

EXPLANATORY NOTES

PUBLIC-PRIVATE PARTNERSHIP (TRANSPARENCY AND ACCOUNTABILITY) BILL 2024

Stephen Andrew, MP

1. Short title

The short title of the Bill is the Public-Private Partnership (Transparency and Accountability) Bill 2024.

2. Policy Objectives and the Reasons for them

The Bill's primary objectives are to:

- Promote consistency, transparency and accountability in decision-making processes around Public-Private Partnerships in Queensland;
- Aid in the prevention of corruption;
- Ensure that all commercial activities of the state are conducted in accordance with the principles of transparency, fairness, stability, proper management, integrity, accountability and long term sustainability;
- Ensure that Public-Private Partnership arrangements deliver 'Value for Money' transparently and prudently by ensuring the right decision-making processes are in place; and
- Promote public trust in government.

The second object of the bill is to allow the Auditor-General to inspect and examine the PPP reports of public sector entities in Queensland.

This Bill is consistent with the objectives of:

- advancing Government priorities;
- achieving value for money; and
- ensuring transparency and accountability for outcomes.

Public-Private Partnership (PPP) model are increasingly being used to deliver everything in Queensland, from roads, tunnels, railways, energy and water, to schools, aged care, hospitals and prisons.

Given the large size of these PPP transactions and the long financial commitment by the taxpayer, these arrangements need to be subjected to a much stronger level of disclosure and transparency.

This is even more true with the large volume of capital projects in the pipeline for the state's renewable energy transition and the 2032 Brisbane Olympic and Paralympic Games.

Accordingly, the Bill seeks to provide a much greater level of transparency and oversight to ensure Queensland's massive infrastructure program is delivered in as transparent and cost-efficient a manner as possible.

The Bill also seeks to increase public knowledge and trust on how public monies are being spent and what contractual commitments the Queensland Government is taking on, which may bind the state for years and decades to come.

3. Achievement of policy objectives

The Bill provides an enabling legislative framework to compel public sector entities to provide information in relation to their PPP arrangements, and to enable that information to be published.

The intention is for the information to be published on a government website.

While the website will not publish confidential information, the Bill does provide a mechanism for information obtained under other legislation to be used for the website.

This will ensure that the relevant confidentiality provisions are not breached when information obtained under those Acts is used for publication.

Promotes Transparency

The bill responds to various findings and recommendations contained in Queensland Audit Office (QAO) reports over the past decade.

On 14 December 2023, the Queensland Audit Office (QAO) released Report no 7 on 'Major Projects 2023', highlighting how:

"Clear and complete reporting on capital projects is critical to building public trust and ensuring accountability."

In relation to Public-Private Partnerships, QAO recommends that:

"Queensland Treasury strengthen disclosures in project summaries for public-private partnerships (agreements private sector companies enter into with the public sector to deliver services)".

More specifically, Report No 7 recommended that Queensland Treasury update its practices to:

- require more information be included in project summaries of PPP projects from public sector entities, including details on service payments, contributions from private sector companies, and details of the value for money assessment; and
- annually publish a report of projects completed during the preceding financial year, in conjunction with the capital statement. This should include the project completion date and the total actual expenditure at the completion of the project.

In Peter Coaldrake's 'Let the Sunshine In' Review of public sector culture, Professor Coaldrake found the Queensland public sector was not meeting the public's expectation that it be *'accountable and transparent, and acts with integrity'*.

Professor Coaldrake also received a number of submissions which raised concerns over the: *"excessive reliance on legislative 'carve-outs' to prevent the disclosure of commercially sensitive information"*, with one submission noting that:

“There has been a disturbing trend in the public sector to use the Right to Information Act (2009) Qld to withhold, rather than provide, information. Information that was once freely available is now difficult to find, expensive and difficult to access.”

Professor Coaldrake said in his Final Report that the government must be prepared to ‘defend its decision’ to withhold information publicly. He also recommended that:

“agencies should not be quick to agree to confidentiality clauses which are proposed by sophisticated commercial parties to protect their own interests. An agency can exercise its discretion to disclose information even where that information qualifies for an exemption, but the RTI process cannot overcome a lack of transparency if expectations are not clear in the procurement process about the openness and accountability to the community that is required when dealing with government”.

In QAO’s 2018 report on Contract Management, the Auditor General states that:

“the public has a right to know how much public money government is spending, on what, and with which vendors”.

Accordingly, the Bill seeks to recognise this key principle, that the public has a right to know how its money is being spent, and whether or not it is being spent in compliance with all the proper guidelines for the allocation of those funds.

Supports Accountability

In Report 7, 2023-24, QAO recommends that Queensland Treasury enhance its required disclosures to *“better support the Queensland Government’s requirements and expectations about integrity, probity, value for money, and accountability within procurement”*. (1) – Major Projects 2023 (Report 7: 2023-24)

The Bill seeks to achieve this by:

- Ensuring that the annual stream of future PPP payments in government accounts are published; and
- Ensuring that a Value for Money assessment be carried out on proposed PPPs, by the contracting government entity and made publicly available.

Value for Money Assessment

In the 2015 Occasional Paper No 5, by the Queensland Office of the Information Commissioner and the Australia and New Zealand School of Government, the authors state:

“In relation to long-term PPPs, politicians have an electoral incentive to enter into contracts with the private sector that deliver immediate benefits in the form of tangible facilities or services while postponing the costs well into the future. Treasury bureaucrats who advise them are naturally predisposed in favour of solutions that suit the government’s short-term fiscal agenda. Governments also rely heavily on external consultants, many of whom are also advising the private sector partners and may have a conflict of interest (Monteiro 2010, 266-8).

Transparency is therefore needed to ensure that governments and their advisers are exposed to a wide range of alternative views as they decide how to act in the interest” (page 13).

In 2014-15, the Queensland Audit Office noted in its audit of the Queensland state government financial statements 2013-14, that:

“PPPs may allocate risk to private sector operators; however, the financing cost the state pays may be higher than if the state had sourced its own debt to fund the project”.

On page 3, the report states:

“The State enters a PPP on the basis that the arrangement will deliver better value of money outcomes”.

Accordingly, in order to achieve “financial sustainability”, QAO states on p.32 that:

“The government must ensure PPPs are assessed, sufficiently and critically, to prove using a private operator produces greater value for the state, given the risks adopted.”

On page 13 of the Auditor General’s Report no 7 2023, Figure 2G shows that the disclosure requirements for Public-Private Partnership Projects in Queensland, do not include a ‘Value for Money’ assessment.

Accordingly the Bill includes provisions stipulating that public sector entities must carry out Value for Money assessments on a proposed PPP project.

As part of the ‘Value for Money’ assessment, a Public Sector Comparator (PSC) calculation should be carried out and made publicly available on a government website.

Public Service Comparator

Both the OECD and IMF confirm that governments are able to raise capital at a much lower cost than the private sector.

With interest rates rising, the higher cost of private finance compared to government obtained finance, will increasingly make some PPPs a significantly more expensive option for the delivery of government services and infrastructure.

It is important to note that numerous inquiries carried out at the international level, have found that governments often use VFM assessments produced by private consultants, who find ways to justify using a PPP model instead of public procurement.

In order to end up with a cheaper PPP option, these Value for Money (VFM) assessments will often make adjustments against a public option, based on intangible benefits such as ‘risk transfer’ or “value-added innovations”.

This has the effect of artificially inflating the cost of public projects.

For this reason, the Bill includes a provision requiring that the methodology for both the VFM assessment and the PSC calculations must also be made publicly available.

Definition: A Public Sector Comparator (PSC) is a tool used by governments in determining the proper service provider for a public sector project. It consists of an estimate of the cost that the government would pay were it to deliver a service by itself.

Strengthening oversight by the Auditor General - Performance Audits of PPPs

According to a 2017 Research Paper by UNSW researchers Australia's auditors-generals appear to play a "relatively insignificant role in PPP governance and oversight".

According to the paper's authors, NO audit office has consistently or strategically audited the overall performance of a range of PPP projects within their jurisdiction.

Out of the 11 categories of PPPs, only four – road, rail, health and correctional – have been performance audited in three jurisdictions: NSW, Victoria and Western Australia.

The study found that over a 22 year period, only 16 (12.6 percent) individual PPP projects had been audited by state auditor-generals.

This meant the vast majority (87.4 percent) has been subject to NO independent oversight at all.

More importantly, the 2017 report states that Queensland's Audit Office has carried out NO dedicated performance audits on any of the state's PPP arrangements.

Accordingly, the Bill will facilitate the QAO conducting an audit of Queensland's PPP arrangements with a focus on investigating the achievement of 'Value for Money' and Public Sector Comparator objectives, to ensure government policy is being implemented transparently and cost-effectively.

4. Why this approach is reasonable and appropriate

The Bill's measures to increase the transparency and accountability of PPPs will be introduced in a reasonable and appropriate way so as to not unnecessarily increase the burden of administration and cost of PPP projects.

5. Alternative ways of achieving policy objectives

There are no alternative ways of achieving the policy objectives of the Bill.

6. Estimated cost for government implementation

The implementation of the provisions in the Act will not incur any additional costs for government and can be achieved within existing budget allocations.

7. Consistency with fundamental legislative principles

The Bill is consistent with the fundamental legislative principles (FLPs) in section 4 of the Legislative Standards Act 1992.

8. Consistency with legislation of other jurisdictions

Generally, the Bill is specific to the State of Queensland.

Currently, there are no express legislative or regulatory constraints on the use of PPP contracts in Australia.

The National PPP Policy and Guidelines sets out the processes to be followed in the "*investment, procurement, development and operations stages of PPPs*".

The National PPP Policy has been endorsed by all Australian state and territory governments and applies to all PPPs that are released to the market.

Apart from this, State Governments have their own jurisdictional policies and guidelines, which they use in conjunction with the National Guidelines to set out the rules around the use of PPPs.

In some states, the National PPP Policy is supplemented by state-specific PPP guidelines, for example, the NSW PPP Guidelines, and Queensland's own PPP supporting Guidelines, published in July 2015.

Two key pieces of federal legislation with application to PPPs are the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA Act) and the Competition and Consumer Act 2010 (Cth).

Under the recent reforms to the FATA Act, effective 1 January 2021, FIRB applies an additional pre-transaction mandatory approval requirement for notifiable national security actions.

The Competition Act aims to promote competition, fair trading and consumer protection in Australia. Bidders participating in PPPs in sectors where there are competition concerns may be required to obtain approval from the Australian Competition and Consumer Commission.

Certain pieces of state, territory and federal legislation may also be applicable to PPPs on a case-by-case basis.

9. Notes on Provisions:

Part 2 – Preliminary Matters

Clause 11 (3) requires a public sector entity to carry out a Value For Money (VFM) assessment as to whether a project should be undertaken as a PPP or not. This assessment must consider:

11(3)(a) the feasibility and affordability of the project; and (b) whether undertaking the project as a PPP would provide the State with reasonable Value for Money.

Under Clause 11(4), the public sector entity must prepare a report that summarises the matters considered when assessing whether the major project should be undertaken as a PPP and the outcome of the assessment.

Under Part 2, Clause 12 of the Bill requires that before a public sector entity enters into a PPP, it must:

- Make information about the project and the report publicly available, without disclosing information that, if disclosed, could jeopardise the public sector entity's ability to realise the best value for money through a competitive procurement process; and
- Provide a reasonable opportunity for members of the public to comment on it.

Part 3 – Obligations for Public Sector Entities

Clause 13 sets out the general obligations for public sector entities before undertaking a major project as a PPP.

These include a requirement under Clause 13(2)(a) to “analyse the viability and the expected risks, cost and benefits of the proposed PPP”, including “an assessment of the business case for the project” (13(2)(a)(i) and “an evaluation of the qualifications, experience and financial capacity of the private sector entity that will be carrying out the project to confirm whether the entity has the ability to deliver the project on time and within budget”.

Clause 13(2)(c) requires public sector entities to “use a conventional and systematic process to assess whether the project is likely to assess whether the project is likely to achieve Value For Money (VFM) and publish on a government website the process used, including the data compiled and the methodology used, and the results of the assessment.

When assessing whether the project is likely to achieve Value For Money under subsection (2)(c), the public sector entity must consider for each step in the project—

- the priority of the step;
- alternative ways of achieving the step;
- the costs and benefits of alternative approaches.

Under 13(4b) the public sector entity must also “*prepare an appropriate and relative comparator (Public Sector Comparator) for the project, measured against value for money achieved by other projects carried out by public sector entities.*”

Clause 14 – Obligations in relation to Commercial-in-Confidence Information

Clause 14 requires public sector entities to prepare a report that:

- Justifies any decision that information be classified as commercial-in-confidence; and
- Identifies the party for the PPP that asks for information to be classified as commercial-in-confidence and gives an explanation as to why that party’s commercial interests may be harmed by disclosure of the information and explains how the public interest is served by the classification of information as commercial-in-confidence.

The PPP Contracts should make clear which party is requesting that information provided by the contracting parties be treated as confidential, and include specific details and the reasoning on which the request is made, including:

- The time period that the information is deemed commercial-in-confidence should also be disclosed together with an explanation for the time period chosen.
- Contracts that are commercial-in-confidence should be made subject to regular review to ensure the conditions justifying confidentiality remain valid;
- The party requesting commercial-in-confidence should be identified, should justify that position, and demonstrate how its commercial interests may be harmed by disclosure.

Commercial-in-confidence provisions may be appropriate while a deal is being done, but once it is in place, details of the financial and administrative arrangements should be fully

disclosed to the people of Queensland and their elected representatives for scrutiny and monitoring.

As most PPP contracts are in areas where there is effectively a monopoly, the argument of competition should only rarely apply.

Moreover, publicly traded companies are able to disclose their financial dealings and performance whilst still managing to maintain the security of their trade secrets, intellectual property rights and other commercially sensitive information.

There is no reason, therefore, that Private Sector companies engaged in a PPP project with the Government, shouldn't be able to do the same.

The underlying principle of the Bill is that information should be made public unless there is a justifiable commercial-in-confidence reason for non-disclosure.

This means that as much information in a Government PPP contract as possible, should be made publicly available, and where this is *not* done, the government must be called on to justify why not.

Part 4 – Role of Auditor-General

Clause 16 outlines the reporting duties of public sector entities to the Auditor-General including the preparation of a report on the progress or results of the project at least once every 4 years, within 2 years after construction of a project has been completed or within six months of a Public-Private Partnership being completed.

Clause 17 requires the auditor-general to conduct a review into all relevant matters relating to a major project as soon as practicable after receiving a report about the project under Section 16(2).

Under Clause 20(1), the auditor-general must give the review report to the Minister, if the auditor-general considers it is in the public interest to do so, following which the Minister must table the review report in the Legislative Assembly within 10 business days.

The Auditor General may:

- table a report about a review to Parliament if it is in the public interest to do so, but must allow at least 14 days for the public sector entity to review and comment on the report before finalising it for tabling in Parliament; and
- continue to make the reports and comments publicly available throughout the term of the public-private partnership and for one year after the end of that term.

If the Auditor General's comments about a report includes a recommendation for the public sector entity, the public sector entity must:

- consider the recommendation and adopt a response to it;
- if its response is to implement the recommendation or some other measure, set a time frame for that implementation; and
- make a description of that response publicly available along with the report and the Auditor General's comments.

Part 5 – Role of the Treasurer

Under Clause 21, the Treasurer must publish on the Treasury Department's website—

- for each major project for which a PPP is proposed—details of the stages reached in the scrutiny and approval of the proposed PPP; and
- for each major project undertaken as a PPP—updates on the status and progress of the project.

The Treasurer must also publish a statement each financial year, containing information, including financial information, about each major project undertaken as a PPP during the financial year. As soon as practicable after preparing the statement for a financial year, the Treasurer must make the statement publicly available.

Treasury is also required to:

- ensure that the stream of future PPP payments in government accounts are included in the annual Budget. It must be clear from which Budget these annual costs are being paid from, and what the actual cost to government and taxpayer will be.

Part 6 – Role of Information Commissioner

Clause 22 details the Information Commissioner's functions in connection with the operation of this Act as being:

- (a) to promote public awareness and understanding of this Act and to promote the object of this Act;
- (b) to provide information, advice and assistance to public sector entities and the public on any matters relevant to this Act;
- (c) to Issue guidelines on public interest considerations in favour of the disclosure of PPP information, for the assistance of public sector entities;
- (d) to audit and report on the exercise by public sector entities of their functions under, and compliance with, this Act; and
- (e) to make reports and provide recommendations to the Treasurer about proposals for legislative and administrative changes to further the object and goals of this Act.

Part 7 - Miscellaneous

Clause 23 requires a public sector entity proposing to use a PPP model for the delivery of a major project, to publish all the information on a PPP project, other than information classified as commercial in confidence, on a government website.

Additionally, Clause 24 requires a public sector entity to also publish on a government website, details on:

- a) Whether, and to what extent, the project achieved value for money; and
- b) The value for money achieved for the projected measured against value for money achieved by other projects carried out by public sector entities.