

Queensland Productivity Commission Bill 2024

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* (HR Act), I, David Janetzki, Treasurer, Minister for Energy and Minister for Home Ownership make this statement of compatibility with respect to the Queensland Productivity Commission Bill 2024 (Bill).

In my opinion, the Bill 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 Bill

The Bill establishes the Queensland Productivity Commission (the commission) to undertake inquiries and research and provide independent advice to the Minister in relation to economic and social issues, regulatory matters or legislation, having particular regard to productivity, economic growth and improving living standards in Queensland.

Human Rights Issues

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

Human rights under the HR Act relevant to the Bill to be prepared in accordance with the drafting instructions include:

- taking part in public life (section 23);
- privacy and reputation (section 25);
- right to liberty and security of person (section 29);
- rights in criminal proceedings (section 32).

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, HR Act)

Taking part in public life – eligibility to be appointed as a commissioner, conflict of interest requirements and transfer of employees

Nature of the right

Section 23 of the HR Act provides that every person in Queensland has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives. The right protected by section 23 of the HR Act includes a right for every eligible person to have access on general terms of equality, to the public service and to public office.

Eligibility for appointment as a commissioner and conflict of interest disclosure requirements

To ensure access to positions in public office on general terms of equality, the criteria and process of appointment, promotion, suspension and dismissal must be objective and reasonable. In relation to this right, it is of particular importance to ensure that persons do not suffer discrimination in the exercise of their rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or

social origin, property, birth or other status. The right in section 23 is limited to ‘eligible persons’, which provides for the prescribing of matters such as eligibility for membership to a body or statutory office.

The right to take part in public life will be limited by proposed requirements on the eligibility of a person to be appointed to and to hold the public office of a commissioner of the commission (references to a commissioner include the productivity commissioner). It may also be limited by the proposed conflict of interest disclosure requirements, which prevent a commissioner from taking part in a matter where they have a direct or indirect interest in the matter that could conflict with the proper performance of their duties.

It is arguable that where the Bill transfers employees from Queensland Treasury to the commission, their human right to take part in public life is limited in removing them from their existing employment in the Queensland public service to employment in a Queensland public sector entity, without their consent.

The purpose of the limitation

The purpose of the limitation in relation to eligibility and conflict of interest requirements is to ensure persons appointed as commissioners have the appropriate qualifications and integrity to perform the proposed functions of the roles and perform their duties fairly and impartially.

The purpose of the limitation in relation to the transfer of employees is to ensure that the commission has suitably qualified and experienced staff to carry out its functions from commencement.

Whether the limitation will achieve the purpose

The eligibility limitation will achieve the purpose by requiring the Minister to consider and be satisfied of certain grounds before recommending or making an appointment. It is proposed that the Minister will only be able to recommend the appointment of a person as a commissioner if the Minister is satisfied the person is appropriately qualified to perform the commissioner’s functions effectively and efficiently.

In addition, it is proposed that commissioners will not be eligible for appointment, or continue to be appointed, where they have been convicted of an indictable offence, are insolvent under administration, have been disqualified from managing corporations under the *Corporations Act 2001* (Cth) (Corporations Act) or refuse to provide consent for the Minister to obtain a criminal history check. This is intended to ensure that the commissioners are of high public standing and integrity and uphold principles of good governance.

The conflict of interest disclosure requirements prevent a commissioner from participating in a matter in which they have a direct or indirect conflict of interest, unless the Minister directs otherwise. These requirements achieve their purpose by ensuring a conflicted commissioner is not involved in matters where their personal or financial interest may affect the conduct of their duties. This limitation is necessary for good governance and in alignment with community expectations that holders of public office perform their duties in a fair and impartial way, that is not affected by self-interest.

The transfer of employees will provide the commission with staff currently employed in Queensland Treasury who carry out work similar to the functions undertaken by the commission and allow continuity of this work without disruption or delay.

Less restrictive, reasonably available alternatives

There are no less restrictive or reasonably available alternatives to prescribing the eligibility requirements for the role of a commissioner. The requirements are reasonable in that they require persons to be appropriately qualified to be a commissioner. The *Acts Interpretation Act 1954* defines the expression “appropriately qualified” for an appointment to an office to mean “having the qualifications, experience or standing appropriate to perform the functions of the office”. Beyond that, the Bill does not

prescribe what qualifications are appropriate and it is for the Minister to determine. This allows a broad scope of qualifications and experience to be taken into account and a broad scope of persons to be considered eligible for appointment.

There are no less restrictive or reasonably available alternatives to managing conflict of interests. These requirements are consistent with conflict-of-interest policies and guidance for the Queensland public service and public sector entities in Queensland.

Further, it is noted that similar provisions apply to many statutory bodies across the Queensland statute book and are intended to ensure that:

- any significant appointments are of persons of appropriate standing and with relevant expertise; and
- conflicts of interest, or the perception of a conflicts of interest, do not compromise the performance of a statutory body's functions.

In relation to the transfer of employees, an available alternative is for the commission to employ its own staff, which would delay commencing the work of the commission in order for staff to be recruited and engaged. The commission may also find it difficult to find suitably qualified and experienced staff in Queensland other than those in Queensland Treasury who currently carry out work similar to that to be undertaken by the commission. Another alternative is the Bill providing that Queensland Treasury may enter into a service agreement with the commission for Queensland Treasury's existing staff to carry out work for the commission. However, this may call into question the independence of the commission and undermine the purpose for which the commission is being established and does not resolve the commission's long term staffing arrangements.

Fair balance

The limitations of the right are reasonable and demonstrably justified as:

- (1) the eligibility requirements and conflict of interest requirements are not considered to impose arbitrary requirements and achieve an appropriate balance to ensure that persons appointed to the proposed public offices of commissioners are suitable, hold appropriate standing and carry out their duties fairly and impartially; and
- (2) employees transferred will maintain all their existing rights and entitlements, including their terms and conditions of employment under any fixed term contracts, industrial instruments and directives that currently apply to them, on transfer to the commission. Additionally, these employees are not restricted from seeking employment in the public service after being transferred.

Privacy and reputation – Disclosures of personal information by prospective and continuing commissioners

Nature of the right

Section 25 of the HR Act protects a person's privacy and reputation and provides that a person has the right not to have the person's privacy, family, home or correspondence (written and verbal) unlawfully or arbitrarily interfered with and not to have the person's reputation unlawfully attacked. Only lawful and non-arbitrary intrusions may occur upon privacy and reputation.

The right protected by section 25 is modelled on article 17 of the International Covenant on Civil and Political Rights. Under this section, the scope of the right to privacy is broad and may include matters such as personal information, data collection and correspondence.

Request for criminal history information

The Bill provides that the Minister will be able to request and receive from the Police Commissioner the criminal history of a person who is, or who is seeking to be appointed as, a commissioner with the

consent of that person. In addition, the Bill outlines that a commissioner will be required to disclose to the Minister if the person has been convicted of an indictable offence, is insolvent under administration or is disqualified from managing corporations because of the requirements of the Corporations Act.

This will limit the right to privacy in that applicants for commissioner roles will be required to allow their personal information to be accessed to be considered for appointment. Similarly, the commissioners will be required to disclose personal information as part of their terms of employment.

Conflict of interest disclosure

As discussed above, the Bill also requires that commissioners disclose to the Minister the nature of any direct or indirect financial or personal interest in a matter that could conflict with the performance of the commissioner's duties. This will limit the right to privacy in that commissioners will be required to provide personal information to the Minister.

The purpose of the limitations

The purpose of the criminal history limitation on the right to privacy and reputation is to provide the Minister with information that is relevant to determine the appointment of a commissioner and to ensure the integrity of the position of a commissioner.

As discussed above, the purpose of the conflict-of-interest disclosure is to ensure that commissioners do not take part in a matter where they have a direct or indirect interest in the matter that could conflict with the proper performance of their duties and allow the Minister to direct the commissioner in how to appropriately manage that conflict of interest.

Whether the limitations will achieve the purpose

The criminal history limitation in relation to access to, and disclosure of, an individual's confidential information will achieve the purpose by allowing the Minister to independently verify a person's suitability to hold public office by having access to relevant information. The limitation on the right to privacy and reputation imposed is necessary for such information to be obtained and for a person's suitability for appointment to be evaluated.

The conflict-of-interest limitation will achieve the purpose by disclosing the conflict of interest to the Minister and removing the conflicted commissioner from further involvement in the matter, unless the Minister directs otherwise. This limitation is consistent with conflict-of-interest management policies and procedures across the Queensland public sector, which also require the disclosure of conflicts of interest.

Less restrictive, reasonably available alternatives

There are no less restrictive, reasonably available alternative ways to achieve the purposes of the limitations on the right to privacy.

The Bill provides the Minister with the power to request a person's criminal history and require a prospective or continuing commissioner to disclose certain information which is necessary to ensure the integrity of statutory appointments. Without the power to obtain a person's criminal history information, there is no other way for the Minister to independently verify whether the person is suitable for appointment.

This limitation on an individual's right to privacy will be mitigated by the proposed requirement that the Minister may only exercise their power if the person has given the Minister written consent for the

request. While a person will not be eligible for appointment or their appointment will end if they fail to consent to the request, there is no power of compulsion and there is no compulsion on a person who is not a prospective or current commissioner to consent to the request.

In addition, the Bill includes safeguards to protect the person's criminal history and any criminal history information that the person discloses. The Bill provides that a person's criminal history information is confidential and must not be used or disclosed, unless the use or disclosure is permitted under the Bill. The Bill also requires that criminal history reports provided under the Bill are destroyed as soon as practicable after it is no longer needed for the purpose for which it was given.

In relation to the disclosure of conflicts of interest, it is considered that there is no other less restrictive, reasonably available alternatives to achieve the objective of the limitation, which is the appropriate management of conflict of interest in line with community expectations. Conflicts of interest must be disclosed to a person with sufficient independence and seniority to determine the appropriate strategy for managing those conflicts. In this instance, there is no person within the commission who can make that determination for the commissioners, given they are the most senior individuals in the organisation. The Minister, as the responsible Minister for commission, is considered an appropriate individual to receive those disclosures and make any directions about management of commissioners' conflicts of interest.

Fair balance

It is important for the Minister to have the power to obtain information about a person's criminal history, and for it to be a requirement for a person to disclose certain matters that would disqualify them from being appointed as a commissioner, in order to ensure the integrity of this public body. It is in the public interest for membership of public bodies to be open to scrutiny by the Minister to whom the public body is responsible, and that obligations are imposed on the commissioner or members to disclose matters that would disqualify them from appointment to these statutory roles. Such provisions are common in Queensland legislation and strike a fair balance between the importance of ensuring an individual's right to privacy, and the integrity of membership and appointments to statutory agencies.

In relation to conflicts of interest, the requirements in the Bill are consistent with conflict of interest management policies and procedures across the Queensland public sector and balance the need to manage conflicts of interest in order to ensure the fair and impartial performance of the duties of the commissioners with the commissioners' right to privacy by only requiring personal information to be disclosed to the extent relevant to the conflict of interest and only requiring disclosure to the Minister in order for them to make necessary directions to manage the conflict of interest.

The Bill also includes a requirement that persons who will have access to or acquire confidential information only use or disclose that confidential information where authorised under the Act or another law. This will ensure that individual's human right to privacy is protected in accordance with the Information Privacy Principles under the *Information Privacy Act 2009*. Any criminal history required under the Act is also strictly protected from unlawful use or disclosure by the Act. Additionally, the Act requires the destruction of documents containing a criminal history provided under the Act once they are no longer needed.

Privacy and reputation – Requests for information by the commission

Nature of the right

See description above.

Request for information by the commission

The Bill provides that the commission will be able to request, and have access to, information (including documents) from a range of Queensland Government agencies, including local governments and government owned corporations (relevant entities). This may require the disclosure of personal information by the relevant entities.

The powers provided to the commission will limit the right to privacy and reputation in that an individual's personal information may be disclosed to the commission, to the extent it forms part of information requested by the commission, without their consent. It is not anticipated that personal information will be a significant element of information requested by commission given its focus on productivity but the disclosure of personal information may be necessary or unavoidable as part of some requests.

The purpose of the limitation

The purpose of the limitation on the right to privacy in relation to proposed powers of the commission to request, receive and use confidential information, including personal information, is to ensure the commission can access all relevant information to fulfil its functions.

Whether the limitation will achieve the purpose

Limiting an individual's right to privacy in relation to accessing their confidential information will achieve the purpose by ensuring the commission has access to all relevant information to assist it in fulfilling the commission's functions in conducting inquiries and research by Ministerial direction and advising the Minister.

Less restrictive, reasonably available alternatives

There are no less restrictive, reasonably available alternative ways to achieve the purposes of the limitations on the right to privacy. Access to a wide range of information from the relevant entities, including confidential information, is integral to the effective performance of the functions of the commission.

It would be impractical to require relevant entities to redact all personal information from information or documents provided to the commission following a request. Such a requirement would delay responses to requests and hamper the efficiency and effectiveness of the commission. The removal of personal information may also reduce the usefulness of the documents and information provided.

It is proposed that confidential information may only be requested or disclosed where the commission is carrying out its functions in relation to inquiries or research by a Ministerial direction or advising the Minister. This limits the scope of confidential information that may be disclosed.

There are a number of safeguards in the Bill that will mitigate the limitations on the right.

The relevant entities subject to the requirement are limited to relevant entities as defined in the Bill and these entities may refuse to give the commission the document or information to the extent that:

- it is subject to legal professional privilege, parliamentary privilege or public interest immunity; or
- giving the document or information to the commission is prohibited under an Act; or
- giving the document or information to the commission could reasonably be expected to prejudice the investigation of a contravention, or possible contravention, of a law.

The Bill outlines confidentiality provisions which prevent the use or disclosure of confidential information unless it is otherwise permitted. This allows for disclosure or use in a limited range of circumstances, including where the person to whom the information relates has consented to it being used or disclosed, or where disclosure is necessary to perform a function or power under the Act or where otherwise required or permitted by law.

The commission will also be subject to the Information Privacy Principles in the *Information Privacy Act 2009* in relation to how it uses, stores, and discloses personal information.

Fair balance

The ability of the commission to have access to confidential information is integral to the effective performance of functions of the commission and it is in the public interest that the commission can perform its functions effectively.

The safeguards in the Bill will mitigate the limitation of the right to privacy in that confidential information will only be sought or provided that is relevant to the limited functions of the commission. In addition, the proposed confidentiality requirements will limit the disclosure of any confidential information that is accessed through the administration of the legislation.

Privacy and reputation – transfer of records in relation to transferring employees

Nature of the right

See description above.

Transfer of particular records to the commission

The Bill requires the chief executive to transfer relevant public records to the commission, including public records relating to transferring employees, whose employment will be transferred from the department to the commission. This will transfer the personal information of these employees contained in these records from the department to the commission.

This will not limit these individuals' right to privacy or reputation as it is not an unlawful or arbitrary interference with their right to privacy. Their personal information will only be disclosed to the extent lawfully permitted under the Bill. The commission will also be required to only use and disclose personal information contained in the transferred records as permitted under the *Information Privacy Act 2009* and persons administering the Act who have access to confidential information will also be bound by the specific confidentiality provision in the Act.

The transfer of records in relation to the transferring employees to the commission is also not an arbitrary interference with privacy. The commission, as the transferring employees new employer, needs access to the transferring employees records in order to maintain their rights and entitlements as required under the Act.

There is no limitation of the transferring employees right to privacy by transferring records in relation to these employees from the department to the commission.

Liberty and security of person – new offence provisions

Nature of the right

Section 29 of the HR Act protects a person's right to liberty and security of person. The right protects personal liberty and is focused on the requirement that due process be followed when state authorities exercise their powers of arrest and detention. The right protects against the deprivation of liberty that is arbitrary or unlawful. The right is relevant whenever a person is placed at a risk of imprisonment. The right is only enlivened in the Bill due to the insertion of several new offence provisions, which may lead to the deprivation of liberty where a person does not pay the relevant monetary penalty and other enforcement action is taken against the person.

New offence provisions

The Bill will require commissioners to disclose to the Minister if they are convicted of an indictable offence. Failing to disclose such matters to the Minister will be considered an offence and subject to a penalty unless the person has a reasonable excuse.

The Bill also makes it an offence for a person who has acquired or has access to confidential information because they have a role under the Act to unlawfully use or disclose the confidential information.

The Bill also requires persons who possess criminal history information because the person is involved in the administration of the Act to not disclose or use that information unless permitted under the Bill. Failing to comply with this requirement will be considered an offence and subject to a penalty.

Purpose of the limitation

The purpose of the offence provisions is to prevent:

- commissioners from failing to disclose when they are convicted of an indictable offence;
- for a person to misuse or unlawfully disclose criminal history information provided under the Bill
- misuse or unlawful disclosure of confidential information acquired under the Act.

Whether the limitation will achieve the purpose

The limitations in the Bill which establish new offences will achieve their intended purpose by establishing an appropriate deterrent:

- for a person to fail to disclose information about their eligibility with a view to continuing to act in their statutory office;
- for a person to misuse or unlawfully disclose confidential information acquired under the Act.

Less restrictive, reasonably available alternatives

The requirements to ensure that a person discloses their personal information where they have been convicted of an indictable offence cannot be achieved through any less restrictive or alternative means. As it is proposed to make it an offence where a person fails to disclose that they have been convicted of an indictable offence, it is also necessary to prescribe these offence provisions in the primary legislation rather than an alternative legislative or legal mechanism.

The confidentiality of information accessed or acquired under the Act is essential to protect the privacy and reputation of individuals whose personal information may be disclosed under the Act. The commission's functions will also require it to have access to information that relates to the commercial activities of entities that may cause damage to those entities if disclosed. Confidentiality protections, including a deterrent for breach, are necessary to give entities assurance that confidential information provided to the commission will be protected from misuse or unauthorised disclosure. As it is proposed to make it an offence where a person discloses or uses the confidential information other than permitted under the Bill, it is also necessary to prescribe these offence provisions in the primary legislation rather than an alternative legislative or legal mechanism.

The confidentiality of criminal history information is essential to protect the privacy and reputation of prospective and continuing commissioners. As it is proposed to make it an offence where a person discloses or uses the criminal history information other than permitted under the Bill, it is also necessary to prescribe these offence provisions in the primary legislation rather than an alternative legislative or legal mechanism.

The offences do provide less restrictive and reasonably available alternatives to a person being deprived of liberty where they have been convicted of an offence. As such, it is noted that this human right will only be enlivened where a person fails to pay a relevant fine and an alternative enforcement approach is taken.

Fair balance

The offence provisions for failing to disclose a charge or conviction for an indictable offence, which affects a commissioner's eligibility to continue as a commissioner, achieve a reasonable balance as it places an onus on the relevant person to disclose their change in eligibility for continuing to hold an appointment to the Minister, but also allows for a reasonable excuse to not comply with the obligation to disclose information. As such, the person will not be liable for an offence where there are reasonable grounds for not disclosing the information to the Minister.

The offence provisions for the misuse or unlawful disclosure of criminal history information and confidential information achieve a reasonable balance as it places the onus on persons with access to this information to only use it as permitted under the Bill and are appropriate given the sensitive nature of criminal history information and confidential information potentially accessible under the Bill. The limitation gives prospective and continuing commissioners confidence that they can provide criminal history information and relevant entities required to disclose confidential information to the commission that they can provide this information without risk of inappropriate use or disclosure.

Conclusion

In my opinion, the Queensland Productivity Bill 2024 is compatible with human rights under the Human Rights Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HR Act.

DAVID JANETZKI MP
Treasurer
Minister for Energy and Minister for Home Ownership