



21 May 2020

The Hon Peter Dutton MP
Minister for Home Affairs
Parliament House
CANBERRA ACT 2600

Via email: Peter.Dutton.MP@aph.gov.au

CC: dlo@homeaffairs.gov.au

Dear Minister,

Australian Crime Commission Establishment Regulations 2020 [F2020L00162]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice about this matter.

Availability of independent review

Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests.

Section 6 of the instrument permits the CEO of the Australian Criminal Intelligence Commission (ACIC) to vary or revoke a non-publication direction given by a hearing officer under the (former) *National Crime Authority Act 1984*. Subsection 6(3) provides that the CEO must not vary or revoke a direction 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.

The committee understands that it may be argued that decisions to vary or revoke a non-publication direction should not be subject to merits review, as they are decisions of a law enforcement nature. This accords with the Administrative Review Council guidance document, *What decisions should be subject to merit review?* (ARC Guide). In this respect, the committee understands that the relevant decisions would ordinarily be made in the course of carrying out an investigation, or to enable or assist a law enforcement or investigative body to carry out an investigation.

However, the ARC Guide also indicates that decisions relating directly to the security of a person should be subject to independent merits review. It appears to the committee that the relevant directions relate directly to the security of a person—noting in particular that the CEO must not vary or revoke a non-publication direction if this might prejudice

personal safety. This is despite the fact that the decisions also relate to law enforcement matters.

The committee notes that judicial review is available in relation to decisions to vary or revoke a non-publication order, and that the validity of a decision may be challenged if it breaches subsection 6(3) of the instrument. However, while noting that judicial review is an important safeguard, the committee does not consider judicial review to be an adequate substitute for independent merits review.

In this regard, it appears that subsection 6(3) would require the CEO to determine whether the variation or revocation of a direction might prejudice a person's safety, reputation, or right to a fair trial. If the CEO is satisfied—based on the available evidence—that a person's safety, reputation or right to fair trial would not be affected, it may be difficult for a court to challenge the validity of the CEO's decision on administrative law grounds. By contrast, merits review would permit an independent tribunal (or other person or body, if appropriate), to determine whether the CEO has made the *preferable* decision based on the available evidence.

The committee also appreciates the importance of ensuring that any review process does not unnecessarily expose sensitive law enforcement information. However, the committee notes that the Administrative Appeals Tribunal (AAT) may order that a hearing be held in private, and may issue orders for the non-publication or non-disclosure of information. Moreover, it may not be strictly necessary for independent review to be conducted by the AAT. For example, it may be possible for the ACIC to engage an independent reviewer to conduct the review process.

Finally, the committee notes that other Commonwealth laws allow persons and entities to vary or revoke directions relating to the confidentiality of information, without providing for independent merits review. However, the committee does not consider consistency with other legislation to be a sufficient justification for excluding independent merits review.

In light of the comments above, the committee requests your detailed advice as to the characteristics of a decision made under section 6 of the instrument, to vary or revoke a non-publication direction, which would justify excluding merits review. The committee's consideration of this matter would be assisted if your response would expressly identify established grounds for excluding merits review set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **4 June 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



**THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS**

Ref No: MS20-000997

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Concetta,
Dear Chair

Thank you for your letter of 21 May 2020 regarding the *Australian Crime Commission Establishment Regulations 2020* (the 2020 Regulations) and the power to vary or revoke non-publication directions under section 6 of the 2020 Regulations.

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) has requested further advice as to the characteristics of a decision made under section 6 of the 2020 Regulations which would justify excluding merits review under the Administrative Review Council's guidance document on merits review (ARC Guide). Please find additional information in response to the Committee's request below.

Background

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), the Australian Bureau of Criminal Intelligence and the Office of Strategic Crime Assessments with the Australian Crime Commission (ACC) (which is now known as the Australian Criminal Intelligence Commission (ACIC)). The Australian Crime Commission Establishment (Transitional Provisions) Regulations 2003 (the 2003 Regulations) were made shortly after the commencement of the ACCE Act and prescribed certain matters of a transitional nature, that were not provided for by the ACCE Act.

The 2003 Regulations, included among other things, the power for the Chief Executive Officer (CEO) of the ACC to vary or revoke a non-publication direction made under the NCA Act. This provision was included to ensure that a clear lawful basis existed for the CEO of the ACC to vary or revoke non-publication directions in force, as necessary, and with due consideration of the implications of the direction and any variation a direction upon affected persons, in the same way as the Chair of the NCA had previously done. The provisions in the 2003 Regulations also mirrored the manner in which non-publication directions were varied or revoked under the *Australian Crime Commission Act 2002* (ACC Act), ensuring consistency between NCA Act and ACC Act non-publication directions. Amendments to the ACC Act made in 2015 modified the rules applying to ACC Act non-publication directions, now called Examiner Confidentiality Directions, but retained the personal safety criterion.

The 2020 Regulations remade the power to vary or revoke a non-publication direction made under the NCA Act from the 2003 Regulations, which sunsetted on 1 April 2020. The 2020 Regulations did not create any new powers, but merely replaced the existing transitional provision which was due to sunset. This provision is also consistent with the power to vary or revoke a non-publication direction that was previously in place under the NCA Act and substantially consistent with the power to vary or revoke an Examiner Confidentiality Direction under the current ACC Act, all of which provided a discretion for the CEO to vary or revoke a non-publication direction in substantially the same circumstances, without a merits review process, for reasons given below.

Nature of non-publication directions

Section 6 of the 2020 Regulations enables the CEO of the ACC to vary or revoke a non-publication direction that was given by the NCA or a hearing officer under subsections 25(9) or 25A(12) of the NCA Act, and which was in force immediately before the commencement of the section.

A non-publication direction was 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 make 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 had been, or may be, charged with an offence. These directions prohibited the publication of evidence given at an NCA hearing and the publication of information, that may identify that a person has given, or may give, evidence at such a hearing.

Subsection 6(3) of the 2020 Regulations provides that the CEO must not vary or revoke a non-publication direction 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.

Committee concerns

I understand the Committee considers that given the CEO must not vary or revoke a non-publication direction if to do so might prejudice the safety of a person, these decisions relate directly to the security of a person and should therefore be subject to merits review. I can advise that the decision to vary or revoke a non-publication direction is not solely a decision that relates to the security of a person but is more importantly one of a law enforcement nature as referred to in the ARC Guide. Decisions to vary or revoke a non-publication direction ensure that the ACIC can continue to effectively fulfil its statutory functions in relation to conducting investigations or operations into serious and organised crime. The references in subsection 6(3) of the 2020 Regulations relating to the safety of a person are factors that the CEO must give consideration to when making the decision.

I note the Committee's reference to an example in the ARC Guide suggesting where a merits review would be appropriate, relates to a decision regarding a person being placed in a witness protection program as a basis for suggesting that a merits review may be appropriate for section 6 of the 2020 Regulations. I do not consider this example in the ARC Guide to be analogous to section 6 of the 2020 Regulations, as it is inherently and solely a decision about the security of a person, whereas the decision to vary or revoke a non-publication order is a decision about another matter that incidentally affects the security of a person. The decision would typically be made in the course of carrying out an investigation, or to enable or assist another law enforcement agency or investigative body in carrying out an investigation but may also be varied or revoked for other purposes, including for example Royal Commissions and coronial inquiries. For example, the CEO may decide to vary a non-publication direction to allow evidence given in a hearing to be disclosed to a police force for the purpose of furthering a criminal investigation by that police force. Accordingly, it was not previously, and would now not be, appropriate for such decisions to be subject to merits review as this would affect and could jeopardise current and future law enforcement investigations.

Many witnesses and targets from the NCA era are still alive, and in some cases are still active in criminal enterprises. As such, there have been instances in recent years where material from hearings has been relevant in investigations, Court proceedings or commissions of inquiry. If provision for merits review of such decisions was available, both the investigation of possible breaches and the subsequent enforcement of the law could be jeopardised as it would hinder the ACIC's ability to carry out its functions as a law enforcement and intelligence agency, and may inadvertently provide an avenue for persons to stall or potentially obstruct criminal investigations. Furthermore, notwithstanding the protections which are offered in some circumstances in administrative review processes (for example, the discretion of the Administrative Appeals Tribunal to order a hearing be held in private), the availability of merits review for these decisions could compromise the safety of some individuals as the review process itself may disclose the fact that individuals have been the subject of evidence at a hearing.

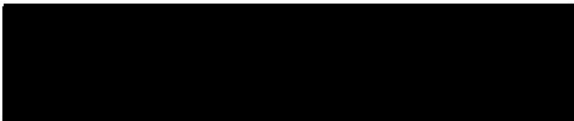
Given the highly sensitive nature of the information involved, it is appropriate to rely on the current mechanism in the 2020 Regulations for the protection of safety of individuals concerned, so as not to interfere with ongoing investigations. The existing structure, in which the CEO is prohibited by law from varying or revoking a non-publication direction where the personal safety of a person might be impacted, as well as the availability of judicial review, provides a more appropriate protection for personal safety in those cases where safety is an issue.

If the 2020 Regulations were amended to include provision for merits review in relation to a decision to vary or revoke a non-publication direction, this would create two significantly different regimes for the ACIC with regards to historical non-publication directions under the NCA Act and present day Examiner Confidentiality Directions under the ACC Act, despite the fact that they are in actual fact two legislative provisions for exercising what is for all intents and purposes, the same power.

If the 2020 Regulations were to be disallowed, the ACIC would no longer have a clear lawful basis to vary or revoke a non-publication direction made under the NCA Act, which would potentially prevent the disclosure of intelligence or evidence gained through hearings under the NCA Act for current or future investigations. This could mean that investigations and prosecutions of serious and organised crimes would be hampered, or at worst case, discontinued for lack of evidence.

I trust the above information is of assistance to the Committee. The relevant advisor in my office is Matt Stock, who can be contacted on 02 6277 7860.

Yours sincerely



PETER DUTTON

11/06/20



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

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27 August 2020

The Hon Peter Dutton MP
Minister for Home Affairs
Parliament House
CANBERRA ACT 2600

Via email: Peter.Dutton.MP@aph.gov.au

CC: dlo@homeaffairs.gov.au


Dear Minister,

Australian Crime Commission Establishment Regulations 2020 [F2020L00162]

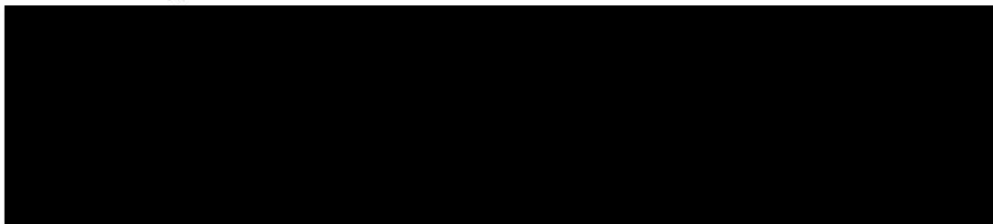
Thank you for your response of 11 June 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 26 August 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,



Senator ~~the~~ Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation