

Criminal Proceeds Confiscation (Corresponding Laws and Serious Criminal Offences) Amendment Regulation 2020

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* (HRA), I, Yvette D'Ath, Attorney-General and Minister for Justice and Leader of the House, provide this human rights certificate with respect to the *Criminal Proceeds Confiscation (Corresponding Laws and Serious Criminal Offences) Regulation 2020* (the Amendment Regulation) made under the *Criminal Proceeds Confiscation Act 2002* (the CPCA).

In my opinion, the Amendment Regulation as tabled in the Legislative Assembly is, to the extent it is made under the CPCA, compatible with the human rights protected by the HRA. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

The main object of the CPCA 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.

The CPCA provides for various matters to be prescribed by regulation. The *Criminal Proceeds Confiscation Regulation 2013* sets out those matters, which include:

- offences that are 'serious criminal offences' under the CPCA, and for which property may be confiscated without the need for conviction. This deters and prevents crime by attacking its profitability and removing funding for further criminal activity; and
- proceeds of crime orders made in other Australian jurisdictions that are recognised as enforceable legal orders in Queensland. Such recognition is important to facilitate mutual recognition and cooperation between jurisdictions, which in turn ensures a nationally effective scheme of confiscating the proceeds of crime.

The Amendment Regulation prescribes tainted property offences at section 252 of the CPCA and section 10A of the *Drugs Misuse Act 1986* (DMA) as 'serious criminal offences' under the CPCA. This will enable a person's property to be forfeited if a court finds it more probable than not that a person engaged in serious crime related activity or that the property involved is serious crime derived property, even if there is no conviction for the relevant tainted property offences.

The Amendment Regulation will also update orders from other Australian jurisdictions that Queensland recognises are corresponding interstate proceeds of crime orders, and will prescribe the unexplained wealth orders in proceeds of crime legislation in South Australia and

Tasmania. Furthermore, it will recognise Victorian and South Australian orders very similar to Queensland's serious drug offender confiscation orders.

The Amendment Regulation will also make a number of minor technical amendments to Schedules 3, 4, 5 and 6 of the Criminal Proceeds Confiscation Regulation 2013 to accurately reflect current drafting practice.

Human Rights Issues

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

I consider the following human rights to be relevant to the inclusion of further 'serious criminal offences' by the Amendment Regulation:

- Property rights (section 24);
- Protection of families and children (section 26); and
- Fair hearing (section 31).

It could be said that the amendments recognising equivalent interstate orders under the CPCR potentially limit property rights, to the extent that they recognise those orders and allow for action to be undertaken in Queensland to enforce the corresponding interstate proceeds of crime orders and unexplained wealth orders to property within the jurisdiction of Queensland. However, having regard to the fact that the amendments relate to orders previously determined by an interstate court relating to the property to be confiscated, I am of the view that the recognition of interstate orders does not limit human rights.

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 HRA 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.

Property rights may be limited by both the inclusion of tainted property offences as 'serious criminal offences' under the CPCA and the recognition of equivalent interstate orders under the CPCR. The Amendment Regulation has the potential to limit the right to property to the extent that it will allow the seizure of property derived from 'serious criminal offences' where the court finds it more probable than not that a person engaged in serious crime related activity or that the property involved is serious crime derived property, even where there is no conviction. This may include property such as cash, houses and cars.

The amendments recognising interstate orders under the CPR may also potentially limit the right to property in that it will allow Queensland courts to enforce an interstate order which requires the seizure or forfeiture of property held within the jurisdiction of Queensland. However, the act undertaken by the Queensland courts in this procedure is to enforce an interstate court's order, rather than determining the matter. Any process in determining the property to be seized or forfeited has been previously determined by an interstate court. As a result, section 4 of the Amendment Regulation arguably does not limit the human rights.

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.

Expanding the non-convicted based forfeiture scheme by including tainted property offences may result in the confiscation of the family home or other assets may impact the respondent's dependants (including their partner or children) and, therefore, limit section 26 of the HRA. However, in contrast the inclusion of the additional tainted property offences also 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.

Right to a fair hearing

Section 31 of the HRA includes, relevantly, 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.

Although confiscation proceedings under the CPCA are civil in nature (section 8), the non-conviction based schemes under the CPCA allow for confiscation orders to be made in the absence of any criminal conviction, and allow for a finding of fact in relation to offending behaviour based on the civil standard of proof. The amendment to Schedule 1 of the Regulation to add two new offences for which property can be confiscated without conviction, means that a person charged with an offence under section 252 of the CPCA or section 10A of the DMA, may be subject to forfeiture of property even without being convicted in a criminal court.

A respondent, their dependents or a third party challenging an application for confiscation of property under the CPCA on the basis of a charge under section 252 of the CPCA or section 10A of the DMA 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 in proving the same may limit 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

The main object of the CPCA 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.

The purpose of expanding the non-conviction based forfeiture scheme under the CPCA to include tainted property offences, and in turn limiting the right to property and fair hearing is to broadly facilitate the forfeiture of property acquired through illegal activity and, to deny profiteering from illegal activity and, reinvestment of such financial gain into further illegal activity. By expanding the scope of the non-conviction based forfeiture scheme to tainted property offences (namely section 252 of the CPCA and section 10A of the DMA), the Amendment 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 CPCA.

The deterrence of 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.

It could also be argued that the Amendment Regulation promotes the right to the protection of families and children under section 26 of the HRA. The right to the protection of families and children under section 26 of the HRA recognises that families are the fundamental group unit of society and entitles families to protection by the society and the State. The Amendment Regulation is intended to further deter persons from committing serious criminal offences by increasing the financial risk associated with committing offences and, removing funding for further criminal activity. By extension, the Amendment Regulation then protects all Queensland families from the effects of criminal activity including drug trafficking. Support for the protective effect of confiscation legislation on families within the broader community can be found in the Victorian Supreme Court decision of *J R Mokbel Pty Ltd v DPP & Anor* [2007] VSC 119.

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

The Crime and Corruption Commission, as administrators of the non-conviction based confiscation scheme under Chapter 2 of the CPCA, have advised that it is not uncommon for persons to be charged solely under section 252 of the CPCA or section 10A of the *Drugs Misuse Act 1986* (DMA) (being offences for possessing suspected tainted property) when police locate large sums of cash. The current confiscation scheme requires a conviction for tainted property

offences and, for a forfeiture order to be sought at sentence. Accordingly, if a person is not convicted, a forfeiture order cannot be sought and the property (i.e. cash) must be returned.

The expansion of the non-conviction based forfeiture scheme under the CPCA to include tainted property offences in the Amendment Regulation will help achieve the policy objective of facilitating the forfeiture of property acquired through illegal activity and, to deny profiteering from illegal activity and, reinvestment of such financial gain into further illegal activity. Despite the lack of conviction for the tainted property offence, the court must still find it more probable than not that a person engaged in serious crime related activity or that the property involved is serious crime derived property before making an order under the forfeiture scheme under the CPCA. The property will not be confiscated without an established link to a serious crime related activity or being serious crime derived property.

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

The CPCA 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 least 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 additionally prescribed offences.

When an application is made under the CPCA, 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 CPCA; 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, notice must also be given to all known dependants of the respondent and, anyone else who may be affected by the order so that they may have the opportunity of seeking a hardship 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 CPCA are conducted by the Supreme Court, sitting in its civil jurisdiction. The Supreme Court is an independent and impartial body invested 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 CPCA, 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. This test requires the court to take into account the nature, seriousness and consequences of the facts to be proved; the persuasiveness of the evidence required to satisfy the standard of proof (on the balance of probabilities) will increase with the seriousness of the consequences.

The CPCA 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*¹, 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 CPCA) on public interest grounds.

¹ *State of Queensland v Deadman; Thompson v State of Queensland [2016] QCA 218*

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 CPCA, 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’.

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, it is considered that the importance of the inclusion of the tainted property offences in the CPCA outweighs the harm caused to the rights to property, protection of families and children and fair hearing.

In the context of the right to property in particular, and having regard to the matters set out in the discussion above, I am of the view that any interference is lawful and not arbitrary. Importantly, the provisions of the CPCA 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. For example, the person would ordinarily have been charged with possessing tainted property under section 252 of the CPCA or section 10A of the DMA and had the relevant tainted property (i.e. cash) seized, then an application under the CPCA would need to be filed and served on the respondent, thereby providing the respondent the opportunity to be heard and, ultimately, for a competent independent court to decide the application. To that end, I consider that the benefit of the provision in achieving the objective of confiscating ill-gotten property outweighs any limitation on the right to property.

(f) Any other relevant factors

Not applicable.

Conclusion

In my opinion, the *Criminal Proceeds Confiscation (Corresponding Laws and Serious Criminal Offences) Amendment Regulation 2020* 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
Leader of the House

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