

EXPLANATORY STATEMENT

Issued by the Minister for Home Affairs

Subject – *Australian Crime Commission Establishment Act 2002*
Australian Crime Commission Establishment Regulations 2020

The *Australian Crime Commission Establishment Act 2002* (ACCE Act) commenced on 1 January 2003 and amended the *National Crime Authority Act 1984* (NCA Act) and a number of other Commonwealth Acts to replace the National Crime Authority (NCA), Australian Bureau of Criminal Intelligence and the Office of Strategic Crime Assessments with the Australian Crime Commission (ACC).

Item 326 of Schedule 1 to the ACCE Act provides that the Governor-General may make regulations prescribing matters of a transitional nature (including prescribing any saving or application provisions) arising out of the amendments made by that Schedule.

The *Australian Crime Commission Establishment (Transitional Provisions) Regulations 2003* (the 2003 Regulations), which are due to sunset on 1 April 2020, provide for, among other things, the power to vary or revoke a non-publication direction made under the NCA Act.

The *Australian Crime Commission Establishment Regulations 2020* (the Regulations) remake section 4 of the 2003 Regulations, and also repeal the 2003 Regulations. Remaking section 4 of the 2003 Regulations ensures that the ACC (now, the Australian Criminal Intelligence Commission) can continue to vary or revoke non-publication directions in force, as necessary, and with due consideration of the implications of the direction upon affected persons. Sections 5 and 6 of the 2003 Regulations were transitional provisions and are no longer required. Details of the Regulations are set out in Attachment A.

The Office of Best Practice Regulation (the OBPR) has advised that a Regulation Impact Statement is not required. The OBPR consultation reference number is 25334.

The Regulations were informed by consultation with Commonwealth agencies, the Australian Criminal Intelligence Commission and the Attorney-General's Department, both of which support the Regulations.

The ACCE Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at Attachment B.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after they are registered on the Federal Register of Legislation.

Authority: Item 326 of Schedule 1 to the
*Australian Crime Commission
Establishment Act 2002.*

ATTACHMENT A**Details of the Australian Crime Commission Establishment Regulations 2020****Section 1 – Name**

This section provides that the title of this instrument is the *Australian Crime Commission Establishment Regulations 2020* (the Regulations).

Section 2 – Commencement

This section provides that the whole of the instrument is to commence the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the instrument is made under item 326 of Schedule 1 to the *Australian Crime Commission Establishment Act 2002* (ACCE Act).

Section 4 – Schedules

This section provides that each instrument that is specified in a schedule to the Regulations is amended or repealed as set out in the applicable items to the Schedule concerned, and any other item in a Schedule to the Regulations has effect according to its terms.

Section 5 – Definitions

This section prescribes definitions for the following terms in the Regulations

CEO

The term ‘CEO’ is defined as having the meaning given by the *Australian Crime Commission Act 2002*.

NCA Act

The term ‘NCA Act’ is defined as having the meaning given by item 308 of Schedule 1 to the *Australian Crime Commission Establishment Act 2002*.

Section 6 – Non-publication directions

Section 6 provides that the Chief Executive Officer (CEO) of the Australian Crime Commission (ACC) (which is now known as the Australian Criminal Intelligence Commission, or the ACIC) may, in writing, vary or revoke a non-publication direction that was given by the National Crime Authority (NCA) under subsection 25(9) of the *National Crime Authority Act 1984* (NCA Act) or by a hearing officer under subsection 25A(12) of the NCA Act, and which was in force immediately before the commencement of this section.

Such a direction may have been made by the NCA or a hearing officer when it was necessary to ensure the protection of the evidence given or the identity of any witness. The NCA or a hearing officer was required to have made an order under subsections 25(9) or 25A(12)

respectively if failure to do so might prejudice the safety or reputation of a person, or prejudice the fair trial of a person who has been, or may be, charged with an offence.

Section 6 is intended to ensure that the CEO can lawfully vary or revoke a direction given under subsections 25(9) or 25(12) of the NCA Act.

Subsection 6(3) limits the power to vary or revoke a direction under subsection 6(2) by providing that the CEO must not vary or revoke a direction mentioned in subsection 6(1) if to do so might prejudice the safety or reputation of a person, or the fair trial of a person who has been or may be charged with an offence. Subsection 6(3) is intended to provide protection to the interests of individuals whose safety, reputation, or right to a fair trial might otherwise be prejudiced by a variation or revocation under subsection 6(2).

This section applies to any directions made under subsections 25(9) or 25A(12) of the NCA Act.

Schedule 1 – Repeals

This section repeals the *Australian Crime Commission Establishment (Transitional Provisions) Regulations 2003* in their entirety.

ATTACHMENT B**Statement of Compatibility with Human Rights**

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Australian Crime Commission Establishment Regulations 2020

This disallowable legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Australian Crime Commission Establishment (Transitional Provisions) Regulations 2003* (the 2003 Regulations) are due to sunset on 1 April 2020 and provide for, among other things, the power to vary or revoke a non-publication direction made under the *National Crime Authority Act 1984* (NCA Act).

The *Australian Crime Commission Establishment Regulations 2020* (the Regulations) remake section 4 of the 2003 Regulations, and also repeal the 2003 Regulations. Remaking section 4 of the 2003 Regulations ensures that the Australian Crime Commission (now, the Australian Criminal Intelligence Commission) can continue to vary or revoke non-publication directions in force, as necessary, and with due consideration of the implications of the direction upon affected persons.

Sections 1, 2, 3, 4 and 5

Sections 1, 2, and 3 of the Regulations provide for the name of, commencement details, and authority for enacting the Regulations.

Section 4 provides that each instrument specified in schedule 1 to the Regulations is amended or repealed as set out in the applicable items to that Schedule, and that any other item in Schedule 1 to this instrument has effect according to its terms.

Section 5 provides for the definitions used in the Regulations.

Section 6 – Non-publication directions

Section 6 provides that the Chief Executive Officer (CEO) may, in writing, vary or revoke a confidentiality direction that the NCA or a hearing officer has made under subsections 25(9) or 25A(12) of the NCA Act, and of which were in force immediately before the commencement of this section. The CEO must not vary or revoke a confidentiality direction if to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence.

Human rights implications

This disallowable legislative instrument engages the following rights:

- the right to security of the person under Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR)

- the right to a fair trial under Article 14 of the ICCPR
- the prohibition against unlawful interference with privacy and attacks on reputation under Article 17 of the ICCPR.

The right to security of the person, the right to a fair trial, and the prohibition against unlawful interference with privacy and attacks on reputation

The Regulations engage and promote the right to security of the person, the right to a fair trial, and the prohibition against unlawful interference with privacy and attacks on reputation.

- Article 9 provides (in part) that everyone has the right to security of the person.
- Article 14(1) provides (in part) that all persons shall be equal before the courts and tribunals and that, in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be treated to a fair and public hearing by a competent, independent and impartial tribunal established by law.
- Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, nor to unlawful attacks on their honour and reputation, and that everyone has the right to the protection of the law against such interference or attacks.

Section 6 – Non-publication directions

Section 6(3) of the Regulations provides that the CEO must not vary or revoke a confidentiality direction if to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence. The requirement that the direction must not be varied or revoked if doing so would prejudice the safety or reputation of a person promotes the right to security of the person in Article 9 of the ICCPR and the right to protection of the reputation of the person in Article 17 of the ICCPR, by requiring the CEO to consider whether varying or revoking the direction would place a person in danger or have their reputation interfered with, before exercising the power to vary or revoke a confidentiality direction. If the CEO determined that the person's security or reputation would be prejudiced, then the CEO must not vary or revoke the direction. Similarly, the right to a fair trial in Article 14(1) of the ICCPR is promoted by requiring the CEO to consider whether the right of a person who has been or may be charged with an offence to a fair trial would be interfered with if the confidentiality direction was varied or revoked. If the right to a fair trial would be prejudiced, then the CEO must not vary or revoke the direction.

Conclusion

This disallowable legislative instrument is compatible with human rights and is consistent with Australian's international obligations.

The Hon Peter Dutton MP, Minister for Home Affairs