of relevant entities as 'declared agencies' for the purpose of:

- section 130 (Disclosure of information obtained using surveillance warrant); and
- Chapter 3, Part 6A (Controlled operations and controlled activities for corruption offences).

Section 130 of the CC Act restricts the disclosure of information obtained using a surveillance warrant where this information has not been disclosed in open court except to certain entities as provided for under the section. A 'declared agency' is referred to at section 130(2)(g) as an entity to whom the CCC may provide such information.

Prescription as a declared agency is also relevant for the purposes of the definition of ‘commission officer’ as it applies under Chapter 3, Part 6A of the CC Act. Chapter 3, Part 6A deals with controlled operations and controlled activities for corruption offences, including who may engage in controlled operations as a covert operative. A covert operative is defined in Schedule 2 to the CC Act as ‘a commission officer or another person named in an approval under s 144 of Chapter 3, Part 6A as a covert operative’. A commission officer is then defined to include, for the purposes of Chapter 3, Part 6A, ‘an officer or employee of a ‘declared agency’’.

Following the commencement of the NACC, the Amendment Regulation includes the NACC as a ‘declared agency’ under the CC Regulation noting that a number of state and territory integrity bodies as well as relevant crime bodies are currently prescribed as declared agencies.

#### Criminal Code (External Agencies) Regulation 2016 (CCEA Regulation)

Section 86 of the *Criminal Code Act 1899* (Criminal Code) makes it an offence to obtain, or disclose, secret information in the possession of a law enforcement agency or officer about the identity of a criminal organisation informant.

For the offence to apply the secret information must relate to a criminal organisation informant, which is defined to include a person who has given to the police service or an *external agency*, criminal intelligence about a criminal organisation or participant.

Section 86(3) of the Criminal Code defines external agency to include the CCC, the Australian Federal Police, a police force or service of another State, the chief executive (corrective services), and another entity declared by regulation to be an ‘external agency’. The Amendment Regulation amends the CCEA Regulation to replace the current prescription of the ACLEI under the LEIC Act as an external agency with the NACC established under the NACC Act.

#### Witness Protection Regulation 2021 (WP Regulation)

The *Witness Protection Act 2000* (WP Act) establishes the statutory regime for the protection of witnesses who assist law enforcement agencies and courts. The witness protection program in Queensland is administered by the CCC.

The WP Act also provides a statutory basis for recognition of witness protection arrangements in place in other Australian jurisdictions under a national coordinated witness protection scheme of complementary witness protection laws. Relevant provisions under the WP Act includes provisions to:

- allow *law enforcement agencies* from other jurisdictions to make applications for a person to be included in the witness protection program
- allow the CCC to provide information about a protected person to an *approved authority* following a notification that the person is being investigated or has been arrested or charged with a serious offence
- extends the power to provide short-term protection under the WP Act to persons who assist, or have a relationship with somebody who assists, a *law enforcement agency*.

Schedule 2 of the WP Act defines the terms ‘approved authority’ (for the purposes of section 43 (only) of the WP Act) and ‘law enforcement agency’ to include entities prescribed by regulation. The Amendment Regulation updates the current prescription of the Integrity Commissioner under the LEIC Act as both an approved authority and law enforcement agency under the WP Regulation to refer to the NACC under the NACC Act.

## **Human Rights Issues**

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

The human rights relevant to the Amendment Regulation are:

- Right to life (section 16 of the HR Act);
- Right to privacy and reputation (section 25 of the HR Act);
- Right to liberty and security of person (section 29 of the HR Act);
- Right to a fair hearing (section 31 of the HR Act); and
- Rights in criminal proceedings (section 32 of the HR Act).

### **Consideration of human rights promoted**

#### *Right to life (section 16 of the Human Rights Act)*

The *right to life* under section 16 of the HR Act imposes substantive and procedural obligations on the State to take appropriate steps and adopt positive measures to protect life. The protective obligation extends to requiring authorities to put in place measures that would protect an individual from real and immediate risks to their life.

#### *Right to liberty and security of person (section 29 of the HR Act)*

The right to liberty and security of person under section 29 of the HR Act protects persons against any unlawful or arbitrary deprivation of liberty. The right to security applies independently of the right to liberty and applies whether or not the individual is detained. It means that all reasonable steps must be taken to ensure the physical safety of those who are in danger of physical harm.

The witness protection program established under the WP Act directly promotes the rights to life and security by providing security and protection to persons who have provided assistance to law enforcement from retribution. The Amendment Regulation supports the operation of the Queensland’s witness protection program under the national scheme through the recognition of the NACC.

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

#### *Amendment to the Crime and Corruption Regulation*

The amendments to the CC Regulation interfere with the right to privacy as they would allow the CCC to share information about individuals obtained pursuant to a surveillance device with

the NACC and allow NACC officers to engage in controlled operations, where such operations would be likely to interfere with aspects of an individual's private life.

The amendments to the CC Regulation relating to the provisions for controlled operations also limit the right to a fair hearing and rights in criminal proceedings as evidence gathering through a controlled operation may limit a person's ability to defend future proceedings, thus limiting the right to a fair trial and, subject to the nature of the proceedings, rights in criminal proceedings.

(a) the nature of the right

The *right to privacy and reputation* under section 25 of the HR Act protects the individual from unlawful<sup>1</sup> and arbitrary interferences<sup>2</sup> upon their privacy, family, home, correspondence and unlawful attacks on their reputation. The scope of the right is broad. The underlying value of the right to privacy is the importance of protection of a person's freedom from the unjustified involvement of public authorities in their private sphere.<sup>3</sup>

The *right to a fair hearing* under section 31 of the HR Act ensures 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 or tribunal after a fair and public hearing'.

*Rights in criminal proceedings* under section 32 of the HR Act include the requirement that a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law and to not be compelled to testify against themselves or confess guilt.

There is significant overlap between the right to a fair hearing and rights in criminal proceedings to the extent that many of the minimum guarantees that must be afforded to persons in criminal proceedings, would also be required in the context of the right to a fair hearing.

(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

Corrupt conduct is by its nature an 'extraordinary crime' that is 'almost impossible to detect or expose using ordinary investigative powers'.<sup>4</sup> The ability to share surveillance device information with the NACC and facilitate the involvement of NACC officers in covert operations is designed to ensure the effective investigation of corruption.

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<sup>1</sup> Internal limitations of lawfulness and arbitrariness apply to the right to privacy. The concept of lawfulness means that were an interference with privacy is provided for by law, it will not be unlawful: Human Rights Committee, *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17 of the International Covenant on Civil and Political Rights)*, UNHRC, 32<sup>nd</sup> sess (8 April 1988) [4].

<sup>2</sup> 'Arbitrary' means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought: *Thompson v Minogue* (2021) 294 A Crim R 216, 231 [55], 269 [221]; *Attorney-General (Qld) v Grant* [No 2] [2022] QSC 252, [111]. Non-arbitrariness and proportionality are different standards, but if the impact is proportionate under section 13 of the HR Act, it will not be arbitrary: *Thompson v Minogue* (2021) 294 A Crim R 216, 232 [56], [58], 269 [221], 270 [226]. Accordingly, it is convenient to consider whether the interference with privacy is arbitrary when considering proportionality.

<sup>3</sup> *Director of Housing v Sudi* [2010] VCAT 328, [29].

<sup>4</sup> *Inquiry into an Independent Integrity Commission*, Select Committee on an Independent Integrity Commission, ACT, October 2017.

There is a high public interest in ensuring corruption is uncovered so that public officials are held to account for their actions where there is a breach of the trust the public has placed in them, and confidence in public institutions can be maintained or restored. The danger in corruption being left unchecked is significant. Indeed, it can have a ‘destructive effect on State institutions and on the capacity of States to respect, protect and fulfill human rights’ and ‘undermines the functioning and legitimacy of institutions and processes, the rule of law and ultimately the state itself’.<sup>5</sup> Ensuring the effective investigation of corruption is therefore 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

The limitations on the identified rights brought about by the amendments to the CC Regulation are designed to achieve the purpose of ensuring the effective investigation of corruption. The difficulties faced by investigators in uncovering corruption are well documented. The use of surveillance devices and controlled operations may be the only viable means to uncover evidence of corrupt conduct given offences of this nature are usually conducted in secret.

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

There are no other less restrictive and reasonably available ways to achieve the purpose of ensuring the effective investigation of corruption.

Not prescribing the NACC as a declared agency would create inconsistencies and gaps regarding the agencies with which the CCC can share information or engage in controlled operations with the result that corruption investigations may not be as effective or be compromised entirely. The ability to obtain a surveillance device and conduct controlled operations are subject to significant oversight and safeguards under the CC Act and the *Police Powers and Responsibilities Act 2000* to ensure that these special powers are only utilised in appropriate cases of sufficient seriousness.

(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 one side of the scales, the right to privacy, fair hearing and rights in criminal proceedings are important, however, the impact on these rights is limited by the safeguards applying to surveillance devices and controlled operations under the CC Act. On the other side of the scales, the public interest in ensuring that corruption is effectively investigated and uncovered is significant in order to prevent individual harm and to maintain trust and confidence in our public institutions.

As the interference with privacy is proportionate and not arbitrary it is not limited by the proposed amendments. The limitations on the right to a fair hearing and rights in criminal proceedings are proportionate, and therefore justified.

(f) any other relevant factors

Nil.

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<sup>5</sup> *Corruption and human rights, OHCHR and good governance: [Corruption and human rights](#) | OHCHR.*

### ***Amendment to the Criminal Code (External Agencies) Regulation 2016***

The amendment to the CCEA Regulation enables a person to be prosecuted where they have obtained, attempted to obtain or disclosed secret information about the identity of a criminal organisation informant in circumstances where the informant has provided criminal intelligence to the NACC. To the extent that such a prosecution may result in a person's imprisonment, the amendment limits the right to liberty.

#### (a) the nature of the right

The *right to liberty* (section 29(1) of the HR Act) is about 'protect[ing] people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense'.<sup>6</sup> The right is relevant whenever a person is placed at risk of imprisonment.

#### (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 offences contained in section 86 of the Criminal Code criminalise conduct which may result in the life or physical safety of a criminal organisation informant being placed in jeopardy. Clearly denouncing this conduct as criminal and subjecting it to a significant maximum penalty serves to ensure that persons who disclose secret information about a criminal organisation informant can be held to account for their actions and appropriately punished. This sends a clear message to the community and would-be offenders about the serious consequences that may attach to this kind of behaviour. Prescribing the NACC as an external agency under the CC Regulation will ensure that persons cannot avoid liability and punishment simply because the informant provided criminal intelligence to the NACC rather than another integrity agency. This is a proper purpose 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

The limit on the right to liberty which arises because imprisonment is an available penalty for the offence is directly linked to the purpose of ensuring that conduct that risks the life and safety of a criminal organisation informant (including where the informant has provided criminal intelligence to the NACC) can be dealt with as a criminal offence with significant consequences.

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

There are no other less restrictive and reasonably available ways to achieve the purpose of denouncing this kind of conduct other than via the imposition of a criminal offence. Not prescribing the NACC as an external agency would risk a gap in the operation of the offence.

#### (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

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<sup>6</sup> *Re Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 140 [665]; *DPP v Kaba* (2014) 44 VR 526, 558 [110].

Ensuring that the offence can operate in circumstances where an informant has provided criminal intelligence to the NACC, strikes a fair balance between the limit on the right to liberty arising from the risk of imprisonment upon conviction for the offence and the purpose of the limitation in ensuring that a person can be prosecuted under the offence and cannot escape liability in these circumstances.

(f) any other relevant factors

Nil.

***Amendments to the Witness Protection Regulation 2021***

The amendments to the WP Regulation interfere with the right to privacy as they will allow the personal information about a participant or prospective participant in the witness protection program to be disclosed by or to the NACC.

(a) the nature of the right

The *right to privacy and reputation* under section 25 of the HR Act protects the individual from unlawful and arbitrary interferences<sup>7</sup> and upon their privacy, family, home, correspondence and from unlawful attacks on their reputation. The right to privacy protects privacy in the sense of personal information, data collection and correspondence as well to an individual private life more generally in terms of protecting the individual against interference with matters such as their legal personality, family and home and individual identity.

(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 interfering with the right to privacy is to allow for the appropriate recognition of the NACC under the WP Act in order to facilitate the effective operation of the coordinated national witness protection scheme. Effective witness protection arrangements are essential to ensuring that ability of witnesses to testify in court or cooperate with law enforcement investigations, without fear of intimidation or retaliation, which is critical to the success of the criminal justice system, particularly to its ability to combat serious crime. This is therefore a proper purpose 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

The interferences with the right to privacy raised by the amendments to the WP Regulation are designed to achieve the effective operation of coordinated national witness protection arrangements. The recognition of the NACC under the WP Act directly facilitates the NACC's involvement in the coordinated national scheme, including its ability to apply for witnesses to be included in Queensland's witness protection program.

As an approved authority the NACC will also be able to receive personal information about a protected witness where it notifies the CCC that the person is under investigation or has been arrested or charged with a serious offence. This ensures that persons cannot benefit from their

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<sup>7</sup> Comments at footnotes 1 and 2 above apply equally here.

status as a protected witness to frustrate the investigation of serious crimes they commit. To allow otherwise would significantly undermine the legitimacy of the national witness protection scheme and, in turn, its effectiveness.

(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 ensuring the recognition of the NACC under the WP Act. Not recognising the NACC would limit its ability to fully participate in the national witness protection scheme with respect to the Queensland's witness protection program and arrangements.

(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 one side of the scales, the right of individuals not to have their privacy interfered with is important. In most instances under the WP Act any interference with an individual's right to privacy would promote and protect other rights belonging to them, such as the right to life and the right to security of the person. Where the disclosure is related to assisting an investigation into serious crimes committed by the person, then the right to privacy is outweighed by the need to facilitate criminal investigations into suspected wrongdoing by a protected witness in order to maintain the legitimacy and effectiveness of witness protection arrangements.

As the interferences with the right to privacy provided for by law and are proportionate and not arbitrary, the right to privacy is not limited by the proposed amendments to the WP Regulation.

(f) any other relevant factors

Nil.

## Conclusion

I consider that the Amendment Regulation 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.

**YVETTE D'ATH MP**  
Attorney-General and Minister for Justice  
Minister for the Prevention of Domestic and Family Violence

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