

Public Records Bill 2023

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, Leeanne Enoch MP, Minister for Treaty, Minister for Aboriginal and Torres Strait Islander Partnerships, Minister for Communities and Minister for the Arts make this statement of compatibility with respect to the Public Records Bill 2023.

In my opinion, the Public Records Bill 2023 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 Bill

The proposed Bill strengthens the legislative framework which governs public authority recordkeeping by:

- adopting a new purpose and principles for administering the Act, including recognition of the importance of public records for Aboriginal peoples and Torres Strait Islander peoples
- recognising the valuable contribution of Aboriginal peoples and Torres Strait Islander peoples by providing for representation on the Public Records Review Committee which provides advice to the Minister, and the creation of a new First Nations Advisory Group to advise the State Archivist
- the clarification of definitions to ensure their appropriateness in the digital world including the definition of a public record
- protecting permanent public records at risk of loss or damage by directing the transfer of those records to Queensland State Archives
- enabling the State Archivist to monitor, investigate and report on compliance with the Act including a power to direct a public authority to report on matters related to making and managing public records
- clarifying the functions of the State Archivist to include the provision of assistance and training to public authorities
- increasing the time limit for prosecution of a contravention for unlawful disposal from one year to three years, including a new sanction for attempted unlawful disposal and expanding the definition of disposal to include 'altering' and 'deleting' to clearly encompass digital records
- enhancing the general powers of authorised officers to obtain copies of a public authority's public records, systems and records management procedures and to ask questions about them
- empowering the State Archivist to issue records management standards which public authorities must comply with
- adopting a pro-disclosure approach for access to records in the custody of Queensland State Archives through the setting of restricted access periods (where needed) and if access is refused by a public authority, the requirement for the public authority to advise the State Archivist why access was refused

- enabling the State Archivist, through a regulation, to restrict access to public records in prescribed circumstances (including where access would not, on balance, be in the public interest and if access would inappropriately reveal culturally sensitive information or personal information)
- specifying the State Archivist is generally subject to the direction of the Minister while retaining independence for decisions about the disposal of public records or for particular matters included in the annual report
- requiring any direction by the Minister about the State Archivist's performance of a function or the exercise of a power under the Act be in writing, consistent with the Act and included in the State Archivist's annual report
- clarifying access to records of Ministers and Assistant Ministers will continue under the *Right to Information Act 2009* (RTI Act)
- empowering the State Archivist to extend the restricted access periods of the Ministerial records of Ministers and Assistant Ministers in the custody of the Archives (if needed) and dispose of temporary Ministerial records in the custody of the Archives following advice from the Public Records Review Committee
- simplifying the process for establishing a public authority to take control of the records of another public authority which ceases to exist and where no other public authority will take over its functions
- other amendments to align with the RTI Act and the *Information Privacy Act 2009* (IP Act) including adopting the definition of personal information (rather than referring to personal affairs) and incorporating the definition of sensitive information (and broadening that definition using the new definition of personal information of high sensitivity) within the restricted access period provisions.

Human Rights Issues

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

Human rights engaged by the Bill are:

- Right to recognition and equality before the law (section 15 of the *Human Rights Act 2019* (the HR Act))
- Right to freedom of expression (section 21 of the HR Act)
- Taking part in public life (section 23 of the HR Act)
- Right to privacy and reputation (section 25 of the HR Act)
- Cultural rights – Aboriginal and Torres Strait Islanders (section 28 of the HR Act).

The changes being made to the access framework supports the positive right to access government-held information within the right to freedom of expression, while protecting privacy. This includes:

- the requirement for public authorities to advise the State Archivist why access to public records is being refused or imposing conditions on access in regard to applications to access restricted records
- the ability for the State Archivist or a public authority to seek resolution from the Committee if unable to reach agreement on an application to access a restricted record
- the ability of a public authority to place a restricted access notice on public records where the record may contain personal information, culturally sensitive information or other

information linked to exemptions under the RTI and IP Acts (e.g., legally protected information which references the RTI Act, schedule 3, section 7 related to information subject to legal professional privilege and section 8 information disclosure of which would found action for breach of confidence)

- the ability of the State Archivist to seek a review of a restricted access notice made by a public authority and, if agreement cannot be reached, for the archivist or a public authority to refer the matter to the Committee for resolution
- establishing an ability to prescribe, by regulation, the circumstances in which the State Archivist may refuse access, for example, where access would not be in the public interest or where the record includes personal information or culturally sensitive information; or where access to a public record can be restricted for more than 100 years.

The Bill contains provisions to promote and support the inclusion of the voices, perspectives and interests of Aboriginal peoples and Torres Strait Islander peoples, including cultural rights, through:

- principles for administering the Bill about records relating to Aboriginal peoples and Torres Strait Islander peoples
- membership requirements of the Committee which provides advice to the Minister about the Bill and reviews specific disputes
- the establishment of the First Nations Advisory Group, with members from the First Nations community, to provide advice to the State Archivist about the management of public records related to Aboriginal peoples and Torres Strait Islander peoples
- the protection of public records that would inappropriately reveal culturally sensitive information. Culturally sensitive information means information relating to Aboriginal law, Aboriginal tradition, Ailan Kastom or Torres Strait Islander law, as defined in the *Path to Treaty Act 2023*.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Right to recognition and equality before the law

The proposed amendments including to change the membership requirements of the Committee, requiring the establishment of a First Nations Advisory Group, including explicit reference to the importance of public records to First Nations peoples are supportive, and enabling the protection of culturally sensitive information are protective, rather than limiting.

(a) the nature of the right

The nature of the right is about equality, including substantive equality, before the law for all individuals. As recognised within section 15(5) of the HR Act, differentiation can be necessary to redress disadvantage. A measure must satisfy three criteria to be a special measure under s15(5):¹

- the purpose of the measure must be to assist or advance particular people or groups of people;

¹ *Re Ipswich City Council* [2020] QIRC 194; (2020) 305 IR 289, 303-4 [54]; *Re Mackay Regional Council* [2022] QIRC 64, [30]-[33].

- those people or groups of people must be disadvantaged; and
- their disadvantage must be caused by discrimination.

As noted by the *Report of review of the Public Records Act 2002*, “Queensland’s public records matter to First Nations peoples....The state’s records attest that surveillance of First Nations persons was common and contributed to considerable intervention into their lives by government.”²

The purpose of restricting membership of the First Nations Advisory Group and two of the positions on the Public Records Review Committee to Aboriginal persons and Torres Strait Islander persons is to ensure their voices and perspectives are formally incorporated in the administration of the Bill, and to advise the Archivist about public records relating to Aboriginal peoples and Torres Strait Islander peoples. Historically, Aboriginal peoples’ and Torres Strait Islander peoples’ perspectives have not been specifically included in the existing *Public Records Act 2002*, a failure which was noted in the Tandanya-Adelaide Declaration and QSA’s own Statement of Intent.³ In July 2022, QSA proactively changed membership of the Committee ahead of the anticipated legislative requirement to support this recommendation.

The explicit reference to Aboriginal peoples and Torres Strait Islander peoples interests in the principles of administering the Bill provide guidance for the State Archivist and public authorities. The principles in the Bill state:

1. The knowledge of Aboriginal peoples and Torres Strait Islander peoples gained from governing their lands, seas, waters, air and resources for at least 65,000 years prior to British colonisation of Queensland is unique and a priceless asset for Queensland.
2. The nature, volume and content of public records relating to Aboriginal peoples and Torres Strait Islander peoples and their knowledge is different to that of other Queenslanders.
3. These public records may contain content that is sensitive, inaccurate or offensive and may have been used in the past in a way that disrupted Aboriginal and Torres Strait Islander cultural practices and communities.
4. These public records should be managed and accessed with care to—
 - (i). support Aboriginal peoples and Torres Strait Islander peoples to participate in treaty negotiations; and
 - (ii). contribute to reframing the State government’s relationship with Aboriginal peoples and Torres Strait Islander peoples; and
 - (iii). otherwise support revitalisation of culture and reconnecting communities and families.

As the proposals constitute a special measure, they are not a limitation to the right to recognition and equality before the law.

² p 24.

³ [Tandanya-Adelaide Declaration](#) (Declaration, 25 October 2019); Queensland State Archives, Department of Housing, Communities and Digital Economy, [Statement of Intent](#) (Statement, 31 May 2021).

(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

Not applicable.

(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

Not applicable.

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

Not applicable.

(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

Not applicable.

(f) any other factors.

Not applicable.

Right to freedom of expression

The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Queensland and whether orally, or in writing or in print or by way of art or in another medium chosen by the person.

Personal information

The Bill seeks consistency with the RTI and IP Acts with the adoption of the term ‘personal information’ instead of ‘personal affairs of an individual’ which may result in some information previously available, now potentially subject to a restricted access period. This is because the definition of ‘personal information’ is broader than ‘personal affairs of an individual’.

Originating from now-repealed Commonwealth Freedom of Information legislation and included in Queensland’s Freedom of Information legislation for nearly twenty years before being replaced in the IP Act, there is substantial discussion in case law about the difference between ‘personal affairs’ and ‘personal information’.⁴

The core difference highlighted between the two is that ‘personal affairs’ refers only to the private aspects of an individual’s life, as opposed to their employment or professional affairs. Personal affairs would not include, in the context of public records, the names of public servants who worked on the public record and work contact details. This change can be justified given the benefits gained from consistency with the RTI Act and reduction in confusion between the two terms.

⁴ Stewart and Department of Transport (1993) 1 QAR 227

Restricted access periods

Additionally, within the access framework, the Bill sets legislated restricted access periods for some public records (regulated records), such as Executive Council records, Cabinet records and Ministerial records. The Bill also enables public authorities to set restricted access periods based on their content, with the Bill setting maximum restricted access periods for the content. For instance, if the record contains personal information or culturally sensitive information, the maximum restricted access period is 100 years after last action. Personal information of high sensitivity means —

- (a) personal information relating to the individual's—
 - (i) adoption, separation from parents or other circumstances of birth; or
 - (ii) racial or ethnic origin; or
 - (iii) political opinions; or
 - (iv) membership of a political association; or
 - (v) religious beliefs or affiliations; or
 - (vi) philosophical beliefs; or
 - (vii) membership of a professional or trade association; or
 - (viii) membership of a trade union; or
 - (ix) sexual orientation or practices; or
 - (x) health, medical treatment or genetic characteristics; or
- (b) personal information relating to biometric identification or verification of the individual; or
- (c) personal information relating to the individual committing an offence, whether or not a conviction is recorded; or
- (d) personal information relating to the individual being subject to particular practices or policies because of a matter mentioned in paragraph (a), (b) or (c).

In contrast, information defined as personal information of medium sensitivity means personal information about the individual's relationships, employment or financial affairs; but does not include personal information of high sensitivity. The maximum restricted access period for public records containing this information is 65 years after last action.

The Bill has sought to balance the right to freedom of expression with the right to privacy. While a restricted access period may be applied to a public record by a public authority, a member of the public may still seek access to the restricted record. If access is refused or conditions on access are imposed, the public authority must advise the State Archivist why. If the State Archivist and public authority cannot agree about access or the conditions applying to the restricted record, either party may refer the matter to the Committee for their resolution.

Additionally, either the State Archivist or a public authority can refer the matter to the Committee if they cannot agree on a restricted access notice for a public record.

Records of ministers and assistant ministers

When a public authority ceases to exist, their public records are transferred to the public authority which will take on their functions or powers. Because of the unique nature of the role of ministers and assistant ministers, the Bill recognises the difference between the records of ministers and assistant ministers and other public authorities by:

- providing mechanisms for decisions about access through the RTI Act
- making the archives the responsible public authority for decisions about disposal of temporary records subject to accountability by requiring the archivist to ask the Committee whether the record should be disposed of prior to disposal; and extending restricted access periods for ministerial records in the custody of the archives in limited circumstances.

Refusal of access by State Archivist

Additionally, the Bill will provide for a regulation-making power to prescribe circumstances in which the State Archivist may refuse access to a public record or restrict access by the public for a public record for a period of more than 100 years. These prescribed circumstances may include if access to the record would not, on balance, be in the public interest, or access to the record would inappropriately reveal personal information or culturally sensitive information.

A regulation may also prescribe:

- procedures that apply to the archivist for refusing or restricting access under this clause; and
- matters to be considered by the archivist when refusing or restricting access under this clause; and
- maximum periods of time for restricting access to a public record under this clause.

(a) the nature of the right

The right to freedom of expression protects individual's right to hold and express an opinion and includes, as described in *XYZ v Victoria Police*,⁵ a right to seek out and access government-held information.

The Bill limits this right by reducing the amount of information available to access by:

- enabling public authorities to set restricted access periods for some records based on the nature or content of the record, with the Bill setting minimum or maximum restricted access periods, including:
 - replacing 'personal affairs of an individual' with 'personal information', a broader term which may capture more public records than under the former term
 - the introduction of an ability to set a restricted access period where a public record contains culturally sensitive information
- requiring access to Ministerial records of ministers and assistant ministers to occur through the RTI Act

⁵ *XYZ v Victoria Police* (General) [2010] VCAT 255.

- making the archives the responsible public authority for decisions about disposal of temporary records subject to accountability by requiring the archivist to ask the Committee whether the record should be disposed of prior to disposal; and extending restricted access periods for ministerial records in the custody of the archives in limited circumstances
- enabling the State Archivist to refuse access to a public record in the custody of the archives for archival practice reasons or through regulations in prescribed circumstances (may include if access to the record would not, on balance, be in the public interest, or access to the record would inappropriately reveal personal information or culturally sensitive information).

(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

Restricted access periods

Under the Bill, access to a public record in the custody of the archives may be restricted through setting a restricted access period if the record is a certain category of record (e.g., a cabinet record) or contains certain information (e.g. culturally sensitive information, personal information or public safety information). Depending on the record or information, there may be a minimum or maximum restricted access period under the Bill. The ability to restrict access in these limited categories supports other human rights such as the right to privacy and reputation and is consistent with the protection of human dignity, equality and freedom. It also recognises that sensitivity of information generally reduces over time. The categories and ability to restrict access also support alignment and consistency across the legislative framework, for example, by reflecting categories of information with restricted access from the *Right to Information Act 2009*. Where necessary, the State Archivist can, by regulation, restrict access to a public record for more than 100 years.

Personal information

The change to ‘personal information’ from ‘personal affairs of an individual’ will make the Bill consistent with the RTI and IP Acts. The benefits of this broader consistency will support understanding and reduce confusion, contributing to good decision-making by public authorities which in turn supports broader accountability and transparency.

Culturally sensitive information

The introduction of an ability to set a restricted access period for a public record that may contain culturally sensitive information supports the Cultural rights in section 28 of the HR Act. It recognises that a society built on human dignity, equality and freedom can include restricting access to information where doing so is part of cultural heritage, such as traditional knowledge, distinctive spiritual practices, observances, beliefs and teaching.

Records of ministers and assistant ministers

The above amendments regarding ministerial records are sought to address the existing gap in the current legislative framework which prevents appropriate management of ministerial records. Regular disposal of temporary value records is a feature of best practice records management, see, for example, *Information and documentation – Records management*

Concepts and principles AS ISO 15489.1:2017. Due to the unique nature of the role of ministers and assistant ministers, the current *Public Records Act 2002* does not provide a decision-maker or suitable mechanism to determine a decision-maker for ministerial records of former ministers. As a result, there is no position able to appropriately decide disposal of temporary value of ministerial records when the value of keeping those records is no longer sufficient to justify their ongoing retention. Similarly, there is no position able to appropriately determine a restricted access notice for a ministerial record in the custody of QSA which contains personal information or other information which requires a longer restricted access period than the regulated restricted access period. While access to government held information such as those in ministerial records is an important feature of a free and democratic society, the over-retention of public records or inappropriate access to them can have ongoing and cumulative impacts including unnecessary costs, increased difficulty in finding and accessing relevant or important records, and potential harm to individuals or other entities.

Archival practice

The Bill establishes an ability for the State Archivist to restrict access to a public record in the archives' custody if access would be detrimental to its preservation, is reasonably available for purchase, or can only be accessed through technology which the archives does not have and cannot reasonably gain access to. These limitations enable the overall preservation of a public record and recognise reasonable practical limitations to the requirement for the State Archivist to provide access to public records.

(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

The purpose of the Bill is to recognise the importance and enable the appropriate management of public records for the people of Queensland, including their contribution to the economy, good government, integrity, accountability, and the protection of rights. The limitations to be imposed by the Bill directly support these purposes by addressing an existing gap in the framework for managing ministerial records, enabling better decision making through greater legislative consistency and reduced confusion and enabling the protection of culturally sensitive information.

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

Restricted access periods

The limitation from the ability to set a restricted access period cannot be achieved without legislative amendment due to the open-by-default access framework established by the Bill. Under this framework, all public records transferred into the custody of the archives are open for access by the public unless a restricted access notice is made. Access restrictions for certain types of information or records is standard in archival legislation across Australia and New Zealand and existed in the *Public Records Act 2002*. The limitation is balanced as it will exist alongside legislative mechanisms for individuals to seek access to public records under restricted access periods, for public authorities to provide advice to the State Archivist about why access should not be provided or conditions being imposed on access, for review of such

decisions and through operational mechanisms, such as the advice and guidance provided by QSA to public authorities about making decisions about restricted access periods.

Personal information

Feedback from stakeholders during consultation regarding the change to ‘personal information’ was supportive that the limitation would achieve its desired intent and that alternatives such as greater education of public authorities would not be as effective in reducing confusion about the scope of ‘personal affairs of an individual’ and its application.

Culturally sensitive information

The limitation is balanced through the legislated inclusion of principles for administering the Bill and for the inclusion of First Nations persons in the membership requirements of the Committee and in a dedicated advisory group as well as in the legislative and operational mechanisms described above for restricted access periods.

Records of ministers and assistant ministers

The limitation to be imposed by the Bill regarding ministerial records balances the protection of the right with practical considerations, such as growing storage or management costs, and the protection of other rights which could be negatively impacted through inappropriate access, such as the right to privacy. The inclusion of a provision for decisions of the State Archivist about the disposal of temporary ministerial records to be considered by the Committee ensures that this balance is protected on an ongoing basis.

Alternatives such as nominating another position to make these decisions or not taking action were explored during an independent review of the *Public Records Act 2002* (the Review) and the consultation which occurred as part of the implementation of the government response to the recommendations of the Review. However, these alternatives would either not be as effective in enabling the proper management of ministerial records or would not be any less restrictive than the proposed model.

Archival practice

The limitation balances the right with both overall protection of relevant public records and with practical considerations.

(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

The purpose of the Bill is the crucial foundation to accountability and transparency in government. “Records provide evidence of the actions and decisions of government. They are central to a government’s ability to provide goods and services, protect the community, and demonstrate delivery on its commitments.”⁶ Without appropriate management of public records, this foundation is weakened. The limitations of the proposed amendments are minor and appropriately safeguarded and contribute to the development and maintenance of a robust legislative framework for public records.

⁶ *Report of Review of the Public Records Act 2002*, p 19.

(f) any other relevant factors

Not applicable.

Taking part in public life

The right to take part in public life includes direct participation or through representatives, voting, standing for election and having access to the public service and to public office. It also includes participating in public debate and dialogue with representatives.

As with the right to freedom of expression, the relevant provisions of the Bill are those about restricted access periods, records of ministers and assistant ministers and refusal of access by the State Archivist.

(a) the nature of the right

The nature of the right supports a democratic society by protecting the ability to participate in public life and equality when doing so. The ability to meaningfully participate in public debate and dialogue is affected by the information available, including regarding government activities and decisions.

The Bill limits this right by reducing the amount of information available to access by:

- enabling public authorities to set restricted access periods for some records based on the nature or content of the record, with the Bill setting minimum or maximum restricted access periods, including:
 - replacing ‘personal affairs of an individual’ with ‘personal information’, a broader term which may capture more public records than under the former term
 - the introduction of an ability to set a restricted access period where a public record contains culturally sensitive information
- requiring access to Ministerial records of ministers and assistant ministers occur through the RTI Act
- making the archives the responsible public authority for decisions about disposal of temporary records subject to accountability by requiring the archivist to ask the Committee whether the record should be disposed of prior to disposal; and extending restricted access periods for ministerial records in the custody of the archives in limited circumstances
- enabling the State Archivist to refuse access to a public record in the custody of the archives for archival practice reasons or through regulations in prescribed circumstances (may include if access to the record would not, on balance, be in the public interest, or access to the record would inappropriately reveal personal information or culturally sensitive information).

(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

Restricted access periods

The nature of the purpose of the limitation is to recognise the appropriate restriction of access to information in limited circumstances when doing so is in the public interest, such as if access

would cause harm to an individual or community. This recognises that not all information or records are suitable to be publicly available.

Personal information

The change to ‘personal information’ from ‘personal affairs of an individual’ will make the Bill consistent with the *Right to Information Act 2009* and *Information Privacy Act 2009*. The benefits of this broader consistency will support understanding and reduce confusion, contributing to good decision-making by public authorities which in turn supports broader accountability and transparency.

Culturally sensitive information

The introduction of an ability to set a restricted access period for a public record that may contain culturally sensitive information supports the Cultural rights in section 28 of the HR Act. It recognises that a society built on human dignity, equality and freedom can include restricting access to information that is culturally sensitive. Culturally sensitive information means information relating to Aboriginal law, Aboriginal tradition, Ailan Kastom or Torres Strait Islander law, as defined in the *Path to Treaty Act 2023* (e.g. information showing sacred or significant sites, traditional customs or ceremonies).

Records of ministers and assistant ministers

The above amendments regarding ministerial records are sought to address the existing gap in the current legislative framework which prevents appropriate management of ministerial records. While access to government held information such as those in ministerial records is an important feature of a free and democratic society, the over-retention of public records or inappropriate access to them can have ongoing and cumulative impacts including unnecessary costs, increased difficulty in finding and accessing relevant or important records, and potential harm to individuals or other entities.

Archival practice

The Bill establishes an ability for the State Archivist to restrict access to a public record in the archives’ custody if access would be detrimental to its preservation, is reasonably available for purchase, or can only be accessed through technology which the archives does not have and cannot reasonably gain access to. These limitations enable the overall preservation of a public record and recognise reasonable practical limitations to the requirement for the State Archivist to provide access to public records.

Regulations in prescribed circumstances

The State Archivist will be able, through regulations, to restrict access to records in prescribed circumstances, including restricting certain records for more than 100 years. This will help protect privacy and culturally sensitive information. For instance, this may apply to public records about a person that could reveal personal information that needs to be restricted for more than 100 years. Regulations will set the matters the State Archivist needs to consider in making determinations about access and the maximum time set for restricted access to help balance privacy and sensitivity of the records with access.

- (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

The purpose of the Bill is to recognise the importance and enable the appropriate management of public records for the people of Queensland, including their contribution to the economy, good government, integrity, accountability, and the protection of rights. The limitations to be imposed by the Bill directly support these purposes by addressing an existing gap in the framework for managing ministerial records, enabling better decision making through greater legislative consistency and reduced confusion and enabling the protection of culturally sensitive information and personal information.

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

Restricted access periods

The limitation from the ability to set a restricted access period cannot be achieved without legislative amendment due to the open-by-default access framework established by the Bill. The limitation is balanced as it will exist alongside legislative mechanisms for individuals to seek access to public records under restricted access periods, for public authorities to provide advice to the State Archivist about decisions to refuse or impose conditions on access, for review of such decisions and through operational mechanisms, such as the advice and guidance provided by QSA to public authorities about making decisions about restricted access periods.

Personal information

Feedback from stakeholders during consultation regarding the change to ‘personal information’ was supportive that the limitation would achieve its desired intent and that alternatives such as greater education of public authorities would not be as effective in reducing confusion about the scope of ‘personal affairs of an individual’ and its application.

Culturally sensitive information

The limitation is balanced through the legislated inclusion of principles for administering the Bill and for the inclusion of First Nations persons in the membership requirements of the Committee and in a dedicated advisory group as well as in the legislative and operational mechanisms described above for restricted access periods.

Regulations in prescribed circumstances

This limitation is balanced through oversight of a regulation-making process. There is no alternative approach to legislative amendment.

Records of ministers and assistant ministers

The limitation to be imposed by the Bill regarding ministerial records balances the protection of the right with practical considerations, such as growing storage or management costs, and the protection of other rights which could be negatively impacted through inappropriate access, such as the right to privacy. The inclusion of a provision for decisions of the State Archivist about the disposal of temporary ministerial records to be considered by the Committee ensures that this balance is protected on an ongoing basis. Alternatives would either not be as effective

in enabling the proper management of ministerial records or would not be any less restrictive than the proposed model.

Archival practice

The limitation balances the right with both overall protection of relevant public records and with practical considerations.

- (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

The purpose of the Bill is the crucial foundation to accountability and transparency in government. “Records provide evidence of the actions and decisions of government. They are central to a government’s ability to provide goods and services, protect the community, and demonstrate delivery on its commitments.”⁷ Without appropriate management of public records, this foundation is weakened. The limitations of the proposed amendments are minor and appropriately safeguarded and contribute to the development and maintenance of a robust legislative framework for public records.

- (f) any other relevant factors

Not applicable.

Right to privacy and reputation

A person has the right not to have the person’s privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The proposed Bill includes powers for:

- an authorised officer to require an employee of a public authority to answer questions relating to making or managing a public record, produce a public record for inspection, give access or a copy of a public record, allow examination of a system for making or managing public records or allow an officer to take a copy, including a photo or video of a public record or public authority’s recordkeeping system
- the State Archivist to direct a public authority to report on their records management or public records.

These amendments may result in the accessing of personal information, for example, of employees of a public authority or in the content of a public record.

- (a) the nature of the right

The nature of the right to privacy is broad and seeks to recognise the importance of an individual’s control of their own life including who has information about that life. The scope of this right is curtailed in the HR Act – only unlawful or arbitrary infringements are protected against.

An authorised officer will not have unrestricted access to a public authority’s recordkeeping system or public records.

⁷ *Report of Review of the Public Records Act 2002*, p 19.

- (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

The purpose of the limitations is to enable authorised officers, including the State Archivist, to inspect and to gather information about public authorities' records management activities and public records, and help determine compliance with the Bill. This will enable the effective performance of the State Archivist's functions and support compliance by public authorities with the Bill, compliance which directly contributes to accountability and transparency, a critical aspect of a free and democratic society.

- (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

The proposed powers are a minor expansion to the existing powers of entry and inspection under the existing *Public Records Act 2002*. The proposed ability to ask questions, take copies and photographs or video and to access recordkeeping systems will support the gathering of information about a public authority's records management and public records which is necessary to perform the State Archivist's functions such as monitoring and reporting on compliance and to inform strategic and operational decisions. In the absence of these powers, authorised officers will be reliant on cooperation by public authorities or on memory or written documentation of public records or records management activities which are a less efficient and effective mechanism of information gathering. The Bill provides employee may refuse to answer a question or produce a public record if answering the question or producing the record might tend to incriminate the employee, or expose the employee to a penalty.

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

As one of the purposes of the Bill is to enable improved information gathering and monitoring of compliance, there are no less restrictive ways to achieve the purpose of the Bill. Relying on cooperation from public authorities will limit the ability of authorised officers and the State Archivist to efficiently and effectively gather information which is the purpose of the amendments. The powers will be safeguarded by the requirements to give notice to a public authority and, for an authorised officer, to produce an identity card to demonstrate they are duly authorised. These safeguards will exist alongside the broader protections to the right to privacy such as those in the IP Act and Public Sector Code of Conduct, both of which regulate the actions of authorised officers.

- (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

The amendments, which will enable improved information gathering, are appropriately safeguarded and strike a fair balance with the limitation on the right to privacy and reputation.

- (f) any other relevant factors

Not applicable.

Cultural rights – Aboriginal and Torres Strait Islanders

(a) the nature of the right

The HR Act recognises the special importance of human rights for Aboriginal peoples and Torres Strait Islander peoples, and explicitly protects their distinct cultural rights as Australia's first people. Section 28(2) of the HR Act provides Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community—

- (a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and
- (b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and
- (c) to enjoy, maintain, control, protect and develop their kinship ties; and
- (d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and
- (e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.

The Bill contains an ability for a restricted access notice to be made if a record may contain culturally sensitive information and a regulation-making power to prescribe circumstances in which the State Archivist may refuse access to a public record or restrict access by the public to a public record in the custody of QSA for a period of more than 100 years, including if access would inappropriately reveal culturally sensitive information or personal information.

The Bill also provides a regulation may prescribe:

- procedures that apply to the archivist for refusing or restricting access under this clause; and
- matters to be considered by the archivist when refusing or restricting access under this clause; and
- maximum periods of time for restricting access to a public record under this clause.

(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

This provision aims to protect culturally sensitive information and personal information. Without the inclusion, protection from access to public records in the custody of the archives would only be possible if they also contained other information for which a restricted access period may be set, for example, personal information. These other categories are unlikely to be able to protect all culturally sensitive information, for example, about secret or sacred sites.

Given restricted access periods set by public authorities under the Bill can only be set at a maximum of 100 years depending on the content of the record, this provision provides additional protection for these sensitive records by being able to restrict access beyond 100 years, where necessary. For example, there are public records about individual Aboriginal people that contain personal information that may need to be restricted for more than 100 years.

(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

The possible limitation on access to public records which would inappropriately reveal culturally sensitive information or personal information is justified.

The limitation on the cultural rights of Aboriginal peoples and Torres Strait Islander peoples is justified as a restricted access notice may be reviewed and amended and, if the State Archivist and the public authority cannot agree on a restricted access period, the matter may also be referred to the Committee for resolution. The Committee's membership requirements and the principles for the Bill support the consideration of the interests and needs of Aboriginal peoples and Torres Strait Islander peoples regarding these matters.

The limitation on the cultural rights of Aboriginal peoples and Torres Strait Islander peoples is justified as a regulation will provide the circumstances in which the State Archivist may exercise the power and may prescribe the matters the State Archivist is to consider when refusing access under this clause, which may include consultation with the First Nations Advisory Group or consultation with the relevant Aboriginal peoples or Torres Strait Islander peoples to whom the public records relate. This will ensure consistency and transparency in decision making and help to achieve the ultimate purpose of the clause which is to ensure public records which would inappropriately reveal culturally sensitive information or personal information are not disclosed even when they otherwise could be accessed.

Additionally, restricted access periods are often set by people who are not Aboriginal persons or Torres Strait Islander persons. It would be appropriate to seek the views of relevant Aboriginal peoples and Torres Strait Islander peoples when considering whether access ought to be given for records which would inappropriately reveal culturally sensitive information or personal information.

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

There are no less restrictive and reasonably available ways to ensure public records that would inappropriately reveal culturally sensitive information are restricted.

In the absence of this ability in the Bill, access to the records can only be restricted up to 100 years since last action. This may mean that public records containing culturally sensitive information or personal information could be accessible 100 years after the last action on that record even if access to those records is still inappropriate (e.g., sacred sites).

(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

On balance, the proposed amendment strikes a fair balance between the benefits arising from restricting access to public records containing culturally sensitive information and personal information where access to those records is inappropriate, and the possible limitation of cultural rights of Aboriginal peoples and Torres Strait Islander peoples in limited circumstances.

(f) any other relevant factors

Not applicable.

Conclusion

In my opinion, the Public Records Bill 2023 is compatible with human rights under the *Human Rights Act 2019* because it limits a human right only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

LEEANNE ENOCH MP

Minister for Treaty

Minister for Aboriginal and Torres Strait Islander Partnerships

Minister for Communities and

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