

Oaths 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 *Oaths Amendment Regulation 2024* (Amendment Regulation) made under the *Oaths Act 1867* (Oaths Act).

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

Affidavits and statutory declarations - current

An affidavit is a written statement made by a person who swears an oath or makes an affirmation, before an authorised witness, that the contents of the statement are truthful. Taking an affidavit is also called 'witnessing' or 'administering' an affidavit. A declaration is a similar statutory instrument in which a person makes a solemn promise, called a declaration, before an authorised witness, that the contents of the statement are truthful.

Under the Oaths Act, affidavits and statutory declarations can be:

- signed on paper and witnessed in person if witnessed by an eligible witness (such as a Justice of the Peace (JP), Commissioner for Declaration (CDec), notary public, lawyer etc) or another prescribed person;
- made in electronic form, signed electronically, and witnessed over audio visual (AV) link if witnessed by a narrower class of eligible witness called a ‘special witness’ or another prescribed person.

The Oaths Act also requires particular statements and information to be included in the document to help verify its authenticity.

The *Oaths Regulation 2022* (Oaths Regulation) prescribes ‘senior police officers’ (a police officer of at least the rank of sergeant or above, a watch house manager or an officer-in-charge of a police station, police establishment of watch house) as eligible witnesses for three particular types of affidavits made by other police officers:

- bail affidavits – affidavits for a bail proceeding under the *Bail Act 1980* or the *Youth Justice Act 1992*;
- affidavits of service – affidavits confirming personal service of a document; and

- urgent applications for prescribed authorities under section 801(4)(a) of the *Police Powers and Responsibilities Act 2000* (PPRA).

This means that senior police officers can witness the abovementioned affidavits made by other police officers, regardless of whether witnessed in person or over AV link and regardless of whether they are signed electronically or on paper. The Oaths Regulation also states that witnessing of bail affidavits must occur in person unless it is not reasonably practicable to do so and that the senior police officer must state their rank on the document.

Police officers are not permitted to witness affidavits or statutory declarations made by members of the community and are not permitted to witness any statutory declarations made by other police officers.

The current framework for the making of affidavits and declarations was substantively introduced by the Justice Legislation (COVID-19 Emergency Response—Permanency) Amendment Bill 2021 (the Permanency Bill) (which was enacted as the *Justice and Other Legislation Amendment Act 2021*) and the Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021 (the PLEE Bill). The reforms in the Permanency Bill modernised the way that affidavits and declarations can be made to allow them to be signed electronically and made over AV link in certain circumstances. The PLEE Bill expanded upon those reforms and provided for police witnessing particular affidavits in the specific circumstances set out above.

The Amendment Regulation

The Amendment Regulation will increase efficiencies for the Queensland Police Service (QPS), by streamlining the process for witnessing affidavits and declarations made by police officers in the course of duty.

The QPS faces increasing demands to respond to and investigate crime, placing significant pressure on frontline police officers. The QPS has identified that substantial officer time is spent engaging a Justice of the Peace (JP) or Commissioner of Declarations (CDec) to witness affidavit and statutory declarations. This time is increased when having to locate a JP or CDec outside of regular business hours.

The Amendment Regulation will enable senior police officers to:

- witness any affidavit made by a police officer in the course of duty (including through the use of electronic signatures and AV links); and
- witness any declaration made by a police officer in the course of duty (including through the use of electronic signatures and AV links).

The Amendment Regulation requires the senior police officer witnessing the affidavit or declaration to not be directly involved in the matters to which the contents of the affidavit or declaration relates (the deposed or declared facts). Senior police officers will continue to be required to state their rank on the document. The Amendment Regulation also provides that witnessing of these documents must occur in person unless not practical to do so.

Human Rights Issues

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

The human rights that are relevant to the Amendment Regulation are:

- property rights (section 24 of the HR Act);
- privacy and reputation (section 25 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).

Making documents electronically (electronic signature, electronic documents)

The Amendment Regulation permits senior police officers to make affidavits and declarations made by other police officers in the course of duty in electronic form and permits them to be signed by electronic signature. Currently, electronic signatures can only be used on the four particular types of affidavits made by police officers and witnessed by a senior police officer (affidavits of service, bail objections or urgent or remote applications pursuant to section 801 of the PPRA), unless witnessed by a special witness under the Oaths Act.

The creation, storage and transmission of electronic documents also brings new security issues. Documents created and stored electronically may be more susceptible to data breaches or cyber-attack. There is an increased risk that the use of technology to make and execute documents will mean personal information (such as names, addresses and other private details) is more susceptible to data breaches and/or cyber security issues when compared to traditional physical documents. The transmission of documents between the signatory (police officer) and witness (senior police officer) for signature may be more vulnerable to interception by a third party.

For these reasons, the Amendment Regulation limits the right to privacy and reputation (section 25 of the HR Act) and property rights (section 24 of the HR Act) (if the interception or breach resulted in fraud).

Taking of an oath or affirmation / Witnessing by AV link

The Amendment Regulation allows affidavits and declarations made by a police officer in the course of duty to be witnessed over AV link by senior police officer. Currently, witnessing by AV link can only occur for the four particular types of affidavits made by police officers and witnessed by a senior police officer (affidavits of service, bail objections or urgent or remote applications pursuant to section 801 of the PPRA), unless witnessed by a special witness under the Oaths Act.

The Amendment Regulation potentially promotes and strengthens human rights in criminal proceedings by preventing unreasonable delays in proceedings by increasing the efficiency of the QPS.

The nature of AV communication increases the risk that the communication may be intercepted or recorded without the consent of a person involved in the witnessing process. This limits the right to privacy and reputation (section 25 of the HR Act). This is because in the AV environment, a witness may not be able to assess the existence of duress or fraud by third parties as thoroughly as they can when they are witnessing a document in person (for example, where the witness can converse with the signatory on their own). The use of AV technology also impacts the ability to ascertain non-verbal cues or properly assess the person's demeanour. Dialogue is also likely to be less fluid and reactions harder to gauge.

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

Right to a fair hearing (section 31)

(a) the nature of the right

The right to a fair hearing (section 31 of the HR Act) is a fundamental principle of common law, both in relation to criminal and civil proceedings. It confers on a person charged with a criminal offence or a party to a civil proceeding, the right to a fair and public hearing by a competent, independent and impartial court or tribunal. A fair hearing is a personal right “so deeply rooted in our system of law and so elementary as to need no authority to support it. It is a right which inheres in every system of law that makes any pretension to civilisation”.¹ The concept of a fair hearing is concerned with matters of procedural fairness, rather than substantive fairness in the sense of the merits of a particular decision.² Reflecting the common law tradition of the due process of the law, it is manifested in rules of law and of practice designed to regulate the course of a trial.³ The right to a fair hearing is closely related to the particular rights in criminal proceedings (section 32 of the HR Act). Section 32 of the HR Act expressly guarantees the majority of the elements that constitute the right to a fair hearing in a criminal proceeding, and therefore these rights do not necessarily require separate analysis.⁴

This right applies to procedural fairness, not the fairness of a decision or judgement of a court or tribunal. For example, the right to a fair hearing may be impacted by laws, policies, acts or decisions that regulate the rules of evidence in courts and tribunals; regulate the procedures for challenging the impartiality and independence of courts and tribunals; or impact on the way witnesses give evidence.

The protection of property rights (section 24 of the HR Act) encompasses ‘free use, enjoyment and disposal of all [one’s] acquisitions’.⁵ It protects the right of all persons to own property (alone or with others) and protects individuals from the arbitrary deprivation of their property, including real property, shares, etc. In a human rights context, ‘arbitrary’ means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.⁶ The right to privacy (section 25(a) of the HR Act) protects a person from having their privacy arbitrarily interfered with. The purpose of this is ‘to protect and enhance the

¹ Victoria Police Toll Enforcement v Taha [2013] VSCA 37 at [203], Tate JA referring to R v McFarlane (1923) 32 CLR 518.

² Knight v Wise [2014] VSC 76.

³ Victoria Police Toll Enforcement v Taha [2013] VSCA 37 at [205].

⁴ Following the approach of Warren CJ in In Re Application under Major Crimes (Investigative Powers) Act 2004 [2009] VSC 381 at [40].

liberty of the person – the existence, autonomy, security and well-being of every individual in their own private sphere'.⁷ In the context of the Amendment Regulation, the right protects against arbitrary interference with a person's private information as well as protecting their correspondence and communications with others.

(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

Consistent with the purpose of the Oaths Act reforms in the PLEE Bill, and the Statement of Compatibility for that Bill, the purpose of enabling senior police officers to witness any affidavit or declaration made by a police officer in the course of duty over audiovisual or electronic link is to increase efficiencies for the QPS by streamlining processes for police officers who are preparing documents in the course of duty.

Increasing efficiencies for frontline police officers will increase the ability of the QPS to respond to and investigate crime. The time savings will ultimately be reinvested into frontline operational functions that benefit the community.

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

The Amendment Regulation will allow increased efficiencies for the QPS. Specifically, allowing senior police officers to witness any affidavit or declaration made by a police officer in the course of duty will result in front line police officers spending less time having to locate a JP or CDec, which is particularly time-consuming outside regular business hours.

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

While there are less restrictive ways to achieve this purpose, such alternatives are not reasonably available. For example, another way of achieving the purpose of the Amendment Regulation would be through appointing more police officers as CDecs. However, this option is not reasonably available because it would require: the diversion of police to attend additional training; additional costs for providing that training; and increase responsibilities for the government agency responsible for managing CDecs. In essence, this alternative option would defeat the express purpose of implementing the reforms proposed by the Amendment Regulation, by making the increased efficiencies for the QPS redundant.

The Amendment Regulation includes a number of safeguards to ameliorate the impact on the rights. The Amendment Regulation does not allow any police officer to witness affidavits and statutory declarations, this is limited to senior police officers who are:

- an officer-in-charge of a station or establishment or a police officer nominated to be in charge of a police station or establishment in the absence of the officer-in-charge;
- a watchhouse manager; or
- a police officer of, or above, the rank of sergeant.

Further, the senior police officer witnessing the affidavit or declaration must not be directly involved in the matters to which the content of affidavit or declaration relates (the deposed or declared facts). For example, they must not have also been at the scene of the incident and

therefore another witness to the events that are being declared in the contents of the document. In practice, this will mean that police officers will typically return to the police station to complete an affidavit or statutory declaration, rather than when out on duty, for witnessing before the officer-in-charge of the station. Further, QPS policy will be developed to provide guidance to officers about how to appropriately witness affidavits and declarations.

Also, to assist third parties verify the validity of an affidavit or declaration so witnessed, the senior police officers are required to state their rank or position on the document.

The Amendment Regulation also provides that witnessing of these documents must occur in person unless not reasonably practicable to do so.

Together these safeguards will maintain the independence of the witness and help to preserve the solemnity of the execution of these important legal documents.

It should be noted that existing offences in the *Criminal Code Act 1899* regarding false verified statements (section 193), false declarations (section 194), and perjury (section 123), will continue to apply.

(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 property rights, the right to a fair hearing, right to privacy and rights in criminal proceedings caused by allowing senior police officers to witness any affidavit or declaration made by a police officer in the course of duty, are reasonable and demonstrably justifiable given the benefits to public safety in achieving the purpose of increasing efficiencies for police officers who are preparing documents in the course of duty.

Therefore, as the limitations are reasonable and justifiable, the Amendment Regulation is compatible with human rights.

(f) any other relevant factors

Nil.

Conclusion

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

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

© The State of Queensland 2024