

Building and Other Legislation Amendment Bill 2022

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, the Honourable Mick de Brenni MP, Minister for Energy, Renewables and Hydrogen and Minister for Public Works and Procurement, make this statement of compatibility with respect to the Building and Other Legislation Amendment Bill 2022.

In my opinion, the Building and Other Legislation Amendment Bill 2022 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 Bill

Queensland's \$47 billion construction industry employs around 230,000 people and is integral to the state's economy, employment market and training apprenticeship programs. Amendments are needed to clarify and modernise Queensland's building and plumbing laws to assist in delivering Queensland's forward program of building reform, reflect the outcomes of recent court decisions and implement initiatives outlined in the Queensland Building Plan.

The Bill seeks to amend a range of Acts, including the:

- *Architects Act 2002* (Architects Act);
- *Building Act 1975* (Building Act);
- *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act);
- *Planning Act 2016* (Planning Act);
- *Plumbing and Drainage Act 2018* (PD Act);
- *Professional Engineers Act 2002* (PE Act);
- *Queensland Building and Construction Commission Act 1991* (QBCC Act).

The objectives of the Bill are to:

- support contemporary consumer expectations about efficiency of buildings through amendments to legislative provisions regarding:
 - 'ban the banners' – solar hot water systems and solar panels
 - expanded use of greywater
 - holding tanks for sewage and greywater
- enhance the efficacy and transparency of the regulatory framework through amendments to legislative provisions regarding:
 - head contractor licensing

- sharing information on investigation outcomes
- decision making
- improve the operation of building-related legislation through minor technical amendments.

Human Rights Issues

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

I have considered each of the rights protected by part 2 of the HR Act. In my opinion, the human rights that are relevant to the Bill are:

- Right to a fair hearing (section 31 of the HR Act);
- Right to equality before the law (section 15 of the HR Act);
- Right to privacy (section 25 of the HR Act).

Queensland Building and Construction Commission Act 1991

(a) the nature of the right

Right to a fair hearing

The right to a fair hearing affirms the right of all individuals to procedural fairness and natural justice when coming before a court or tribunal. It applies to both criminal and civil proceedings and guarantees that such matters must be heard and decided by a competent, impartial, and independent court or tribunal in a fair and public hearing, and that all judgments or decisions are publicly available. The right to a fair hearing is enshrined in section 31 of the HR Act and is a fundamental guarantee in relation to legal proceedings. Fair hearing rights are also contained in article 14 of the *International Covenant on Civil and Political Rights* (ICCPR).

What constitutes a ‘fair’ hearing depends on the facts of the case and requires the weighing of a number of public interest factors including the rights of the parties. Broadly, this right ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to the other party, and also embraces principles of unimpeded access to the courts, and a justice system that can be said to be operating in a way that is predictable to the parties. The concept of a fair hearing is concerned with matters of procedural fairness, rather than substantive fairness in relation to the merits of a particular decision.

One of the main tenets of the right to a fair hearing and procedural fairness ‘is that a statutory authority having power to affect the rights of a person is bound to hear [them] before exercising that power’.¹ Clause 61 of the Bill expands the power of QBCC to immediately suspend a licence without undertaking a show cause process, if it reasonably believes there is a real likelihood of serious harm or financial loss to a person. Currently, QBCC can only immediately suspend a QBCC licence if it reasonably believes there is a real likelihood that serious financial loss or other serious harm will happen to any of the following: other licensees, employees of other licensees, consumers, and suppliers of building materials or services. The absence of a

¹ *Kioa v West* (1985) 159 CLR 550, 563.

show cause process does not provide the QBCC licensee with a reasonable opportunity to respond to QBCC's decision and show cause as to why their licence should not be suspended.

Right to privacy

The right to privacy protects individuals against unlawful or arbitrary interference with their privacy, family, home, or correspondence (written or verbal). Privacy is generally understood to comprise of freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by the law, while the concept of arbitrariness extends to interferences that may be lawful but are capricious, unpredictable, unreasonable, and disproportionate.

Clause 60 of the Bill will limit the right to privacy by expanding QBCC's ability to enter an information-sharing arrangement under section 28B of the QBCC Act to include Queensland statutory bodies. An information-sharing arrangement authorises QBCC to ask for and receive information held by another agency, as well as disclose information to the other agency. A person's privacy may be interfered with to the extent that information shared between agencies includes personal information.

Clause 65 of the Bill will limit the right to privacy of both licensed and unlicensed persons, as it clarifies that the QBCC Commissioner may disclose the result of an investigation to the complainant without the respondent's consent. However, the proposal is considered to primarily limit the right of respondents not in possession of a QBCC licence, as certain information relating to QBCC licensees, for example information about any licence cancellation or suspension, or directions to rectify building work or remedy consequential damage, is already required to be published on the licensee register under section 99 of the QBCC Act to support consumers undertaking due diligence before engaging a contractor.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Right to a fair hearing

The purpose of the limitations on the right to a fair hearing is to promote public safety and consumer protection by expanding the power of QBCC to immediately suspend a licence, so that it can effectively respond to risks of serious harm or financial loss to a person, which is broader than the present provision that only relates to licensees, their employees, consumers, and suppliers.

Right to privacy – Clause 60 (information sharing with Queensland statutory bodies)

The purpose of the limitation on the right to privacy contained in clause 60 is to help QBCC perform its functions in relation to ensuring the maintenance of proper standards in the industry and integrity of industry participants. The facilitation of information-sharing with relevant agencies will ensure QBCC can effectively perform its role as a regulator and effectively identify and address offending behaviour.

Right to privacy – Clause 65 (disclosing outcome of complaint to complainant)

The purpose of the limitation on the right to privacy contained in clause 65 is to reduce the regulatory burden imposed on QBCC and allow complainants, particularly those directly affected by a subject matter, to access the outcome of their investigation without undergoing the Right to Information (RTI) process. The RTI process is intended to be a method of last resort, with a preference for government to provide information administratively to avoid the need and potential cost of a formal method of access. It is considered that complainants should not need to use the RTI process to simply find out the result of their complaint, particularly when the outcome is directly relevant to the complainant, for example, alleged safety matters involving structural building work elements in the complainant's home. Other government agencies, including local governments, are required to provide complainants with information relating to the outcome of complaints, and it is considered that this should also apply to QBCC.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Right to a fair hearing

The limitation on the right to a fair hearing will achieve its purpose of promoting public safety and consumer protection, by equipping QBCC with the power to immediately suspend a licence when it reasonably believes there is a real likelihood that there is a risk of serious harm or financial loss to a person. As the suspension is not subject to a show cause process in these circumstances, QBCC will be able to immediately halt building work and ensure the potential harm to any persons will not ensue. There is a show cause process required before the immediate suspension may become permanent, which provides a licensee with the ability to provide written representations and a right of review if they wish to challenge the decision.

Right to privacy – Clause 60 (information sharing with Queensland statutory bodies)

The limitation on the right to privacy will achieve its purpose of facilitating information-sharing with relevant agencies, by clarifying that a Queensland statutory body is a 'relevant agency' for the purpose of the information-sharing arrangement. This will assist in the collection of information and evidence about possible offending behaviour.

The QBCC Act provides strict eligibility criteria for licensees, aimed at protecting consumers, the community and subcontractors from unscrupulous or substandard operators. Oversight of a person's commercial or other dealings, for example, previous registration and disciplinary history with another statutory body such as QLeave or the Board of Professional Engineers of Queensland, provided through timely information-sharing, ensures QBCC can effectively administer the licensing requirements. Further, it enables more efficient and effective performance of investigation, compliance and enforcement activities, such as when a number of practitioners have contributed to building work that is the subject of a defect complaint.

Right to privacy – Clause 65 (disclosing outcome of complaint to complainant)

The limitation on the right to privacy will achieve its purpose of reducing the administrative burden imposed on both consumers and QBCC, by clarifying that the QBCC Commissioner may disclose the outcome of an investigation to a complainant once the investigation and any

relevant internal review, is concluded. This is anticipated to reduce the number of RTI requests received and processed by QBCC and streamline complaint outcome processes.

Complainants may seek information regarding their complaint for a variety of reasons. For example, the outcome of QBCC's investigation may directly impact the complainant's decision to pursue the matter in court. The current application of section 110 restrains the ability of QBCC to provide information regarding the outcome of a complaint to complainants, leaving the RTI process as the only means for complainants to obtain the information sought. The RTI process is subject to a monetary fee and is intended to be a method of last resort.

The limitation will achieve the purpose by ensuring complainants will no longer be required to lodge an application under the *Right to Information Act 2009* (RTI Act) to obtain the outcome of their complaint and QBCC will not be subject to an additional regulatory burden.

It is also important to note that the limitation has been targeted to achieve the amendment's purpose. While the *Information Privacy Act 2009* (IPA), allows personal information to be disclosed if it is 'authorised or required under a law' (such as the proposed new section), only information that is necessary to disclose the 'result of the investigation' may be disclosed. All other personal information about a respondent will remain subject to the Information Privacy Principles set out under the IPA, including non-disclosure. Similarly, the other information privacy principles, such as those relating the collection, storage, security and use of personal information, will continue to apply.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

Right to a fair hearing

Retaining the current legal framework is the only alternative to expanding QBCC's power to immediately suspend licences in response to risks of serious harm or financial loss to a person. This option would promote the licensee's right to a fair hearing, but create substantial, potential negative consequences to members of the public as QBCC will not be able to immediately respond to risks adversely impacting a person, including public safety and consumer protection issues, unless those issues also affect an already listed class of person. QBCC would instead need to rely on its other regulatory powers, which are predominately subject to a show cause process or, in the case of issuing a direction to rectify, not fit-for-purpose.

The expansion of power under the Bill is considered to appropriately balance the right to a fair hearing against the protection of public safety to all persons in a manner that is less restrictive, as the Bill includes a range of safeguards to ensure the powers of QBCC are not misused. For example, QBCC's operational processes require an established evidence base and application of an existing high threshold of "a real likelihood that serious financial loss or other serious harm will happen" to a person when deciding whether to suspend a licence. There are also existing avenues to seek a review of the suspension of a licence, including the ability to seek redress through the Queensland Civil and Administrative Tribunal to contest decisions and potentially pursue damages. Furthermore, the delegation to exercise this power rests exclusively with the Chief Executive Officer/Commissioner of QBCC, mitigating the risk of potential misuse.

Therefore, expanding QBCC's power is the preferred option as it is the only option that delivers the Government's objective of enhanced public safety and consumer protection to all persons by allowing QBCC to take immediate, effective action in response to identified risks, while also introducing only a minor additional burden on industry.

Right to privacy – Clause 60 (information sharing with Queensland statutory bodies)

Retaining the current legal framework is the only alternative to expanding QBCC's information-sharing arrangements to include Queensland statutory bodies. While this option will promote a person's right to privacy to the extent that the information shared between the relevant agencies involve personal information, it fails to achieve the purpose of the amendments.

No other less restrictive way has been identified to achieve the facilitation of information-sharing between QBCC and Queensland statutory bodies. Information obtained by an agency in the performance of its functions is unlikely to be available through sources other than the agency itself or the person to whom the information relates. For example, in cases of negligence or the performance of substandard building work, there would be limited incentive for a person to incriminate themselves to an investigating or prosecuting authority and so reliance upon voluntary disclosure would not achieve the same result, and thus not achieve the purpose.

The QBCC Act provides safeguards to restrict the impact of the limitation, as an information-sharing arrangement may relate only to information that assists QBCC or the other agency to perform its functions, or the disclosure of information that is reasonably necessary to protect the health or safety of a person or property.

Right to privacy – Clause 65 (disclosing outcome of complaint to complainant)

Retaining the current legal framework is the only alternative to clarifying that QBCC may disclose the outcome of an investigation to a complainant. This option does not address the additional administrative burden faced by QBCC and complainants resulting from RTI applications and fails to achieve the purpose of the amendments.

The introduction of clause 65 appropriately addresses the concerns faced by QBCC and complainants in a manner that is less restrictive. The new provision clarifies that the QBCC Commissioner may inform the complainant, in a way they consider appropriate, of the result of the investigation.

Furthermore, it is primarily intended for complainants directly affected by the subject matter to be privy to advice from QBCC relating to the outcome of their complaint. While discretion is provided, it is not considered as necessary for QBCC to disclose the outcome of a complaint to a third-party complainant, such as those who may have observed or merely suspect non-compliance by the respondent but who has not been directly or personally affected.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Right to a fair hearing

The limitation on the right to a fair hearing is appropriate when considering the gravity and

potential harm that could be caused to a person by any one instance of defective building work. Limiting the right to a fair hearing by providing that QBCC may immediately suspend a licence and halt building work is important to protect, as much as is possible, the safety and welfare of all persons, as well as consumer protection. In addition, the provision does not prevent affected licensees from seeking avenues to review QBCC's decision, including through the Queensland Civil and Administrative Tribunal.

Right to privacy – Clause 60 (information sharing with Queensland statutory bodies)

The limitation on the right to privacy will be authorised by law and is demonstrably justified. More collaborative enforcement between QBCC and other agencies will improve QBCC's ability to identify and address offending behaviour within the building and construction industry. The collection of information and evidence to ensure the maintenance of proper standards in the industry does not constitute an arbitrary interference with privacy and QBCC remains subject to the legal obligation to only ask for, and disclose, relevant information, as an information-sharing arrangement may only relate to information that assists QBCC or other agency perform its function, or the disclosure of information is reasonably necessary to protect the health or safety of a person or property. Having regard to the nature and extent of the potential limitation on the right to privacy, it is considered the importance of ensuring QBCC has the necessary information to effectively regulate the industry outweighs the potential negative impact on the right.

Right to privacy – Clause 65 (disclosing outcome of complaint to complainant)

The limitations on the right to privacy will be authorised by law and are appropriate when considering the need to provide QBCC with clarity regarding the circumstances in which they can disclose the outcomes of an investigation to a complainant. The new provision contains safeguards to reduce the impact of the limitation, as only the QBCC Commissioner will be authorised to inform the complainant, in a way they consider appropriate, of the results of the investigation. While it is intended that the Commissioner will delegate this function, the Commissioner may, under the QBCC Act, only delegate functions to appropriately qualified persons (i.e. those with the qualifications, experience or standing appropriate to perform the function). This will help ensure that information about complaint outcomes is provided with appropriate sensitivity and in accordance with the *Information Privacy Act 2009*. The limitation will also ensure complainants are no longer be required to lodge an application under the RTI Act at a monetary cost to obtain details about their complaint, thus reducing the regulatory burden on QBCC. Having regard to the nature and extent of the potential limitation on the right to privacy, it is considered that the importance of QBCC disclosing the outcome of an investigation to a complainant after it is finalised outweighs the potential negative impact on that right.

(f) any other relevant factors

Nil.

Architects Act 2002 and Professional Engineers Act 2002

Right to equality before the law

Clauses 11 and 58 of the Bill clarify that staff appointed directly by the Board of Architects of

Queensland (BOAQ) and Board of Professional Engineers of Queensland (BPEQ) (the Boards), respectively, are ‘relevant persons’ who are not civilly liable for an act done, or omission made, honestly and without negligence under the Act. Extending executive immunity from civil liability may deprive people, who wish to take civil action against Board appointed staff, of legal rights and principles enshrining the right to equality before the law.

(a) the nature of the right

Right to equality before the law

The right to equality before the law affirms the right that no one is above the law. This principle applies not only to ordinary citizens, but to the government, its officers, and instrumentalities. In general, the government, and those acting on its behalf, should be subject to the same liabilities, civil and criminal, as any individual. The right to equality before the law is enshrined in article 15 of the HR Act and is also contained in article 26 of the ICCPR.

The right to equality before the law also affirms the right that every person is entitled to the equal protection of the law without discrimination. This requires public entities, as well as courts and tribunals in undertaking certain functions, to treat people equally when applying the law and to not apply the law in a discriminatory and arbitrary way.

However, not all treatment that differs among individuals or groups, will amount to prohibited inequality. The UN Human Rights Committee has recognised that ‘not every differentiation of treatment will constitute discrimination if the criteria for such differentiation are reasonable and objective’.²

Clauses 11 and 58 of the Bill will limit the right to equality before the law, as they extend the immunity from civil liability to staff appointed directly by the Boards. This increases the pool of people against whom a person is unable to take civil action, provided that the Board appointed staff member acted honestly and without negligence.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Right to equality before the law

The purpose of the limitation on the right to equality before the law is to create certainty among Board appointed staff when undertaking their functions. As the BOAQ and BPEQ are regulators for the architecture and professional engineering professions in Queensland, respectively, and perform unique functions, Board appointed staff may carry out actions to discharge those functions. Exposure to civil liability may make the tasks required by Board appointed staff difficult, or prohibitively costly, to perform.

² UN Human Rights Committee, General Comment 18 on non-discrimination:
https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/INT_CCPR_GEC_6622_E.doc

Extending executive immunity from civil liability to Board appointed staff also creates consistency with liability immunities already offered to the Minister, Board members, investigators and persons engaged to assist the Board, as well as other Queensland Government employees.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Right to equality before the law

The limitation on the right to equality before the law will achieve its purpose of creating certainty among Board appointed staff to enable them to effectively discharge their responsibilities. It will also create consistency amongst liability protections offered to the BOAQ and BPEQ staff, as well as with other Queensland Government employees.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

Right to equality before the law

Retaining the current legal framework is the only alternative to extending immunity from civil liability to Board appointed staff members. This option would hinder the ability of staff appointed directly by the Board to effectively undertake their functions, create inconsistencies between liability protections offered among Queensland government employees, and fail to achieve the purpose of the amendments.

The extension of immunity from civil liability is not unique to Board appointed staff. Identical protections are already offered under the Architects Act and PE Act to the Minister, Board members, investigators and persons engaged to assist the Board. The *Public Service Act 2008* also creates similar immunities for Queensland Government employees.

Clause 11 and 58 is consistent with the principle of legality, which provides that executive immunities should be only as wide as necessary to achieve the legislative purpose and should not unduly derogate from individual rights. Adequate safeguards exist in the Architects Act and PE Act, which provide that persons unable to take civil action against Board appointed staff, can seek legal redress from the State or the Board. Furthermore, the immunity is limited to civil liability, where the Board appointed staff member acted honestly and without negligence. Therefore, persons may still take legal action against a Board appointed staff member for the tort of negligence, or other civil wrongs where the Board appointed staff member acted dishonestly.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Right to equality before the law

The limitation on the right to equality before the law is appropriate when considering the need for Board appointed staff to effectively undertake their responsibilities, the scope of the immunity, and limitations and conditions attaching to the immunity.

(f) any other relevant factors

Nil.

Conclusion

In my opinion, the Building and Other Legislation Amendment Bill 2022 is compatible with human rights under the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

THE HONOURABLE MICK DE BRENNI MP
MINISTER FOR ENERGY, RENEWABLES AND HYDROGEN
MINISTER FOR PUBLIC WORKS AND PROCUREMENT

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