

Child Protection Regulation 2023

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, Craig Crawford, Minister for Child Safety and Minister for Seniors and Disability Services provide this human rights certificate with respect to the *Child Protection Regulation 2023* (the Regulation) made under the *Child Protection Act 1999*.

In my opinion, the *Child Protection Regulation 2023*, 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 *Child Protection Act 1999* (the Act) provides for the protection of children in Queensland; promotes the safety of children; and to the extent that it is appropriate, supports families caring for children. The Act is administered under the principle that the safety, wellbeing and best interests of a child, both through childhood and for the rest of the child's life, is paramount. The Act also provides general principles for making decisions relating to the safety, wellbeing and best interests of children.

The Act further requires active efforts be made to apply the Aboriginal and Torres Strait Islander Child Placement Principle when making a significant decision about an Aboriginal or Torres Strait Islander child, with the recent amendments to the Act by the *Child Protection Reform and Other Legislation Amendment Act 2022* (CPROLA Act). These amendments set a clear standard for the application of the Aboriginal and Torres Strait Islander Child Placement Principle in significant decision-making by the chief executive (Child Safety), litigation director and an authorised officer under the Act, thereby strengthening the rights recognised by the principle and supporting transparent and accountable processes.

The Regulation provides practical detail for administrative decision making and operational processes to support the administration of the Act, including:

- information to be included in mandatory reports;
- information to be included in placement agreements for children in care;
- matters to be considered before telling a child's parents where and with whom a child has been placed;
- matters about the licensing of care services, including independent evaluations, procedures for reporting standards of care concerns and record keeping;
- prescribed entities for information sharing;
- matters for consideration when deciding whether to give approval for information about a child to be published;
- corresponding child welfare laws of other States;
- particular records that must be kept by the chief executive;

- matters for consideration when deciding if a person is a ‘suitable person’ to: have custody or guardianship of a child; be a foster, kinship or provisionally approved carer; associate on a daily basis with a child; or perform a particular role (director, nominee or risk-assessed role) in relation to a licensed care service.

The Regulation is being made to replace the expiring *Child Protection Regulation 2011* (the 2011 Regulation). The 2011 Regulation was due to expire on 1 September 2022; however, was extended for one year under section 56A of the *Statutory Instruments Act 1992*, as approved by the Governor in Council on 25 August 2022.

Before a regulation is remade, the administering department is required to undertake a sunset review. The outcome of the sunset review undertaken by the Department of Child Safety, Seniors and Disability Services (the department) was that there is an ongoing need for the Regulation; it is operating efficiently and effectively; and that amendments were required to improve clarity and consistency with the Act.

The sunset review also provided an opportunity to make improvements to the Regulation to better align with recent reforms. These include opportunities to further embed the connection principle of the Aboriginal and Torres Strait Islander Child Placement Principle; to better align considerations of violence with modern understandings of violence to align with the *Domestic and Family Violence Act 2012*; and to modernise language relating to sex, gender identity and diversity to align with the *Births, Deaths and Marriages Registration Act 2023*.

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 rights under the HR Act that are relevant to the Regulation are:

- Recognition and equality before the law (section 15)
- Privacy and reputation (section 25)
- Protection of families and children (section 26)
- Cultural rights (generally) (section 27)
- Cultural rights (Aboriginal peoples and Torres Strait Islander peoples) (section 28)

The nature and scope of these rights are considered below, along with considerations of how each right may be promoted or limited by the Regulation.

Consideration of human rights promoted

For the reasons outlined below, I am of the view that the Regulation protects and promotes the following human rights:

Protection of Families and Children

Section 26 of the HR Act provides the right to the protection of families and children, recognising that families are the fundamental group unit of society and entitles families to protection by society and the State. The meaning of families under the HR Act is broad and

recognises that the term ‘family’ is understood broadly in international law, extending to different cultural understandings of family and small family units with or without children.

The right also protects the right of every child, without discrimination, to the protection that is needed by the child and is in the child’s best interests. This right recognises the special protection that must be afforded to children based on their particular vulnerability. The right requires the State to take into account the best interests of the child as the primary consideration in all actions affecting a child (Convention on the Rights of the Child, GA Res 44/25 (2 September 1990) art 3(1)).

The Regulation promotes the rights of children by:

- ensuring mandatory reports about reasonable suspicions of significant harm to a child contain the information necessary to assess the report (section 4);
- ensuring that placement agreements made under section 84 of the Act support the safety, wellbeing and best interests of children, including providing for the child’s cultural needs (section 5);
- ensuring matters relevant to safety are considered before a parent is told where and with whom their child has been placed under the chief executive’s custody or guardianship (section 6);
- protecting children by maintaining Queensland’s legislative framework for a carers’ register in line with recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) (Part 4, Division 2);
- supporting licensees to provide care services to children which meet the standards of care in the statement of standards by detailing requirements for the licensing, operation and record keeping of licensed of care services, and ensuring that there are procedures in place to report concerns about the standards of care not being met (sections 7-8, 28-31);
- supporting accountability and the safety of children by detailing the records that must be kept by the chief executive (section 32);
- protecting the safety and privacy of children by detailing matters to be considered by the chief executive before approving the publication of confidential information (section 14); and
- protecting the safety of children by providing the requirements for a person to be considered a ‘suitable person’ under Schedule 3 of the Act (Part 8).

Right to privacy and reputation

Section 25 of the HR Act recognises that a person has the right not to have the person’s privacy, family, home or correspondence unlawfully or arbitrarily interfered with, and not to have their reputation unlawfully attacked.

Section 189 of the Act prohibits the publication of information which identifies, or is likely to lead to the identification of, certain children such as those under the chief executive’s custody or guardianship, without the written approval of the chief executive. This protects the privacy of children by ensuring their personal and identifying information is not routinely published.

The Regulation further protects children’s right to privacy by detailing matters which the chief executive may have regard to when deciding whether to give an approval to publish

information about a child. The matters include, for example, the views of the child and the child's parents, and the likely effect of the publication on the child, now or in the future.

Providing for these matters to be considered promotes the rights of the child, and their best interests, by protecting them from any harm that could come to them from the publication of information that would identify them as being involved with the department.

Cultural Rights (Generally) and Cultural Rights (Aboriginal peoples and Torres Strait Islander peoples)

Section 27 of the HR Act recognises that all persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language.

Section 28 of the HR Act recognises the distinct cultural rights held by Aboriginal peoples and Torres Strait Islander peoples. This protects their distinct cultural rights as Australia's first peoples to enjoy, maintain, control, protect and develop their identity and cultural heritage. It further protects the rights of Aboriginal and Torres Strait Islander peoples to use their language and enjoy their kinship ties, without being subjected to forced assimilation or destruction of their culture.

The Regulation promotes the right by:

- Including, in the terms for an agreement entered into between the chief executive and an approved carer for the care of a child in the custody or guardianship of the chief executive (placement agreement), a new requirement to include arrangements to ensure the child's connection to culture and, for Aboriginal and Torres Strait Islander children, arrangements for ensuring their connection to family, community, culture, traditions and language.
- Prescribing in the information that a licensee must keep/ record about a child receiving their care services, a new requirement to record the culture of the child.

Addressing ethnicity and culture in a child's placement agreement will promote the right to culture generally and the cultural rights of Aboriginal people and Torres Strait Islander peoples by ensuring that, in making these agreements, consideration is given to how to best meet the child's cultural needs.

The specific cultural rights of Aboriginal and Torres Strait Islander children are further protected by ensuring placement agreements contain arrangements for ensuring the child is supported to develop and maintain a connection with the child's family, community, language and tradition (for an Aboriginal child) or custom (for a Torres Strait Islander child). This reflects and further embeds the connection principle within the Aboriginal and Torres Strait Islander Child Placement Principle (section 5C(2)(e) of the Act).

Including culture in records that must be kept by licensees will ensure that the importance of culture is reflected in the records required to be kept. This will ensure that both the licensee and relevant child will have a record of their cultural identity, and aims to support the provision of care services to children in a culturally safe and appropriate manner.

Recognition and equality before the law

I have also considered whether, in the context of recording the culture of origin of children receiving care services and detailing arrangements for meeting a child's cultural needs in placement agreements, the right to recognition and equality before the law has been limited. In my opinion, the right has been engaged, but not limited in this context for the reasons outlined below.

Section 15 of the HR Act provides the right to recognition and equality before the law. The HR Act recognises that every person has a right to recognition as a person before the law; is equal before the law and is entitled to the equal protection of the law without discrimination; has the right to equal and effective protection against discrimination; and that measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

It may be considered that including cultural arrangements for children in placement agreements, with additional requirements for cultural arrangements for Aboriginal and Torres Strait Islander children, could limit the right to equality before the law by resulting in the different treatment of children depending on their cultural background. However, the HR Act is clear that such measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

There is a disproportionate representation of Aboriginal and Torres Strait Islander children involved in the child protection system. *Our Way: A generational strategy for Aboriginal and Torres Strait Islander children and families* recognises the majority of Aboriginal and Torres Strait Islander children live safely at home and have developed a clear identity linked to their communities and culture. However, Aboriginal and Torres Strait Islander children in Queensland continue to experience disadvantage and poorer life outcomes and much higher rates than other Queenslanders. *Our Way* aims to eliminate the disproportionate representation of Aboriginal and Torres Strait Islander children in the child protection system by 2037. *Our Way* outlines a vision that all Aboriginal and Torres Strait Islander children and young people in Queensland grow up safe and cared for in family, community and culture.. It is important that the regulatory framework supports this vision.

The safety, wellbeing and best interests of Aboriginal and Torres Strait Islander children in care are protected when they remain connected to family, community, culture, traditions and language. Consistent with the connection principle, supporting the cultural needs of an Aboriginal child or Torres Strait Islander child through their placement agreement is particularly important when the child is in the care of a person who is not an Aboriginal or Torres Strait Islander person. These provisions acknowledge the importance of culture, and reflect that it is imperative that Aboriginal and Torres Strait Islander children are connected to family, community, culture and kin from initial discussions and agreement about placement and during any involvement with a licensed care service.

Ensuring that culture is recorded by licensees for children receiving services from a licensed care service will also enable the service to provide more culturally appropriate and culturally safe services for an Aboriginal and/or Torres Strait Islander child, and will enable the child to have a better understanding of their cultural identity.

For the reasons above, I consider that sections in the Regulation concerning recording cultural information and arrangements for meeting a child's cultural needs, including for an Aboriginal or Torres Strait Islander child, their connection to family, community, culture, traditions and language, do not limit the right to recognition and equality before the law. In my opinion, these provisions do not constitute discrimination because they are positive measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination.

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

In my opinion, the Regulation limits the following human rights:

- Recognition and equality before the law (section 15)
- Privacy and reputation (section 25)
- Protection of families and children (section 26)

Recording and sharing information about children and families

(a) the nature of the right

Right to privacy and reputation

As noted above, Section 25 of the HR Act recognises that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with, and not to have their reputation unlawfully attacked. In the human rights context, 'arbitrarily' refers to interferences which are 'capricious, unpredictable or unjust, or unreasonable to the extent of not being proportionate to a legitimate aim that is sought'.¹

The Regulation limits the rights of families and children to privacy and reputation by prescribing information to be collected about a child and their family to support the requirements of the Act, including information:

- included in a mandatory report or report about a child in care or another child to be provided to the chief executive (section 4);
- relating to a child's needs (e.g. behavioural, medical, cultural) in placement agreements (section 5);
- from the department in which the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* are administered, as a prescribed entity (section 13);
- kept on a carers register (i.e., register of applicants, authority holders and former authority holders) (Part 4, Division 2);
- provided to licensees as required by a procedure to facilitate reporting of standards of care concerns by staff members (section 28);
- kept in records by licensees, provided to the chief executive by a licensee, and kept or inspected by the chief executive (sections 29-32);
- collected by the chief executive in the process of keeping records (section 32).

¹ *P J B v Melbourne Health & Ors (Patrick's Case)* [2011] VSC 327 [85].

The Regulation also includes a reference to keeping records which include information about the ‘sex descriptor’ of a child (section 4 and 29). This may limit a child’s right to privacy if a child has not disclosed their preferred sex descriptor (gender identity) and that has been recorded, reported on, or provided to a person, in the course of performing their functions, to identify the child or young person, rather than sex assigned at birth.

Right to the protection of families and children

The nature and scope of the right to the protection of families and children is outlined above. The right protects families and children from non-interference, and guarantees institutional protection of the family and positive measures for the protection of children, by society and the State.

The right to the protection of families and children is limited by the recording of information about children and families, which may be relied upon as a basis for certain action, intervention or interference with a family for the purpose of protecting the safety, wellbeing and best interests of a child. Conversely, and as discussed below, the rights of children are protected by the collection of information which is necessary to protect their safety, wellbeing and best interests.

(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 collecting prescribed information and maintaining records relating to a child is to protect the safety, wellbeing and interests of an individual child or children in care. This purpose ensures that the department and licensed care services, in making decisions under the Act, have required information for decision making about the child that will lead to the best possible outcome for the child in care. In particular, the purpose of the limitation is to collect or provide prescribed information in order to:

- assist to identify parties related to a report made under section 13G of the Act, to contact the child, and to provide information that the department needs to assess the report (section 4);
- enable a carer to support and facilitate arrangements to meet a child’s individual needs while they are placed in their care, as noted in placement agreements (section 5);
- ensure the protection of children through maintain Queensland’s legislative framework for a carers’ registers in line with recommendations of the Royal Commission (Part 4, Division 2);
- record a child’s ‘sex descriptor’, where identified by a notifier or the child, to assist the department with undertaking investigations following reports made that a child is at risk of suffering harm, and to support appropriate service provision for a child in care (sections 4 and 29);
- enable information sharing between the department and the department in which the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* are administered to in line with Chapter 5A, Part 4 of the Act (section 13);
- facilitate reporting of standards of care concerns by staff members of the licensee where the standards of care are not being met for a child receiving care services in line with the required procedure (section 28);

- identify children and young people in care and receiving services from licenced care services, to assist with their care by ensuring there is a record for the child or young person of the care they received (section 29);
- assist with the department’s inspections and monitoring of licensed care services to ensure the licensee is meeting the standards of care (sections 30-31);

It is considered that the purpose of the limitation on the right to privacy and reputation, made by provisions for recording information and maintaining records, is consistent with the right to protection of children (protected under section 26 of the HR Act) where the purposes are consistent with a child’s best interests. It is also consistent with the right to security of person (section 29 of the HR Act) in ensuring a child’s physical and mental integrity is protected. These purposes are consistent with a free and democratic society based on human dignity, equality and freedom.

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

The limitations on the right to privacy and reputation and the protection of families and children help to achieve the purpose of protecting the safety, wellbeing and interests of an individual child or children in care by:

- ensuring the department has all relevant and necessary information to assess a report from a notifier who has formed a reasonable suspicion that a child is being harmed. (section 4);
- ensuring a carer can provide appropriate care and support for a child’s special needs while in the child is in their care (section 5);
- enabling a child’s sex and gender identity to be considered to support appropriate service provision and support for a child in care, and to support investigations following reports made to the chief executive that a child is at risk of suffering harm (section 4 and 29);
- ensuring that the department and prescribed entities under section 13 of the Regulation can share information necessary to respond to a child’s needs;
- allowing the department to monitor a licensed care service to ensure that the licensee and licensed care services are continuing to meet the standards of care by requiring them to collect and maintain records about children in their care or receiving care services;
- ensuring that the necessary information is kept on the carers register relating to applicants, authority holders and former authority holders in line with Royal Commission recommendations (recommendation 8.17);
- ensuring licensees provide clear advice via a procedure for staff members to support reporting of care concerns as it relates to a child receiving care services, in line with the licensee’s obligations under section 129A of the Act (section 28);

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

There are no less restrictive or reasonably available ways to achieve the purpose identified above. It is necessary for information concerning parties involved in the child protection system (e.g., children, parents, carers, licensees, etc) to be recorded and kept in a way which enables the protection of children.

Safeguards are in place to minimise the limitation on the right. Existing provisions under the Act will apply to protect the confidentiality of information collected under the Regulation. For example, Chapter 6, Part 6 of the Act restricts the disclosure of a person's information collected in accordance with the Act except to authorised persons. Further, section 189 of the Act prohibits the publication of identifying information for certain children without written approval.

(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

The Regulation promotes the right to protection of children and the right to liberty and security of person, which also outweighs potential limitations on the right to privacy and reputation and the right to protection of families. These limitations are further mitigated by safeguards in place under Chapter 6, Part 6 of the Act which restrict the disclosure of information.

On balance, it is considered the benefit of collecting, sharing and maintaining information about a child or their family, to protect the safety, wellbeing and interests of an individual child or children in care, outweighs potential limitations on the right to privacy and reputation and the protection of families and children.

Overall, any limitations on the right to privacy and the protection of families and children are reasonable and demonstrably justifiable under section 13 of the HR Act.

(f) any other relevant factors

Nil.

Matters to consider before telling or notifying parents

(a) the nature of the right

Protection of families and children

As discussed above, the right to the protection of families and children, recognises that:

- families are the fundamental group unit of society and entitles families to protection by society and the State.
- 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.

The Act provides that when a child is placed in care under an assessment order or child protection order granting custody or guardianship to the chief executive, the chief executive is required to tell the child's parents who the child is placed with and where they are living. If the chief executive considers doing so would constitute a significant risk to the safety of the child or anyone else with whom the child is living, it is not necessary to tell the child's parents who the child is placed with and where they are living. The Regulation provides matters the chief executive must consider when making this decision under section 6.

The matters prescribed for consideration include, for example, whether a relevant person for a child (i.e. a parent of the child, a spouse of a parent of the child, or another person closely associated with a parent of the child) has a history of violence or threatening behaviour towards

to the child or is likely to attempt to remove the child from the chief executive's custody or guardianship. The Regulation now provides additional breadth in the matters to be considered when determining whether to disclose in whose care a child is placed and where the child is living to their parents, by clarifying violence includes non-physical violence such as coercion.

In situations where, on consideration of the matters in this section, the chief executive reasonably suspects complying with the requirement could constitute a significant risk to the safety of the child or anyone else with whom the child is living, the chief executive does not have to comply with the requirement to notify the parent under section 85 and 86 of the Act.

This provision limits the right to protection of the family by allowing information about the location and care of a child is to be withheld from their parent in particular circumstances, thereby interfering with the family unit and the connection between the parent and the child. Expanding the definition of violence further widens the situations in which a decision to not notify the parent of their child's location may be made.

Privacy and reputation

The nature and scope of the right to privacy and reputation are detailed above. Relevantly, the right prohibits a public entity from unlawfully or arbitrarily interfering with a person's family. Withholding information about the location and care of a child, where the chief executive reasonably suspects that there is a significant risk to the safety of the child or anyone else with whom the child is living, limits this right by interfering with the connection of a parent and their child. Providing additional breadth in the matters to be considered when determining the risk to a child and their carer household's safety, by clarifying a contemporary approach to violence further limits this right by expanding what may be considered as violence.

(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 this limitation is to protect a relevant child, and anyone else with whom the child is living, from significant harm.

It is reasonable, necessary and proportionate to provide criteria for the chief executive's consideration of whether to notify the parents of who their child is placed with and where they are placed. This includes considerations of contemporary understandings of violence for determining whether a child, or anyone with whom the child is living, may be at significant risk of harm if the child's parent is told with whom the child is placed with and where they are living. Prescribing these matters is necessary in order to protect the child, their carers and other members of the carer's household.

The provision promotes the protection of families and children by ensuring safety matters are considered before telling a child's parent in whose care the child is placed and where the child is living. Further, the provision promotes the right to life, right to privacy and right to liberty and security of person of the child and people with whom they are living where there may be a significant risk to their safety. Protecting the safety of children in this way necessitates the ability to withhold location information in certain, limited circumstances. Providing such information could, in some instances, result in traumatic experiences for children where there is a significant risk to their safety or the safety of another person with whom they are living.

The limitation imposed on the rights to protection of families and children and the right to privacy by the provision is a purpose consistent with a free and democratic society based on human dignity, equality and freedom.

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

The limitation on the right to protection of families and children and the right to privacy achieves the purpose of the limitation by protecting a child who has been placed in care (and anyone else with whom the child is living) from significant risk of harm.

Under the Act, the child's safety, wellbeing and best interests are paramount. The Act provides for the protection of children and promotes the safety of children. Further, under the HR Act, every child has the right to protection that is needed by the child, and is in the child's best interests.

If the child's parents, a partner of the child's parent, or another person closely associated with the child's parent have a history of violence, threatening or intimidating behaviour, that may pose a significant risk to the child's safety. Enabling this information to be considered in deciding whether to tell a parent where and with whom their child is, achieves the necessary level of protection required for the department to effectively protect children.

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

There is no less restrictive or reasonably available way to achieve the purpose of this limitation: to protect children or people they are living with from significant risk of harm. As noted above, sections 85 and 86 operate as an obligation of the chief executive to notify a child's parents where and with whom a child is living. The matters prescribed in the Regulation facilitate the exception to this obligation, that the chief executive does not have to comply with the obligation if the chief executive reasonably suspects that doing so could constitute a significant risk to the safety of the child or anyone else with whom the child is living.

Limiting the matters to be considered by the chief executive in this context would reduce the effectiveness of the chief executive's assessment of significant risk of harm, and would therefore be less effective in achieving the purpose of the limitation. Considering histories of threats and violence, including both physical and non-physical violence, are relevant in determining significant risk of harm.

Additional clarification that the concept of violence, includes coercion contemporises and confirms the socially accepted understanding of violence, that includes non-physical violence particularly as a result of domestic and family violence. Including and clarifying considerations about violence in the matters prescribed in the Regulation, that the chief executive must consider in making the decision under the Act about whether to notify a parent about the placement of their child, is the least restrictive and only way 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, it is considered the need to ensure the chief executive considers all matters relevant to the safety of a child, or persons the child is living with, when considering whether there is a significant risk under section 85 and 86 of the Act, outweighs the limitations on the rights to the protection of families and children and to privacy. Clarifying a broader definition of violence for considerations as to whether to notify parents about where and with whom their child is placed is also considered to outweigh the above limitations.

Overall, any limitations on the right to protection of families and children are reasonable and demonstrably justifiable under section 13 of the HR Act.

(f) any other relevant factors

Nil.

Determining suitable persons

(a) the nature of the right

Right to recognition and equality before the law

As noted above, Section 15 of the HR Act provides the right to recognition and equality before the law. The HR Act recognises that every person has a right to recognition as a person before the law; is equal before the law and is entitled to the equal protection of the law without discrimination; has the right to equal and effective protection against discrimination.

Part 8 of the Regulation supports the system established in the Act for ensuring that people who are responsible for caring for, providing services to, or associating with children in the child protection system in a specific context meet certain requirements before they can be considered a 'suitable person'. Part 8 sets out separate requirements for persons to be considered suitable persons to:

- have custody or guardianship of a child (section 18);
- manage a licensed care service (section 19), be a director or an applicant for a licence or a licensee (section 20), be a nominee for a licence (section 21) or be a person performing risk-assessed role for licensed care service (section 22);
- be a foster carer, kinship carer or a provisionally approved carer (section 23-25); or
- associate on a daily basis with children or a particular child (section 26).

Although there are different requirements across these roles, the suitability requirements generally provide that a person is a suitable person where they:

- do not pose a risk to the child's safety;
- are able and willing to care for the child in a way that meets the standards of care;
- are able and willing to protect the child from harm;
- understand and are committed to the principles for administering the Act; and/or
- have completed any training reasonably required by the chief executive to ensure they are able to care properly for a child.

To assist in the determination of who is a suitable person, the Regulation also provides for consideration of 'other matters' including a person's employment history; the person's physical or mental health; and any other matter relevant to deciding whether the person is a suitable

person under Part 8. This limits the right to recognition and equality by the law by enabling an unrestricted scope of matters to be considered, potentially limiting opportunity and enabling discriminatory decision making.

Right to privacy and reputation

The nature and scope of the right to privacy and reputation is detailed above. The unlimited scope of matters which may be considered in determining whether a person is a suitable person limits the right to privacy by exposing an individual to the examination of their private life and personal details when being assessed.

Right to the protection of families and children

Section 24 provides the requirements for a person to be considered a suitable person to be an approved kinship carer for a child. As kinship carers are often family members of the children placed, or intended to be placed, in their care, the matters in this section limit the right to the protection of families and children by establishing barriers to the approval of kinship care arrangements. For example, a kinship carer who has not completed training reasonably required by the chief executive to ensure the person is able to care properly for a child may not be considered a suitable person to be a kinship carer for 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

The purpose of the limitations is to protect the safety, wellbeing and best interests of children in care or receiving care services by ensuring persons do not pose a risk to a child and, for foster and kinship carers, are able and willing to protect a child from harm. The purpose of the limitation is also to ensure they are provided care which meets the standards of care in the statement of standards. These purposes are reasonable, necessary and proportionate to allow the chief executive to consider matters including a person's employment history, the person's physical or mental health, and any other matter relevant in determining whether a person is a suitable person.

As noted above, every child has the right to protection that is needed by the child, and is in the child's best interests. This limitation is consistent with the right to liberty and security of person (protected under section 29 of the HR Act) and right to life (protected under section 16 of the HR Act) by ensuring suitable persons do not pose a risk of harm to the child. The limitations imposed on the above rights through the determination of whether a person is a 'suitable person' are for a purpose consistent with a free and democratic society based on human dignity, equality and freedom.

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

Providing for the chief executive to ensure a person has the characteristics, knowledge and skills to meet their responsibilities in the role for which they are being assessed, achieves the purpose of protecting the safety, wellbeing and best interests of children in care or receiving care services, and ensuring they are provided care which meets the standards of care in the statement of standards. The limitations on the above listed rights achieve this purpose by ensuring that only 'suitable persons' are given responsibilities for caring for, providing services

to, or working with, children in the child protection system, and that those persons are able to meet the needs and support the safety, wellbeing and best interests of children.

Depending on the specific and individual circumstances and needs of a child or children, a carer or care service provider may need to have a particular level of physical and mental health to meet the standards of care for that child. The purpose of considering these ‘other matters’ (section 27) is to explore if physical or mental health issues for the individual may prevent them from fulfilling their responsibilities as a carer or service provider, such as the daily care of the child and meeting the standards of care. In certain circumstances, it may be important to explore if there are health conditions that could impact on an individual’s ability to meet the physical and emotional demands of the role for which they are being assessed.

Further, if a person’s employment history is contrary to the requirements of the role (for example, if a person is applying to be a licensee without experience to undertake the role or if they have previous disciplinary information recorded from previous similar roles) they may not be considered suitable for that role.

Enabling the consideration of ‘any other matter relevant to deciding whether the person is a suitable person’ under Part 8 achieves the purpose of protecting the safety, wellbeing and best interests of children in care or receiving care services, and ensuring they are provided care which meets the standards of care in the statement of standards. The consideration of ‘other matters’ enables the department to consider whether certain information is relevant to a particular role, determine if it has an impact on an individual’s suitability for the role, and to seek feedback from the individual for departmental screening before determining their suitability. Importantly, this allows consideration of departmentally held child protection information relevant to the individual, and other information the department becomes aware of.

It is necessary for the protection of children and the provision of care that persons providing care or care services do not pose risks to the safety of children, and otherwise meet the requirements of being a suitable person. It is reasonable and necessary that a broad range of matters be able to be considered in making such assessments.

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

No less restrictive or reasonably available ways would achieve the same level of protection for children achieved through considering a broad range of factors in assessing the suitability of persons caring for or providing services to children. Matters which may result in a person being unsuitable to perform certain roles under the Act are broad and varied. It is important that the chief executive be enabled to consider all relevant factors, to ensure that the safety, wellbeing and best interests of children can be protected, and that the care or care services received by children meet the standards of care in the statement of standards (section 122 of the Act).

In practice, the process for determining suitability, and the information which may be considered relevant, varies depending on the relevant role. For example, the matters considered by the department when determining whether a person is a suitable person to be a foster or kinship carer will be different to the matters considered for a person to be a suitable person to be a nominee for a licence. Nevertheless, it is important that the department, and in some instances a court, can consider all matters relevant to suitability when making decisions about suitable persons. In general, information the department considers will impact a person’s

suitability for a role is raised with the person, and they are provided with a right of reply. Providing a right of reply concerning such matters reduces the impact of the limitations on rights identified above.

The continued application of the *Anti-discrimination Act 1991* prohibiting direct and indirect discrimination on the basis of attributes prescribed in that Act, including age and impairment, mitigates the limitation on the right to recognition and equality before the law in the assessment of suitability. This protection continues to apply, as do the protections contained in the HR Act.

(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

It is considered the overall benefit of providing for the chief executive to consider ‘other matters’ in determining a person’s suitability - protecting the safety, wellbeing and best interests of children in care or receiving care services, and ensuring they are provided care which meets the standards of care in the statement of standards - outweighs limitations on the right to recognition and equality before the law, particularly when the anti-discrimination legislative framework provides a safeguard. The section also promotes the rights to the protection of families and children and the right to life of the child.

Overall, any limitations on the rights to recognition and equality before the law, privacy, and the protection of families and children are reasonable and demonstrably justifiable under section 13 of the HR Act.

(f) any other relevant factors

Nil.

Procedure to facilitate the reporting of standards of care concerns

(a) the nature of the right

Right to privacy and reputation

The nature and scope of the right to privacy and reputation is outlined above. Relevantly, the right protects personal information and data collection and prohibits the unlawful or arbitrary interference with privacy. The protection against an attack on someone’s reputation is limited to unlawful attacks. This means attacks that are intentional and based on untrue allegations.

Importantly, the right contains an internal limitation, allowing lawful and non-arbitrary interference with a person’s privacy, family, home or correspondence and lawful attacks on a person’s reputation.

The Act requires that the chief executive must take reasonable steps to ensure a child placed in care is cared for in a way that meets the standards of care in the statement of standards (section 122). The Act also provides a system of licensing services, and approving individuals, to provide care for children in the chief executive’s custody or guardianship which meets the standards of care in the statement of standards. The chief executive can only grant a licence if satisfied that a care service provided complies with the statement of standards.

The Regulation supports licensees to meet their obligations to provide care services which meet the standards of care in the statement of standards, through provisions relating to procedures and record keeping. Section 28 of the Regulation requires a licensee to prepare a procedure for staff members to facilitate staff members to report 'standards of care concerns'. Standards of care concerns include concerns about harm the staff member becomes aware, or reasonably suspects, has been caused to a child being provided services, and concerns that care services being provided no longer meet the standards of care in the statement of standards.

The requirement for licensees to prepare and make staff members aware of such procedures limits the right to privacy and reputation by including allegations relating to harm or the provision of care which may involve a staff member of the licensed care service. Such instances would interfere with the privacy of the relevant staff member, may impact their employment status, and may unlawfully attack their reputation.

(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 on the right to privacy and reputation is to protect the safety, wellbeing and best interests of children receiving care services and to ensure such care services meet the standards of care in the statement of standards. This is a purpose consistent with the right to liberty and security of person (protected under section 29 of the HR Act) and right to life (protected under section 16 of the HR Act), where it may seek to protect a child from harm as a result of the standards of care not being met. This purpose is consistent with a free and democratic society based on human dignity, equality and freedom.

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

The limitation on licensee staff members' right to privacy and reputation helps to achieve the purpose of protecting the safety, wellbeing and best interests of children receiving care services and ensuring such services meet the standards of care in the statement of standards. Section 28 ensures procedures are in place which facilitate and encourage the reporting of standards of care concerns. That the licensee, and subsequently the chief executive, are made aware of such concerns is critical for the protection of children. Procedures under section 28 provide an additional avenue through which the department can be notified of reasonable suspicions of harm to children.

These procedures also safeguard the quality of licensed care services received provided to children in care. Encouraging staff members of licensees to report standards of care concerns supports the provision of quality care services, by notifying the department of circumstances where standards of care may not be being met by licensees, and enabling the department to work with licensees to ensure the standards of care are met. This process of accountability and transparency protects the safety, wellbeing and best interests of children by ensuring they receive services which are safe and of high quality.

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

There are no less restrictive and reasonably available ways to achieve the purpose of protecting the safety, wellbeing and best interests of children receiving care services and ensuring such services meet the standards of care in the statement of standards.

Departmental procedures for responding to standards of care concerns seek to provide procedural fairness for those involved with or subject to a concern. The Child Safety Practice Manual sets out procedures for responding to standards of care concerns, including how to involve and discuss a concern with a staff member of a licensee. When a standards of care concern is received, the department will conduct a standards of care review which will have an outcome of either ‘standards met’ or ‘standards not met’. For licensed care services, the outcome of standards of care reviews are provided to the manager or coordinator of the service, who is then responsible for advising the staff members identified in the review. If a party is not happy with the process or outcome of a review, they may make a complaint or seek a review of the process. These procedural safeguards reduce the impact of the limitation on the right to privacy.

As noted above, safeguards are in place to minimise the limitation on the right. Existing provisions under the Act will apply to protect the confidentiality of information collected under the Regulation. For example, Chapter 6, Part 6 of the Act restricts the disclosure of a person’s information collected in accordance with the Act except to authorised persons.

(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, it is considered the importance of protecting the safety, wellbeing and best interests of children receiving care services, and of encouraging the provision of care services which meet the standards of care in the statement of standards, outweighs the potential limitation on the right to privacy which may come from allegations being made through procedures established under section 28 that involve staff members.

Overall, any limitations on the right to privacy and reputation are reasonable and demonstrably justifiable under section 13 of the HR Act.

(f) any other relevant factors

Nil.

Conclusion

I consider that the *Child Protection Regulation 2023* is compatible with the *Human Rights Act 2019* because while it does limit human rights, the limitations are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

CRAIG CRAWFORD MP
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MINISTER FOR SENIORS AND DISABILITY SERVICES

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