

Gaming Machine (Facial Recognition Technology) and Other Legislation Amendment Regulation 2025

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* (HR Act), I, the Honourable Deb Frecklington MP, Attorney-General and Minister for Justice and Minister for Integrity provide this human rights certificate with respect to the *Gaming Machine (Facial Recognition Technology) and Other Legislation Amendment Regulation 2025* (Amendment Regulation) made under the *Gaming Machine Act 1991* (Gaming Machine Act) and *Liquor Act 1992* (Liquor Act).

In my opinion, the Amendment Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

The Amendment Regulation amends the *Gaming Machine Regulation 2002* (Gaming Machine Regulation) and the *Liquor Regulation 2002* (Liquor Regulation) to authorise licensees under the Gaming Machine Act and Liquor Act to use facial recognition technology (FRT) at the licensed premises, subject to requirements to safeguard human rights.

The authorisation operates as an exception to the requirements under the Australian Privacy Principles (APPs) contained in Schedule 1 of the *Privacy Act 1988* (Cth) (Privacy Act). The APPs apply to the collection of personal and sensitive information. Sensitive information is personal information that carries a higher level of protection and includes the biometric information used by FRT to identify individuals.

Under APP 3.3 a business is not permitted to collect sensitive information from an individual unless the individual has consented, and the information is reasonably necessary for the business's functions and activities. The Australian Privacy Commissioner has held that consent to the collection of sensitive information must be informed, voluntary, current and specific, and the individual must have capacity. Signage advising FRT is not sufficient to imply consent. The Commissioner also expressed the view that convenience and cost-saving alone do not meet the threshold for reasonable necessity.

As a result, licensed businesses using FRT for the detection of persons banned or excluded from the venue must obtain the direct and communicated consent of every patron that enters or re-enters the venue prior to the collection of their data by FRT. This is considered to render FRT unviable as a passive tool to assist licensees meet their harm minimisation obligations under relevant liquor and gaming legislation.

There are exceptions to APP 3.3 in APP 3.4. The effect of an exception in APP 3.4 is that the requirement to obtain consent or prove the information is reasonably necessary does not apply. One such exception is if the collection of sensitive information is required or authorised by an Australian law (including the law of a state) or a court or tribunal order.

The consent requirement preventing the practical use of FRT can therefore be addressed through a law that authorises the use of FRT by gaming and liquor licensees. To this effect, the Amendment Regulation inserts new section 28A in the Gaming Machine Regulation and new section 27B in the Liquor Regulation. Under the new provisions, licensees are expressly authorised to operate a FRT system at the licensed premises, for the purpose of identifying an excluded person to prevent them from entering the premises.

An excluded person, under the Gaming Machine Regulation authorisation, means a person who is subject to a self-exclusion order under section 261A of the Gaming Machine Act, or a person subject to an exclusion direction under section 261C of the Act. Exclusion directions are issued by the licensee if they reasonably believe a person is experiencing (or at risk of experiencing) gambling harm. Licensees have an obligation under section 261I of the Gaming Machine Act to stop excluded persons from entering or remaining on the licensed premises, or the gaming area, as they case may be.

For the Liquor Regulation authorisation, an excluded person means a person who is subject to a licensee ban, or a person subject to a banning order. Both terms are defined in the Liquor Act. Banning orders are issued under legislation administered by police or the courts (for example, a person may be banned from a venue as a bail condition). Licensees may ban a person for any reason, however frequently licensee bans are used to support the obligation to maintain a safe environment at the premises under section 142ZZB of the Liquor Act by prohibiting entry to violent or disruptive patrons.

Under new section 28A of the Gaming Machine Regulation and new section 27B of the Liquor Regulation, an FRT system may only be operated on the licensed premises if:

- the FRT system includes a function for the deletion of biometric information that does not identify an excluded person;
- the licensee is treated as an organisation under the Privacy Act and complies with that Act, including the Australian Privacy Principles in Schedule 1, in relation to the protection of personal information held in the FRT system;
- the licensee displays signage advising patrons FRT is in use at the premises;
- the information held by the FRT system is not used in connection with a loyalty or reward program for the venue, or to incentivise gambling or promote the consumption of liquor;
- the licensee does not keep or disclose personal information held by the FRT system if the license for the licensed premises ends under the Act.

These limitations are intended to balance personal privacy with the practical use of FRT in busy entertainment environments. The last three requirements are penalty provisions that attract a maximum penalty of 20 penalty units to encourage compliance.

Human Rights Issues

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

The Amendment Regulation engages the right to privacy and reputation under section 25 of the HR Act. An FRT system collects personal information and sensitive information about every person that enters a venue and compares it against a database of excluded or banned person to detect individuals that should not be allowed to enter the premises, for their own safety or for the safety of others. There are clear implications for individual privacy that are discussed in more detail below.

The authorisations introduced by the Amendment Regulation may also impact the right to freedom of movement protected under section 19 of the HR Act. A person may perceive their movement has been hindered if, based on identification by an FRT system, they are refused entry or asked to leave a venue. However, venues are private property and licensees may refuse entry to any person at any time under the right of withdrawal of licence. Accordingly, any impact on the right to freedom of movement arising from the authorisation is considered reasonable and demonstrably justifiable in accordance with common law.

Consideration of reasonable limitations on human rights (section 13 HR Act)

(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 right to privacy is subject to an internal limitation in that it applies only to interferences with privacy that are ‘unlawful’ or ‘arbitrary’, including interferences that are unreasonable, unnecessary or disproportionate. Further, the right to privacy can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The privacy impacts discussed in more detail below are not arbitrary or unlawful, noting the Privacy Act framework explicitly provides for exceptions to the application of APP 3.3 to be authorised by an Australian law.

(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 primary purpose of authorising FRT in the liquor and gaming context is to support compliance with obligations to exclude certain people from gaming venues and gaming areas and prohibit entry to persons subject to banning orders and licensee bans. These requirements are key to achieving the objects of the Gaming Machine Act and the Liquor Act to ensure the community as a whole benefits from the licensed activity, including by minimising potential harms and maintaining a safe environment.

The Amendment Regulation will authorise licensees to use FRT in accordance with the APPs, but its use will not be mandatory. It may be noted approximately 15 large venues licensed under the Gaming Machine Act are required under licence condition to use FRT to manage exclusions, demonstrating its value to the regulator and industry as a harm-minimisation tool.

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

FRT is an effective tool to identify individuals that should not be permitted to enter or remain on licensed premises under provisions of the Gaming Machine Act or Liquor Act, or under a withdrawal of licence at common law.

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

There are alternatives to FRT currently in use by licensees, including manually monitoring entry points and CCTV footage to identify excluded or banned persons. While these methods may be less restrictive as they do not necessarily involve the collection of sensitive information, they are still invasive in terms of individual privacy. They are also less effective at helping licensees comply with their obligations than FRT, especially when the person is not well known to venue staff, or if the venue is particularly busy. It may also be relevant that the authorisation does not mandate FRT across all venues, and not all licensees will adopt the technology. This means patrons will likely have an option to attend a venue without FRT if they object to its use.

(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 purpose of the proposed authorisation is to allow liquor and gaming licensees to use FRT for legitimate purposes without breaching the APPs. The authorisation is necessary because obtaining the communicated consent of each person is not practicable in the liquor and gaming context. It is not intended to permit licensees to use FRT for any purposes other than in support of existing obligations under the legislation that relate directly to harm minimisation and safety.

It is considered the authorisation to use FRT is justified by the harm minimisation objects of the Amendment Regulation. Safeguards are included to ensure the privacy impacts of FRT are minimised. Namely:

- requiring licensees that are not APP entities to opt in under section 6EA of the Privacy Act;
- requiring licensees to display prominent signage that FRT is in use at the premises to increase the likelihood patrons can make an informed decision about whether to enter the premises;
- ensuring the FRT system has the functionality to ensure the deletion of data that does not identify an excluded person;
- explicitly restricting the use of information collected by the FRT system for promotional purposes.

With these measures in place, it is considered the authorisation of FRT will strike an appropriate balance between the achievement of harm minimisation and safety aims and privacy protection. It should also be noted that the APPs continue to apply to all other aspects of the use of FRT and data collection, apart from the requirements in APP 3.3 relating to the collection of sensitive information including obtaining consent. As a result, licensees will (for example) be required to have publicly available privacy policies regarding how they use the information collected by FRT.

(f) any other relevant factors

Currently both the Gaming Machine Act and Regulation and the Liquor Act and Regulation do not address FRT in any way.

While the authorisation will not prescribe the premises that use FRT, it will provide a clear statement about the permissible use of FRT in liquor and gaming venues.

Aspects of the authorisation, such as a requirement for licensees to opt into the Privacy Act regardless of turnover, will improve privacy protections at some venues where FRT is in use, but the licensee is not currently regulated by the Privacy Act.

Conclusion

I consider that the Amendment Regulation is compatible with the HR Act. Though the Amendment Regulation does limit, restrict or interfere with a human right, the limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

DEB FRECKLINGTON MP
Attorney-General and Minister for Justice
Minister for Integrity

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