

# ***Forensic Disability Regulation 2022***

## **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*, I, the Honourable Craig Crawford MP, Minister for Seniors and Disability Services and Minister for Aboriginal and Torres Strait Islander Partnerships provide this human rights certificate with respect to the *Forensic Disability Regulation 2022* (the new Regulation) made under the *Forensic Disability Act 2011* (the FD Act).

In my opinion, the new Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

### **Overview of the Subordinate Legislation**

The objective of the new Regulation is to support the FD Act. The FD Act provides for the involuntary detention, care, support and protection of forensic disability clients. Forensic disability clients are persons on forensic orders (disability) who are placed in the forensic disability service.

The new Regulation replaces, with minor changes, the *Forensic Disability Regulation 2011* (the existing Regulation), which is due to expire on 31 August 2022 in accordance with the automatic expiry provisions under part 7 of the *Statutory Instruments Act 1992*.

The new Regulation prescribes the geographical location of the forensic disability service, and the details to be recorded in client records and the register for the use of regulated behaviour controls. The new Regulation remakes the existing Regulation substantially in its current form, with the omission of an unnecessary provision of the existing Regulation in order to reduce administrative burden and record duplication.

### **Human Rights Issues**

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

In my opinion, the human right relevant to the subordinate legislation is the right to privacy and reputation (section 25).

The new Regulation engages the right to privacy by prescribing the personal details that the forensic disability service must keep in the register for the use of regulated behaviour control (section 3 ‘Register of use of regulated behaviour controls’, made under section 74 of the FD Act), and requiring that the forensic disability service maintains records about forensic disability clients (section 5 ‘Records about forensic disability clients’, made under section 159 of the FD Act).

## **Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)**

### (a) the nature of the right

Every person has the right to their privacy, family, home and correspondence, which must not be unlawfully or arbitrarily interfered with. The scope of the right to privacy is very broad. It protects personal information and the collection of the information, including for data purposes. However, the right to privacy is subject to an internal limitation in that the right applies only to interferences with privacy that are ‘unlawful’ or ‘arbitrary’ (interferences that are unreasonable, unnecessary or disproportionate).

The right to privacy is limited as personal information about forensic disability clients is required to be collected pursuant to the provisions the new Regulation.

Section 3 of the new Regulation prescribes the information that must be kept in a register of the use of regulated behaviour controls. The details required to be included in the register include: the client’s name and date of birth; the type of regulated behaviour control required to be used; a description of the behaviour which resulted in the use of the regulated behaviour control; the reason for the use; and the name and position of the person who prescribed or authorised the regulated behaviour control.

Section 5 of the Regulation provides that the administrator of the forensic disability service must keep and maintain a record for each forensic disability client, and outlines the information that must be included in the record. Information required to be maintained includes: the client’s name and date of birth; the day the client became a forensic disability client; a photograph identifying the client; the client’s individual development plan; and any decisions or orders made by the tribunal or Mental Health Court.

### (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 purpose of the limitation to the right to privacy pursuant to section 3 is to ensure that sufficient information about the use of regulated behaviour controls is collected to ensure these controls are used transparently and accountably, and in accordance with the requirements of the FD Act. These requirements include that the control must only be used if considered necessary and the least restrictive way to protect the health and safety of clients and other persons, and in a way which aims to reduce or eliminate the use of regulated behaviour controls.

The purpose of the limitation to the right to privacy pursuant to section 5 is to support the involuntary detention, care, support and protection of forensic disability clients, while at the same time promoting their individual development and enhancing their opportunities for a quality life, and maximising their opportunities for reintegration into the community.

These limitations are consistent with the values of a free and democratic society.

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

The information required to be collected and maintained in a register for the use of regulated behaviour controls under section 3 of the new Regulation will help to ensure that, if regulated behaviour controls are used, appropriate and detailed records of the use is maintained, in order to ensure the controls are only used in accordance with the FD Act. This contributes to

protecting the health and safety of clients and other persons, reducing or eliminating the use of regulated behaviour controls, and ensuring use is transparent and accountable.

The information required to be collected and maintained under section 5 of the new Regulation is used to identify clients, and ensure they receive the appropriate treatment and care that is tailored for them. This promotes their individual development and maximises their opportunity for reintegration into society.

For these reasons, these limitations on the right to privacy directly contribute to achieving the purpose of safeguarding forensic disability clients' rights and ensuring appropriate care and supports are provided within the forensic disability service.

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

These limitations on the right to privacy are mitigated by the requirement for the forensic disability service to comply with the Information Privacy Principles. These Principles include specific limits on the handling, use and disclosure of personal information, including requirements to ensure personal information is protected from loss, unauthorised access, use, modification or disclosure, and any other misuse.

Sections 3 and 5 of the new Regulation constitute safeguards that have been built into the FD Act in order to protect the human rights of forensic disability clients and the rights of other people. There are no less restrictive and reasonably available ways to achieve this purpose.

(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, taking into account the nature and extent of the limitation on the right to privacy, the purpose of protecting the rights and freedoms of forensic disability clients and other people outweighs the potential negative impact that the collection of the affected information has on the right to privacy of clients of the forensic disability service. For this reason, I consider that the right to privacy under section 25 of the Human Rights Act is not unreasonably, unnecessarily or disproportionately limited by sections 3 and 5 of the new Regulation, which are authorised by necessary powers under the FD Act to operate the forensic disability service.

(f) any other relevant factors

Not applicable.

## Conclusion

I consider that the *Forensic Disability Regulation 2022* is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom

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