

# Domestic and Family Violence Protection Amendment Rule 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*, 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 *Domestic and Family Violence Protection Amendment Rule 2024* (Amendment Rule) made under the *Magistrates Courts Act 1921*.

In my opinion, the Amendment Rule 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

Sections 36A (Court must be given respondent's criminal history and domestic violence history) and section 90A (Court must be given respondent's criminal history and domestic violence history) of the *Domestic and Family Violence Protection Act 2012* (DFVP Act) require the Commissioner of Police (the Commissioner) to ensure copies of the respondent's domestic violence and criminal history (the histories) are either:

- filed in the court:
  - with an application for a protection order (including a police protection notice) or application for a variation of a domestic violence order; or
  - before the date and time stated in the application for the first hearing of the application; or
- given to the court when the application is first heard.

In addition to these requirements, Rule 19B of the *Domestic and Family Violence Protection Rules 2014* (DFVP Rules) requires the Commissioner to give the respondent a copy of their histories before the date and time for the first hearing of the application, unless it is not reasonable in the circumstances.

The Amendment Rule amends rule 19B of the DFVP Rules to provide flexibility as to when and how the respondent is provided with a copy of the histories.

This is achieved by amending rule 19B to outline that the obligation on the Commissioner to give the respondent a copy of their history before the first hearing of the application does not apply if:

- the Commissioner believes the respondent has obtained a copy of their history from another person (such as the person's legal representative); or
- giving the respondent a copy of their history is not reasonably practicable in the circumstances, including where the Commissioner cannot locate the respondent after making all reasonable inquiries.

## Human Rights Issues

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

The Amendment Rule may potentially limit the right to a fair hearing (section 31, *Human Rights Act 2019* (HR Act)), where the respondent is not afforded sufficient time or opportunity to review and respond to material which is being considered by the court.

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

(a) the nature of the right

Section 31 of the HR Act provides that a person who is a party to a civil proceeding has the right to have the proceeding decided by a competent, independent, and impartial court or tribunal after a fair and public hearing.

The right to fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal. The concept of a fair hearing is concerned with procedural fairness and applies to both criminal and civil proceedings. The underlying value of the right is said to be in relation to defining the relationship between the individual and the State and protecting people against aggressive behaviour of those in authority, both of which reflect the philosophy that the State must prove its case without recourse to the suspect.

Case law suggests that one of the essential requirements for a fair hearing is the principle of 'equality of arms,' meaning that each party must be given a reasonable opportunity to present its case. This will ordinarily involve being informed of the case to be advanced by the opposing party and having an opportunity to respond.

The Amendment Rule will limit the right to fair hearing of a respondent if the respondent has not been given a copy of their histories prior to the first hearing of the application because the Commissioner has not been able to locate the respondent after making all reasonable inquiries. This may limit the ability of the respondent to be informed and participate effectively in the proceeding, as they will not have had the opportunity to consider the history prior to the first 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

The purpose of the limitation is to enable the timely progression of domestic and family violence matters where police have been unable to locate the respondent to give a copy of the histories prior to the first court hearing/mention by explicitly removing the obligation on the Commissioner to give the respondent the histories in these circumstances.

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

Where police are unable to locate the respondent prior to the first hearing, the matter will ordinarily be adjourned. This includes where the respondent has appeared in court and is reasonably aware of the contents of their histories or has been provided a copy of their histories from another source, for example their legal representative. This delays the finalisation of

protection order proceedings which generates ongoing safety concerns for victim-survivors and can lead to the respondent failing to attend court for the adjourned hearing.

The Amendment Rule will explicitly remove the obligation for the Commissioner to provide the histories to the respondent prior to the first hearing of the application if the respondent cannot be located despite reasonable inquiries or where the Commissioner believes the respondent has received the history from another person, such as their legal representative.

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

There is no less restrictive, but equally effective, way to achieve the purpose. To safeguard against significant procedural unfairness where the respondent has not been afforded sufficient time to consider the materials and provide an informed response, the court has discretion to adjourn the matter. If appropriate, the court may also decide an application without taking into account all, or part of, the histories if deemed not relevant.<sup>1</sup>

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

Whilst the amendment will limit the right to fair hearing where the respondent is not adequately informed of the documents presented in court, relevant safeguards are in place to allow the court to adjourn the matter where appropriate to allow the respondent to consider the information in their history. Where the respondent is properly informed and has appeared in court, despite police being unable to locate and give the histories in advance, then the court may choose to proceed. This promotes the protection of victim-survivors and mitigates the risks associated with an adjournment and prolonging the finalisation of a protection order for the aggrieved and reduces the likelihood of frustration and failure to appear by the respondent.

For these reasons, the impact on a respondent's ability to be informed and effectively participate in the proceedings are considered to be justified. As such, the amendments are considered to be compatible with human rights.

(f) any other relevant factors

Nil.

## Conclusion

I consider that the Amendment Rule is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that it 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  
and Minister for the Prevention of Domestic and Family Violence

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<sup>1</sup> DFVP Act, s160A(4).