

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

In compliance with section 15J of the *Legislation Act 2003*

Witness Protection Act 1994

Witness Protection Amendment (Eligible National Security Clearance) Regulations 2024

The *Witness Protection Amendment (Eligible National Security Clearance) Regulations 2024* (the Regulations) amends the *Witness Protection Regulations 2018* (the Principal Regulations) to prescribe security clearances for the purpose of the definition of ‘eligible national security clearance’ in section 3 of the *Witness Protection Act 1994* (the Act).

The Act provides a statutory basis for the National Witness Protection Program (NWPP), which is administered by the Australian Federal Police (AFP). The NWPP provides protection and assistance to people who are assessed as being in danger because they have given, or agreed to give, evidence or a statement on behalf of the Crown in criminal or certain other proceedings, or because of their relationship to such persons; or that for any other reason may require protection or assistance under the NWPP.

Section 32 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

On 14 March 2024, Part 3 of Schedule 9 of the *Crimes and Other Legislation Amendment (Omnibus) Act 2023* (the Omnibus Act) will amend the Act to:

- repeal paragraph (a) of the definition of ‘designated position’ in section 3 to remove the terminology used to specify the type of clearance required for a person in a designated position
- insert a definition for an ‘eligible national security clearance’, and provide that the term means a clearance prescribed by regulations for the purposes of this definition.

To align with the introduction of the definition of an ‘eligible national security clearance’ and to provide consistency throughout the Act, the Omnibus Act will amend the Act to:

- repeal the definitions of ‘position of trust clearance’ and ‘sensitive information’, as they no longer apply following the insertion of the definition for ‘eligible national security clearance’
- amend subsection 12(2) to remove outdated references to security clearances and provide that a person authorised by the Commonwealth Ombudsman must hold an eligible national security clearance in order to access the NWPP Register for the purpose of an investigation
- amend subsection 13(4) to remove outdated references to security clearances and provide that a Commonwealth officer must not prepare documentation relating to the establishment of a new identity for a participant of the NWPP unless the officer holds an eligible national security clearance.

The Regulations prescribe the following security clearance levels for the purposes of the definition of ‘eligible national security clearance’ in section 3 of the Act:

- Negative Vetting Level 1
- Negative Vetting Level 2
- Positive Vetting.

Safeguarding the integrity of and limiting access to, information relating to the NWPP is vital to ensuring the safety of NWPP participants. The Regulations ensure that the types of security clearances required for a person to be able to access sensitive information relating to the NWPP are appropriately limited and reflect the Australian Government security standards that are currently used across government.

Consistent with the requirements under section 17 of the *Legislation Act 2003*, the Regulations were developed in consultation with the AFP, which provided operational advice on the appropriate clearances to be prescribed.

The Office of Impact Analysis has been consulted (OIA Reference: OIA23-06258) in relation to the amendments and has advised that an Impact Analysis is not required.

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 A**

Details of the Regulations are set out at **Attachment B**.

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

Statement of Compatibility with Human Rights

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

Witness Protection Amendment (Eligible National Security Clearance) Regulations 2024

The *Witness Protection Amendment (Eligible National Security Clearance) Regulations 2024* (the Regulations) are 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 Regulations

The Regulations amend the *Witness Protection Regulations 2018* (the Principal Regulations) by prescribing the relevant security clearances in order to give effect to the definition of ‘eligible national security clearance’ in the *Witness Protection Act 1994* (the Act), which was introduced by Part 3 of Schedule 9 of the *Crimes and Other Legislation Amendment (Omnibus) Act 2023*.

Human rights implications

The Regulations engage, directly or indirectly, the following human rights:

- the right to security of the person and freedom from arbitrary detention - subarticle 9(1) of the International Covenant on Civil and Political Rights (ICCPR)
- the right to life – subarticle 6(1) of the ICCPR
- the prohibition on interference with privacy and attacks on reputation – subarticle 17(1) of the ICCPR.

The purpose of the Act, and by extension, the Principal Regulations, is to provide the statutory basis for the National Witness Protection Program (NWPP). The NWPP provides protection and assistance to people who are assessed as being in danger because they have given, or have agreed to give, evidence or a statement on behalf of the Crown in criminal or certain other proceedings, or because of their relationship to such persons; or that for any other reason may require protection or assistance under the NWPP.

The Regulations promote subarticles 9(1) and 6(1) of the ICCPR by giving effect to the definition of ‘eligible national security clearance’ under section 3 of the Act. This ensures that the Act continues to contain the appropriate safeguards and measures needed to maintain the integrity of the NWPP and protect participants where there is a threat to their life or safety. By prescribing the relevant security clearances, the Regulations ensure that the persons with the appropriate security clearance can continue to undertake duties to provide protection and assistance to participants.

The Regulations also promote subarticle 17(1) of the ICCPR by ensuring that only persons with the appropriate security clearance can access sensitive information (such as a participant’s personal information or information about the operation of the NWPP). This requirement for persons to have the relevant security clearances ensures that only appropriately cleared officers may collect, handle, store and disclose a participant's personal information, thus ensuring a participant’s privacy.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights.

Details of the Witness Protection Amendment (Eligible National Security Clearance) Regulations 2024

Regulation 5A – “Meaning of eligible national security clearance”

Regulation 5A prescribes a security clearance at the following levels for the purposes of the definition of ‘eligible national security clearance’ in section 3 of the *Witness Protection Act 1994* (the Act):

- (a) Negative Vetting Level 1
- (b) Negative Vetting Level 2
- (c) Positive Vetting.

These security clearances align with those currently required for persons who undertake duties for the purpose of administering the National Witness Protection Program under the Act and reflect the levels of Australian Government security clearances that are currently used across government.