

Legislation (Deferral of Sunsetting—National Security Information (Criminal and Civil Proceedings) Regulation) Certificate 2024

EXPLANATORY STATEMENT

Issued by the Attorney-General in compliance with
section 15G of the *Legislation Act 2003*

INTRODUCTION

The *Legislation (Deferral of Sunsetting—National Security Information (Criminal and Civil Proceedings) Regulation) Certificate 2024* (the Certificate) is made under paragraph 51(1)(c) of the *Legislation Act 2003* (the Legislation Act). It is a legislative instrument for the purposes of the Legislation Act and must be registered on the Federal Register of Legislation. The Certificate will be subjected to the disallowance provisions of the Legislation Act as the deferred sunsetting day specified in the Certificate is after the first anniversary of the originally scheduled sunsetting day, which means that subsection 51(4) of that Act (which provides an exemption from disallowance for deferrals of 12 months or less) does not apply.

OUTLINE

Sunsetting is the automatic repeal of legislative instruments after a fixed period.

The Australian Government's sunsetting framework is established under Part 4 of Chapter 3 of the Legislation Act. The purpose of the sunsetting framework is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed.

Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration. Under paragraph 51(1)(c) of the Legislation Act the Attorney-General can issue a certificate to defer the sunsetting day of an instrument for a period of either 6, 12, 18 or 24 months.

The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day. This allows instruments to continue to be in force for a further but limited period of time after the date on which they would otherwise sunset. This removes the administrative burden of remaking instruments which would have a limited duration prior to their repeal and

potential replacement, or where circumstances prevent the making of replacement instruments prior to the sunseting day.

The Certificate defers the sunseting date of the *National Security Information (Criminal and Civil Proceedings) Regulation 2015* ('NSI Regulation') by 24 months from 1 April 2025 to 1 April 2027.

The ability to defer sunseting dates is an integral part of the sunseting framework. It provides the necessary flexibility to ensure the standard 10-year sunseting period does not result in unintended consequences or impose an unreasonable administrative burden on Commonwealth agencies or the Parliament. In this case, the NSI Regulation is expected to be remade within 24 months of the sunseting date as a result of a review by the Attorney-General's Department (the department). If the Certificate were to be disallowed, there would not be enough time to review and remake the NSI Regulation prior to the sunseting day.

PROCESS BEFORE CERTIFICATE WAS MADE

Regulatory impact analysis

Certificates of deferral of sunseting are machinery of government instruments, and are therefore not subject to the regulatory impact assessment requirements set out by the Office of Impact Analysis (OIA). The OIA reference for this standing exemption is ID19633.

Consultation before making

Before the Certificate was issued, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act

The NSI Regulation is made under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) (the NSI regulation together with its enabling Act are referred to as the NSI legislative framework). The NSI Regulation acts as a critical safeguard to protect national security information during the initial operationalisation of the NSI Act, before court orders can be sought and made under that Act. The department considers the NSI legislative framework requires secondary legislation to be in force to meet its legislative objectives.

The NSI Regulation prescribes, for the purposes of the NSI Act, the requirements for accessing, storing, handling, destroying and preparing security classified documents and national security information in federal criminal and civil proceedings to which the NSI Act applies. It also deals with matters relating to special advocates appointed under the NSI Act, and provides forms for the purposes of provisions of the NSI Act. It supports the framework established by the NSI Act for the

protected disclosure of national security information in federal criminal and civil proceedings while ensuring the administration of justice is maintained.

The department is seeking to conduct a review of the NSI Regulation to inform advice on whether the Instrument should be remade, remade with amendments or allowed to sunset. When the department undertakes the review, it will involve consultation with key Government stakeholders including National Intelligence Community agencies. To extent practicable, the department will commence this review alongside work to develop a response to the public Independent National Security Legislation Monitor (INSLM)'s 2023 *Review into the operation and effectiveness of the NSI Act*.

Stakeholders have previously been consulted through the public INSLM review, which also considered the NSI Regulation. A range of stakeholders engaged with the INSLM review including government agencies, academics, legal professionals and non-government organisations.

The Government has yet to indicate its response to the INSLM review, which was tabled in the Senate on 30 November 2023. Generally, as a matter of good practice, the Government seeks to respond to INSLM recommendations within 12 months, although the timeframe for response can be longer where recommendations raise complex legal and policy questions. Stakeholders will expect a holistic and aligned approach to any amendments to the NSI Act and NSI Regulation. Delaying further consultation with stakeholders on amendments to the NSI Regulation until after a government response to the INSLM report will minimise administrative burden on stakeholders, who have already been consulted through the INSLM review, and also better ensure that any consultation process aligns with the government's direction on the NSI Act and NSI Regulation.

Certificates of deferral are machinery in nature, and enable legislative instruments that would otherwise sunset to remain in force for a further, but strictly limited, period of time. Consultation on the proposed deferral of sunseting has not occurred to minimise the administrative burden on stakeholders associated with consultation on a deferral that will only have effect for a limited amount of time. Any replacement instrument will be subject to further consultation and parliamentary oversight, including oversight of whether adequate consultation occurred with persons likely to be affected by the replacement instrument.

A 24-month deferral will allow sufficient time for the department to conduct the review, informed by a government response to the INSLM review. It will also avoid the need to remake the NSI Regulation in its current form for a short period of time before it is either repealed and a replacement instrument is made, or significantly amended, to give effect to a government response to the INSLM review. As such, given that deferral of the sunseting date of the NSI Regulation is

consistent with the policy intent of the sunseting regime and does not significantly alter existing arrangements, appropriate consultation has occurred for the purposes of section 17 of the Legislation Act.

Statutory preconditions relevant to the Certificate

If the statutory conditions in section 51 of the Legislation Act are met, an instrument's sunseting day can be deferred for 6, 12, 18 or 24 months by means of a certificate made under that section. In terms of process, the Legislation Act requires:

- a) the responsible rule-maker to apply to the Attorney-General in writing, and
- b) the Attorney-General to be satisfied that:
 - (i) the instrument would (apart from the operation of the sunseting provisions) be likely to cease to be in force within 24 months after its sunseting day
 - (ii) the proposed replacement instrument will not be able to be completed before the sunseting day for reasons that the rule-maker could not have foreseen and avoided
 - (iii) the dissolution or expiration of the House of Representatives or the prorogation of the Parliament renders it inappropriate to make a replacement instrument before a new government is formed, or
 - (iv) the Attorney-General has approved Part 4 of Chapter 3 of the Legislation Act (Sunsetting) not applying to that instrument, and
- c) the Attorney-General to issue a certificate. The explanatory statement for the certificate must include a statement of reasons for the issue of the certificate.

As the rule-maker for the NSI Regulation is the Attorney-General, the Hon Mark Dreyfus KC MP, there is no written application associated with this Amendment Certificate.

On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the NSI Regulation would, apart from the operation of Part 4 of Chapter 3 of the Legislation Act, be likely to cease to be in force within 24 months after its sunseting day. As such, the criterion in subparagraph 51(1)(b)(i) of the Legislation Act is met.

Statement of Reasons for issuing of the Certificate

For the purposes of subsection 51(5) of the Legislation Act this section sets out the statement of reasons for issuing the Certificate.

The Certificate defers the sunseting date of the NSI Regulation by 24 months from 1 April 2025 to 1 April 2027 as the NSI Regulation is likely to be remade within 24 months of the original sunseting date. The department expects to conduct a review of the NSI Regulation following the Government's

response to the 2023 INSLM review into the NSI Act to ensure reforms to the NSI Regulation align with any proposed reforms to the NSI Act.

The NSI Act, with the supporting NSI Regulation, provides a framework for the protected disclosure of national security information in federal criminal and civil proceedings while ensuring the administration of justice is maintained. Under the framework, the courts are empowered to make orders considered appropriate in the particular proceedings.

The NSI Regulation prescribes, for the purposes of the NSI Act, the requirements for accessing, storing, handling, destroying and preparing security classified documents and national security information in federal criminal and civil proceedings to which the NSI Act applies. It also deals with matters relating to special advocates appointed under the NSI Act, and provides forms for the purposes of provisions of the NSI Act.

On 30 November 2023, the Attorney-General tabled in the Senate the INSLM's *Review into the operation and effectiveness of the NSI Act*, which also considered the NSI Regulation. The Government has yet to indicate its response to the INSLM review. A deferral will ensure that the NSI Regulation is not remade and then amended (potentially significantly) within a short time of its remaking, should the government choose to pursue significant reform to the NSI legislative framework in response to the INSLM review. Stakeholders will expect a holistic and aligned approach to any amendments to the NSI Act and NSI Regulation. Delaying further consultation with stakeholders on amendments to the NSI Regulation until after a government response to the INSLM report will minimise administrative burden on stakeholders, who have already been consulted through the INSLM review, and also better ensure that any consultation process aligns with the government's direction on this legal framework.

Accordingly, the NSI Regulation will likely cease to be in force in its current form within 24 months of its original sunset date.

More information

Further details on the provisions of the Certificate are provided in [Attachment A](#).

The NSI Regulation which is subject to the Certificate, and which will now sunset at a later day as specified in the Certificate, is available on the Federal Register of Legislation.

Further information may be requested from the department about the operation of the Certificate and information about the Instrument to which the Certificate applies.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The Legislation (*Deferral of Sunsetting—National Security Information (Criminal and Civil Proceedings) Regulation*) Certificate 2024 (the Certificate) is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Human Rights Act).

Overview of the Certificate

The Certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003*. Under that paragraph the Attorney-General can issue a certificate to defer the sunsetting day of an instrument for a period of either 6, 12, 18 or 24 months. The instrument will then be repealed on the day specified in the Certificate instead of the originally scheduled sunsetting day. The Instrument specified in the Certificate is the *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (NSI Regulation).

The NSI Regulation is expected to be repealed and replaced within 24 months of its scheduled sunsetting day as part of a review of the NSI legislative framework.

The Certificate allows the NSI Regulation to continue to be in force for a further, but limited, period of time when it would otherwise sunset. This removes the administrative burden of remaking the Instrument which would have a limited duration prior to its expected repeal and replacement, or where circumstances prevent the making of a replacement instrument prior to the sunsetting day.

Human Rights Implications

A certificate of deferral of sunsetting extends the operation of the instrument but does not change or affect the rights engaged under the original instrument.

The NSI Regulation engages the following rights and freedoms declared by the international instruments set out in section 3 of the Human Rights Act:

- the right to a fair trial and fair hearing, under Article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR);
- the right to minimum guarantees in criminal proceedings, under Article 14(3)(d) of the ICCPR;
- the right to have freedom from unwarranted and unreasonable intrusions (i.e. the right to privacy), under Article 17 of the ICCPR and;
- the right to freedom of expression, under Article 19 of the ICCPR.

Article 14(1) of the ICCPR – Right to a fair trial and fair and public hearing

The NSI Regulation promotes the right to a fair trial and fair and public hearing as per article 14(1) of the ICCPR through its support for all parties to be treated equally before courts. The NSI Regulation establishes obligations for the protection of national security information during the proceeding including accessing, storing, handling, destroying and creating and preparing documents containing national security information. These obligations apply equally to all parties.

The Attorney-General's Department provides practical guidance and advice, and physical security and Information Technology equipment, to support parties to comply with their obligations under the NSI Regulation. Subparagraphs 23(2) and 38C(2) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) make clear that the obligations established by the NSI Regulation do not apply where all parties to a proceeding have agreed to an arrangement for the protection of national security information in the proceeding, and this is subsequently reflected in court orders made under the NSI Act. Similarly, section 7A of the NSI Regulation makes clear that a court may make orders on application by the Attorney-General to override the obligations of the NSI Regulation.

The NSI Regulation also supports the principle of equality of arms, which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings. The NSI Regulation does not seek to restrict the courts' power to determine who has access to information in a proceeding. More information can be disclosed than would otherwise be disclosed in a proceeding without appropriate protections for national security information (as established by the obligations imposed by the NSI Regulation, which apply unless varied by court orders made under the NSI Act). The NSI Regulation establishes requirements to support the appointment of special advocates in civil proceedings relating to control orders or extended supervision orders where the court has ordered that the offender and their legal representatives are not entitled to be present during part of a hearing in the proceeding.

The NSI Regulation also supports the right to a public hearing, which is an important safeguard of the interest of the individual and society more broadly that also recognises that the press and the public may be excluded from all or part of a hearing for reasons of national security. The NSI Regulation specifies the forms to be used by legal representatives to notify the Attorney-General, other parties to a proceeding and the court of the expected disclosure of national security information, which enables consideration to be given to what, if any, protections are appropriate including whether any hearing where that information is disclosed can be public or needs to be closed.

Article 14(3)(d) of the ICCPR – Minimum guarantees in criminal proceedings

Article 14(3)(d) supports the minimum guarantees in criminal proceedings, which include for an accused person to be tried in person, and to have legal assistance. This is reflected in the NSI Regulation as it does not prevent a party to an NSI proceeding from obtaining legal assistance of their own choosing. Under the NSI Regulation, obligations for the protection of national security information during the proceeding may have practical implications for how legal assistance is delivered (for example, section 8 of the NSI Regulation establishes requirements that must be met to create or prepare a document containing national security information, such as using approved electronic equipment). To the extent that an individual's legal representative might not be permitted to access NSI, this is a reasonable, necessary, and proportionate limitation for the purposes of protecting national security. As noted above these obligations apply equally to all parties and the Attorney-General's Department provides practical support and equipment to assist a party's legal representatives to meet their obligations under the NSI Regulation.

Article 17 of the ICCPR – Right to have freedom from unwarranted and unreasonable intrusions

The NSI Regulation promotes the right to have freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy (i.e. the right to privacy) as provided by article 17 of the ICCPR. The NSI Regulation does not place any limitations on the right to privacy and reputation. It could be argued that the NSI Regulation promotes this right, to the extent that private information is also national security information (for example, the name of a security agency employee). The NSI Regulation ensures protections are placed on this information to prevent its inappropriate disclosure, which could prejudice Australia's defence, security, international relations and law enforcement interests.

Article 19 of the ICCPR – Right to freedom of expression

The NSI Regulation does not place any limitations on the right to freedom of opinion and expression, as provided under article 19 of the ICCPR. The NSI Regulation establishes obligations that restrict the handling and creation or preparation of documents containing national security information. However, the NSI Regulation does not, in itself, limit the disclosure of national security information, and does not restrict the courts' power to determine who can access information in a proceeding.

Therefore, overall, the NSI Regulation is compatible with human rights and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate for the purposes of protecting national security.

Before issuing the Certificate, the Attorney-General was satisfied that the NSI Regulation would, apart from the operation of the sunset provisions, cease to be in force within 24 months of their sunset date. Issuing a certificate of deferral therefore avoids the need to replace the Instrument in its current form for a short period of time before it is expected to be repealed and replaced.

Instruments that are replaced will be subject to parliamentary scrutiny and oversight through the disallowance processes unless otherwise exempt. The human rights impact of the remade NSI Regulation will be assessed at the time it is made, including through the requirement to prepare a Statement of Compatibility with Human Rights.

Conclusion

This Certificate is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights Act, as it does not raise any human rights issues, and ensures that any proposal to make a replacement instrument will be subject to parliamentary oversight and scrutiny.

NOTES ON THE CERTIFICATE

Section 1 Name

This section provides that the Certificate is named the *Legislation (Deferral of Sunsetting—National Security Information (Criminal and Civil Proceedings) Regulation) Certificate 2024*. The Certificate may be cited by this name.

Section 2 Commencement

This section provides for the Certificate to commence on the day after it is registered.

Section 3 Authority

This section provides that the Certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003*.

Section 4 Deferral of sunsetting

This section provides that the *National Security Information (Criminal and Civil Proceedings) Regulation 2015*, for which the sunseting day is 1 April 2025, is repealed by section 51 of the *Legislation Act 2003* on 1 April 2027.

Section 5 Repeal of the instrument

This section provides that the Certificate is repealed at the start of 2 April 2027.