

Status of Children 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, Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence provide this human rights certificate with respect to the *Status of Children Regulation 2022* made under the *Status of Children Act 1978*.

In my opinion, the *Status of Children Regulation 2022*, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019* (HR Act). I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

The *Status of Children Regulation 2022* (the Regulation) is made under section 32 of the *Status of Children Act 1978* (the Act). The Act provides for declarations of parentage required in certain circumstances, for example, to determine next of kin for the purpose of administering a deceased's estate, or for same sex couples seeking to establish legal parentage of their children born of donor arrangements for the purpose of amending the children's birth certificates.

The Regulation supports the operation of the Act by prescribing the requirements for carrying out parentage testing procedures and the preparation of parentage testing procedure reports, following a parentage testing order made by the Supreme Court. This procedure relates to applications for a declaration of parentage made to the Supreme Court and maintains consistency between other States and Territories, and the Commonwealth.

Human Rights Issues

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

The Regulation engages the following rights under the HR Act:

- taking part in public life (section 23);
- privacy and reputation (section 25); and
- protection of families and children (section 26).

Provisions in Divisions 2 to 4 of the Regulation interfere with the right to privacy due to the collection and use of personal information. Personal information is provided during the parentage testing procedure by way of:

- the deponent's affidavit, which also includes a photograph (clause 6);

- the collection and storage of blood and/or DNA samples (clauses 7 to 11); and
- the completion of the parentage testing procedure report that contains information on the results of the procedure (clause 14).

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

(a) the nature of the right

Taking part in public life (section 23)

Section 23 of the HR Act is based on Article 25 of the *International Covenant on Civil and Political Rights* (ICCPR). It protects the right of every Queenslanders to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives. This includes the right of eligible persons to have the opportunity, without discrimination, to vote and be elected at state and local government elections; and to have access, on general terms of equality, to the public service and to public office. Both components are relevant to the Regulation.

Taking part in public life essentially encompasses participation in the political decision-making process and contributing to the conduct of public affairs in the state. Participation occurs either through freely chosen representatives or directly, such as through voting, standing for public office, or being employed in the public service.

‘Eligible’ in the context of section 23 is an internal limitation which recognises there are exceptions on the right to participate in the political decision-making process in Queensland or to contribute to the conduct of public affairs in the state. For example, non-Queensland residents or children are not eligible to participate in the political decision-making process in Queensland and section 23 will therefore not be engaged for non-eligible individuals.

The Regulation engages and promotes section 23 by supporting the Act’s operation in creating legal certainty regarding the status of children. The Regulation prescribes the requirements for carrying out parentage testing procedures and the preparation of parentage testing procedure reports to facilitate the making of declarations of parentage following an order for parentage testing by the Supreme Court. In certain situations, establishing the legal status of a child through a declaration of parentage, following an order for parentage testing, allows the child to become an Australian citizen and to be issued an Australian passport. In turn, this will result in the child becoming eligible (when of age) to take part in public life by way of voting, standing for public office or being employed in the public service.

Privacy and reputation (section 25)

Section 25 is modelled on Article 17 of the ICCPR and includes the right to:

- (a) not have the person’s privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
- (b) not to have the person’s reputation unlawfully attacked.

Only the right to privacy under part (a) is interfered with by the Regulation under Divisions 2 to 4 through the collection, storage and testing of personal information (including blood and/or DNA), as well as by the preparation of parentage testing procedure reports.

Section 25(a) broadly protects an individual's privacy in terms of personal information, data collection and correspondence, as well as their private life more generally. The United Nations Human Rights Committee has said that the right to privacy imposes a positive obligation on states to protect this right, and to prevent and prohibit unlawful and arbitrary interferences, including from state authorities or from others.

Section 25(a) contains an internal limitation in that only lawful and non-arbitrary intrusions on the right to privacy can occur. Interferences provided for by law will not be unlawful. Arbitrariness in the context of the right to privacy is considered to be conduct that is capricious, unpredictable or unjust, or unreasonable in terms of not being proportionate to the aim. Importantly, interferences provided for by law can be arbitrary.

Protection of families and children (section 26)

Section 26 includes three rights that originate from Articles 23(1) and 24(1) of the ICCPR, all of which are relevant to the Regulation:

- (1) families are the fundamental group unit of society and are entitled to be protected by society and the state;
- (2) every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child; and
- (3) every person born in Queensland has the right to a name and to be registered having been born, under a law of the state as soon as practicable after being born.

At international law, this right recognises the family unit as a special institution that requires protection from both the state and society. A broad interpretation is to be applied to the term 'family' to include consideration of the various social and cultural groups in Queensland whose definition of family may differ.

Section 26(2) incorporates one of the fundamental principles of the *International Covenant on the Rights of the Child* that the best interests of the child should be the paramount consideration in all actions concerning children. It further recognises that all children have the same rights as adults but are entitled to additional protection by virtue of being children. This includes the duty of the State to protect children from interferences from the state and private parties, as well as to adopt positive measures for when children require special protection.

Section 26(3) specifically protects the right to a name and birth registration by requiring the state to ensure registration services are available.

The Regulation engages and promotes section 26 by facilitating the making of declarations of parentage under the Act through prescribing the requirements for carrying out parentage testing. Declarations of parentage create legal certainty on the status of children and their parents, allowing for recognition of the family unit and entitlement to protection of society and the state. Declarations of parentage may also be used to support an application to amend a birth record under the *Births, Deaths and Marriages Registration Act 2003* to correctly reflect the legal parentage of a child. Creating legal certainty for children and their parents that entitles them to protection from the state and society will also be in the best interests of the child.

(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

Privacy and reputation (section 25)

Carrying out parentage testing and preparing a parentage testing procedure report in accordance with the Regulation's requirements enables evidence of parentage to be provided to the Court's satisfaction for the purpose of making a declaration of parentage.

The purpose inherently involves interference with the right to privacy due to the collection and use of personal information by individuals ordered to undergo parentage testing. Parentage testing cannot be undertaken without the collection and use of personal information.

Personal information provided during a parentage testing procedure includes identifying information, such as a name and photograph, as well as blood and DNA for testing to determine parentage. The results of parentage testing are then included in a parentage testing procedure report and provided to the court.

The purpose is consistent with a free and democratic society based on human dignity, equality and freedom by facilitating the making of a declaration of parentage to create legal certainty regarding the status of children. This, in turn, supports the protection of individuals' human rights under sections 23 and 26 of the HR Act and the interests of individuals where legal parentage is an issue in proceedings that requires resolution by the Supreme court (for example, determining paternity to administer a deceased's estate).

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

Privacy and reputation (section 25)

When there is an issue in determining parentage which can only be resolved through genetic testing due to an absence of alternative evidence, this will necessarily involve the collection and use of personal information. The limitation on the right to privacy resulting from the collection and use of personal information when carrying out parentage testing is therefore essential in achieving the purpose.

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

Privacy and reputation (section 25)

There are no alternative ways to achieve the purpose. Parentage testing cannot be undertaken without limiting the right to privacy through the collection and use of personal information. While the limitation on the right to privacy is necessary to achieve the purpose, there are safeguards in place to ensure the limitation is not unlawful or arbitrary.

The limitation on the right to privacy through carrying out parentage testing in accordance with the Regulation's requirements is provided for under law through an order for parentage testing made by the Supreme Court under section 11 of the Act. The court will only make an order for parentage testing when there is no alternative evidence (e.g. a will or birth certificate) to satisfy presumptions of parentage in the Act to make a declaration of parentage. This only occurs in limited circumstances.

Even in circumstances where parentage testing has been ordered, the person who is the subject of the order can choose not to comply. Although it is open to the court to draw whatever inferences it considers appropriate for someone's failure to comply with any or all steps required to give effect to a parentage testing order, a person who fails to comply is not liable to any penalty for the contravention.

The Regulation also requires parentage testing to be carried out at laboratories operating under standards of practice that entitle them to be accredited by the National Association of Testing Authorities (NATA). This means that any accredited laboratory carrying out parentage testing in accordance with the Regulation's requirements must adhere to standards of practice that include specific privacy and confidentiality provisions on the management and release of information. This ensures the person's information is only used for the purpose of carrying out a parentage testing procedure and the preparation of a parentage testing procedure report to facilitate the making of a declaration of parentage.

The limitation on the right to privacy is therefore lawful and not arbitrary, by being necessary and proportionate to the purpose, and provided for under law.

(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

Privacy and reputation (section 25)

Despite the limitation on the right to privacy through carrying out parentage testing, the benefit of achieving the purpose is reaching resolution in proceedings where parentage is an issue that requires court intervention. The extent of the limitation is also constrained by safeguards so that parentage testing only occurs in limited circumstances and is done in accordance with privacy and confidentiality provisions in standards of practice under which laboratories operate.

On balance, the Regulation strikes an appropriate balance between the importance of its purpose and the importance of preserving the right to privacy.

(f) any other relevant factors

The Regulation maintains consistency between other Australian states and territories, as well as the federal family law jurisdiction, in the way parentage testing is carried out.

Additionally, the Regulation replaces the former Status of Children Regulation 2012.

Conclusion

I consider that the *Status of Children Regulation 2022* is compatible with the HR Act 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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