OPTIONS PAPER (APPROVED)
This document was provided to the Commission and decided upon (decisions recorded).

Options for reform – Decision

Note to the Commissioners:

The purpose of this options paper is to provide the Commission with relevant information on reform options for decision-making about mining lease and associated environmental authority applications to support the Commission's recommendations.

For some key topics, a proposal for a draft recommendation (coloured blue) is presented. For others, multiple options (coloured orange) are presented. Where multiple viable options are identified, the preferred option is listed first. Where relevant considerations, risks or opportunities are identified by stakeholders, they are noted accordingly.

Terms of reference

Our terms of reference ask us to have regard to 'the role of statutory criteria under the Mineral Resources Act 1989 and the Environmental Protection Act 1994 in making an objection, deciding an application, and reviewing the decision'.

We have considered the statutory criteria for both the mining lease and the environmental authority. However, we are not proposing any changes to the statutory criteria in the Environmental Protection Act 1994. Based on our research and consultations, we consider that the statutory criteria in that legislation are adequate and directed specifically at environmental impact assessment (ss 191, 194B).

How the statutory criteria are applied

The introductory text of s 269(4) of the Mineral Resources Act 1989 requires the Land Court to 'take into account and consider' the statutory criteria. This requires the Land Court to consider all of the criteria and place the weight it considers appropriate on each criterion. During an objections hearing, the Land Court may only receive evidence that relates to an objection duly lodged (s 268(3)). Where an objection does not address a criterion, the Land Court must consider it solely on the referral material.

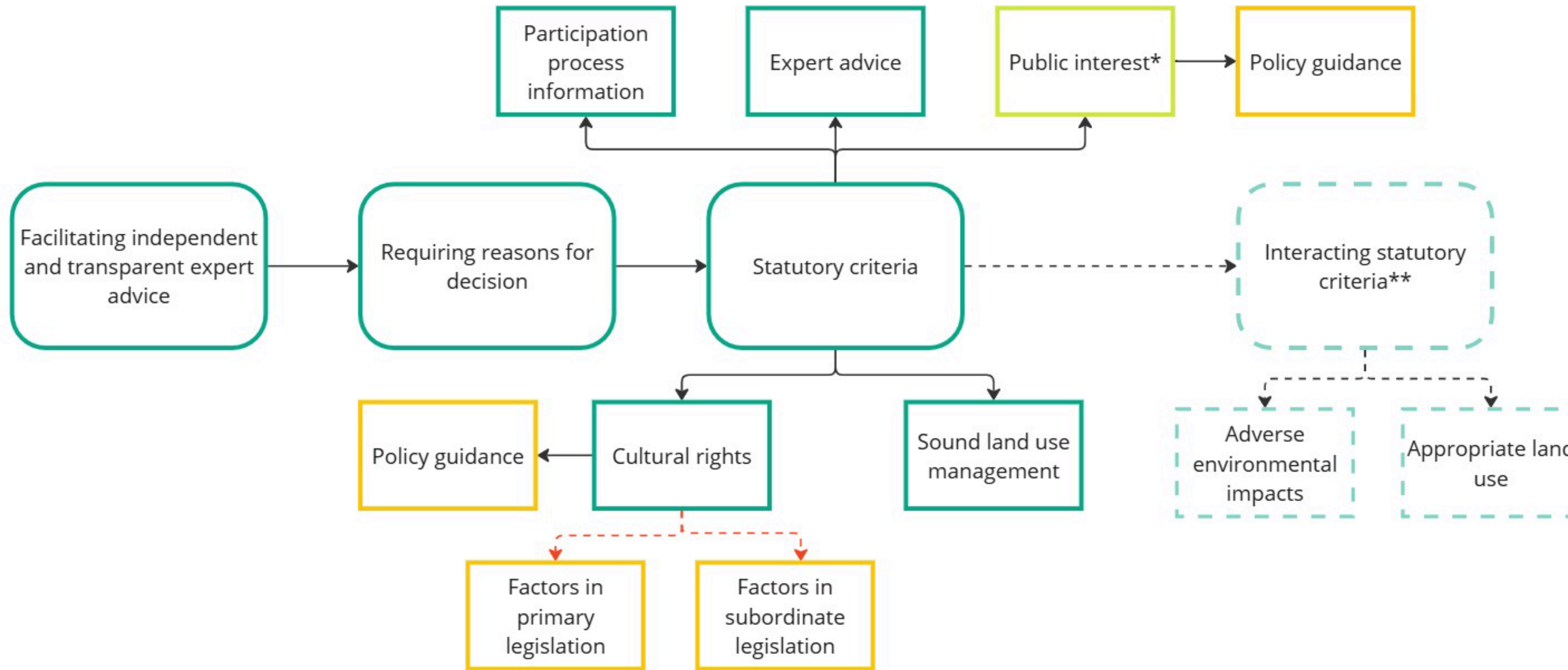
Following the Land Court hearing, the Minister must consider the Land Court's recommendation and the statutory criteria and decide whether to grant the mining lease. Under our reformed process, the Minister will consider the statutory criteria without the input of the Land Court.

The text of the statutory criteria indicates that it is an exhaustive list. However, a provision of the Mineral Resources Act 1989 declares that when the Minister is considering statutory criteria, they may take into account all other issues and matters they deem relevant (s 386M).

Omission of specific statutory criteria

Not all of the criteria in s 269(4) are included in this options paper. The excluded criteria (s 269(4)(a)–(h) and (l)) are not considered to require reform. Our research and consultation show that these criteria operate well under the current framework and no amendment is necessary under our reformed process.

Key decision points



* Note that we are not proposing a change to this criterion but have included it as it was considered in our consultation papers and we are proposing a related reform.

** We are considering the potential for reform of these criteria in the Mineral Resources Act 1989. Given their inter-relationship with other interacting processes, we will separately consider appropriate reform options as part of the options paper for interacting laws and processes (April Commission meeting).

Key topics

1. Facilitating independent, transparent expert advice for decision-makers

Draft recommendation: Amend the Mineral Resources Act 1989 and Environmental Protection Act 1994 to insert a legislative framework facilitating independent and transparent expert advice
Key considerations (and relevant implications)
• Currently, provisions exist in both the Mineral Resources Act 1989 (s 386J) and Environmental Protection Act 1994 (s 62) that allow the respective chief executives to request or verify information from an independent party. Our recommendation is designed to build upon these provisions. - We did not specifically consult with the Resources Department about their usage of the provision. However, from research, it appears that any usage is low. It is difficult to ascertain how frequently it is used, given the opaque nature of mining lease applications and grants. - Consultation with the Environment Department indicates that they use the provision frequently. However, details are not always apparent from publicly available documents. • Transparency: - Currently, there is little transparency on how independent expert advice is utilised. For mining leases, there is no information available to the public. For environmental authorities, it may be discernible from an EIS assessment reports (ss 57, 59), but they are not always publicly available and can be inconsistent. - Our recommendation is to oblige the respective decision-maker to publish details about any independent expert advice on the portal (see Options Paper 1 – Participation Part 1 – Online portal). This would include any request for information and any received report. Our recommendations about reasons for decision will also augment this change to enhance transparency. • Timing: - Currently, for mining leases, information may be required any time before the application is decided (s 386J). For environmental authorities, information may only be requested during the EIS process (s 61). - Our recommendation is to allow independent expert advice to be sought any time before the mining lease and environmental authority proposal is finalised. This will allow members of the public to make submissions on a final proposal, that will contain the independent expert advice. Such an arrangement is significant, given the nexus between making a submission and statutory appeal rights under our reformed review framework. • Source of advice: - Currently, the source of the advice is different depending on the relevant authority. For mining leases, the source must be an ‘appropriately qualified person’ (s 386J). This phrase is vaguely defined as someone who has the qualifications, experience and competence to perform the function (sch 2). In contrast, for environmental authorities, the information can be from any person (s 62). Neither authorisation has proper legislative safeguards for who may provide advice. - We recognise that the type of expertise required by the Resources Department and Environment Department will differ. Our recommendation is to allow each agency to declare ‘qualified persons’ who are capable of giving the Department independent expert advice. This mechanism should allow declarations for persons or a class of

persons (such as members of the Commonwealth IESC or NSW IEAPM), as well as accepting applications from experts. A public register of all qualified persons should be maintained on each Department's website.

  - Provisions should provide a framework for managing conflicts of interest (see Environment Protection Act 2019 (NT) pt 13 div 3A).

- Applicability and discretionary nature:
  - Currently, for both mining leases and environmental authorities, requesting independent expert advice is discretionary. For environmental authorities, information may only be requested where an EIS is required (s 61).
  - We intend to maintain the discretionary nature of the power. There will be no triggers or thresholds that compel a decision-maker to seek advice. Such a structure will reinforce that seeking independent expert advice is an optional step that may be engaged when the circumstances call for it. Generally, discretionary powers are less likely to be challenged, given there is no legal obligation to exercise the power.
- Where independent expert advice is sought, the decision-maker should (in the interests of natural justice) supply the proponent with the information and ask for their input before making a decision: Kioa v West (1985) 159 CLR 550 at 563.
- We do not propose to change the repository of the power to request independent expert advice (respective chief executive).
- We consulted on a committee or panel structure for the environmental authority only.

Arguments in support	Counter-arguments
• Our recommendation builds upon and clarifies the existing but opaque powers in the legislation. • An expanded independent expert advice mechanism will improve transparency and feed without detracting from decision-making efficiency. • Legislative parameters around access to independent expert advice will enhance the quality of decision-making. • The current Land Court hearing and recommendation allows for the presentation of independent expert advice. When this mechanism is replaced by post-decision statutory appeal, there should be some analogous mechanism that allows the decision-maker to access independent expert advice. • Lower cost and resourcing burden than constituting a committee or panel.	• Despite being discretionary, the exercise or non-exercise of a power to obtain independent advice may be the focal point of challenge in the Land Court under our revised statutory appeal mechanism. Appeals will introduce delay and reduce efficiency. • Accessing independent experts on a project-by-project basis, as is proposed, is a less reliable way of ensuring that experts will be available when compared to a committee or panel.

Alternatives not proposed

- Establishing a committee or panel. One of our consultation proposals was that experts appointed to an Independent Expert Advisory Panel would form project-specific committees (Independent Expert Advisory Committees) to provide expert advice on environmental authority applications that meet specified criteria. While the underlying rationale of this proposal was broadly supported in submissions, the proposed mechanism was not. Stakeholders:
  - Expressed in principle support for increasing the quality, consistency, rigour and transparency of the decision-making process for environmental authority applications
  - Supported the inclusion of cultural expertise as a source of advice for Government decision-makers

- Raised concerns that a committee could add an additional layer to the decision-making process, derogate from the Government's authority, create undue complications, increase uncertainty and decrease efficiency.

- Maintaining the status quo.
- Expanding the legislative facilitation of expert advice for the environmental authority only. While our consultation proposal only related to decision-making on environmental authority applications, stakeholder feedback and subsequent research and consultation supported its extension to decision-making on the mining lease, particularly to inform decisions about sound and appropriate land use.

The Commission approved in-principle the draft recommendation to facilitate independent expert advice. Members agreed that a committee or panel structure was not preferable.

2. Reasons for decision

Draft recommendation: Amend the Mineral Resources Act 1989 and Environmental Protection Act 1994 to impose an obligation for decision-makers to publish written reasons for decision upon request by an eligible person

Key considerations (and relevant implications)

- The common law of Australia does not impose an inherent right to reasons unless expressly or impliedly required by statute (Public Service Board of New South Wales v Osmond (1986) 159 CLR 656 at 662, 667, cited with approval in Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480 at 498).
- In Queensland, reasons for a decision must set out the findings of material questions of fact and refer to the evidence/material on which those findings are based (Acts Interpretation Act s 27B).
- Under the current legislative framework, only some decisions compel reasons to be given by the decision-maker.
  - For mining leases and environmental authorities referred to the Land Court pursuant to the Mineral Resources Act 1989 (s 265) or Environmental Protection Act 1994 (s 185), the Land Court routinely makes its reasons for recommendation publicly available. As a statutory party, the Environment Department receive the reasons and the Mining Minister may, in some circumstances, be sent the reasons (s 269).
  - Final decisions on mining leases do not attract a duty to provide reasons, other than in some limited circumstances.
  - Some decisions on environmental authorities attract a duty to provide reasons to the proponent and submitters (s 181).
- Decisions on both the mining lease and environmental authority are amenable to review by the Supreme Court under the Judicial Review Act (s 4). Consequently, persons who are aggrieved by those decisions may apply to the decision-maker for a statement of reasons (ss 7, 20, 32). For third-parties, it may be difficult to establish that they are persons aggrieved by the decision to obtain reasons: Lock the Gate Alliance Ltd v The Minister for Natural Resources and Mines [2018] QSC 21 at [40]–[83]. There is considerable uncertainty, delay and expense in acquiring reasons this way.
- An 'eligible person' in our recommendation could include the proponent and a submitter. Consider including 'affected land holders' in the definition.

• Reasons may need to redact or exclude information that is culturally sensitive, commercial-in-confidence or protected by some other principle of law.	
Arguments in support	**Counter-arguments**
• Enhancing the ability to obtain reasons for a decision is central to a fair, transparent and accountable decision-making process. (Queensland Ombudsman, p 23). • Imposing a broader obligation to give reasons may improve the quality of decision-making (Queensland Ombudsman, p 24). • Reasons for decision play a pivotal role in appealing decisions that are not correct or preferable. Given our recommended statutory appeal process, it follows that those eligible to appeal a final decision are also entitled to reasons. • Frequent litigation has demonstrated that the threshold in the Judicial Review Act to request reasons introduces uncertainty, delay and expense. For mining disputes, these disadvantages could be alleviated by legislative intervention to clarify who may obtain reasons. • Will assist in demonstrating that the decision-maker adequately consider human rights, discharging their s 58 obligation.	• Creating a right to obtain reasons for a broader class of persons will increase the resourcing burden on the Resources Department and Environment Departments. An allocation of resources and training may be required. The Environment Department already prepares an EIS assessment report (s 57) which is similar to reasons (s 59). In consultation, the Resources Department indicated they provide a briefing to the Minister. This may inform a statement of reasons. • The availability of reasons may promote appeals to the Land Court. This would introduce delay and uncertainty. Although, the provision of high-quality reasons may somewhat offset this concern or even reduce the number of appeals.
Alternatives not proposed	
• Introduce a requirement for decision-makers to publish written reasons for decision for all mining lease and environmental authority decisions. - This option would be incredibly onerous on the Resources Department and Environment Department, and would require far more resourcing. - Reasons for all decisions may generate more challenges in the Land Court. - Could lead to a ‘tick-the-box’ approach to completing reasons and detract from the quality of reasons for decisions prepared for significant/complex matters. • Maintaining the status quo.	
The Commission approved of the draft recommendation to impose an obligation for decision-makers to give reasons, when requested by ‘eligible persons’. It was considered that the definition of ‘eligible person’ would be linked to those with appeal rights (for example, submitters).	

3. New statutory criterion – consideration of information generated through the participation process

Draft recommendation: Decision-makers for both the mining lease and the associated environmental authority must consider information generated through the new participation process
Key considerations (and relevant implications)

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- Introducing a new statutory criterion is a consequential amendment, enhancing the effectiveness of our recommended participation process.
- Currently, participation is assessed in an inconsistent way:
  - For mining leases, participation is principally by way of objection. A lodged objection triggers a Land Court hearing (s 265) and recommendation (s 269) which must be considered by the Mining Minister when deciding the application (s 271).
  - For environmental authorities, all submissions form part of the standard criteria (sch 4), which must be considered by the chief executive when deciding the application (s 194B).
- We may consider the requirement for the proponent to generate a consultation report, covering how the recommended participation process progressed. This may apply to the environmental authority and be similar in nature to the existing requirement to provide a submissions summary and response during the EIS process (s 56).

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<tr><th>Arguments in support</th><th>Counter-arguments</th></tr>
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- Gives effectiveness to our recommendation about a new participation process.
- Promotes public confidence in decision-making by ensuring that decisions incorporate and reference public sentiment.

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- Introducing any new statutory criterion could increase the number of statutory appeals to the Land Court.
- It may be argued that allowing the information generated by the participation process to be assessed directly through a criterion, the amount of considerations would be too broad.

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<tr><th colspan="2">Alternatives not proposed</th></tr>
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- Maintaining the status quo.

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<tr><td colspan="2">The Commission approved draft recommendation 3 and 4, and considered that they be combined into one statutory criterion.</td></tr>
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4. New statutory criterion – consideration of expert advice

Draft recommendation: Amend the Mineral Resources Act 1989 and Environmental Protection Act 1994 to include a statutory criterion requiring the decision-makers for a mining lease and environmental authority to consider any independent expert advice received
Key considerations (and relevant implications)
• Introducing a new statutory criterion is a consequential amendment, enhancing the effectiveness of our recommended independent expert advice mechanism. • Currently, independent expert advice is assessed in an inconsistent way.

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- For the environmental authority, the statutory criteria includes "any response given for an information request", which includes independent expert advice (ss 191(b), 194B(1)(b), 2(c)).
- For the mining lease, there is no specific statutory criterion. However, the independent expert advice will relate to one of the stated criteria under s 269(4), which must be considered by the Minister (s 271(b)).

- The basis of this recommendation was consulted on for the environmental authority but not the mining lease. While feedback was not positive on the independent expert advice mechanism, it was generally accepted that inserting a statutory criterion was a positive development.
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- Gives effectiveness to our recommendation that a transparent and accountable independent expert advice mechanism is available to decision-makers.
- Promotes good quality decision-making by ensuring that adequate attention has been given to independent expert reports.
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- Introducing any new statutory criterion could increase the number of statutory appeals to the Land Court.
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<tr><th colspan="2">Alternatives not proposed</th></tr>
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- Maintaining the status quo.
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<tr><td colspan="2"><u>The Commission approved draft recommendation 3 and 4, and considered that they be combined into one statutory criterion.</u></td></tr>
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5. Statutory criterion – rights of Aboriginal peoples and Torres Strait Islander peoples

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<tr><th>Draft recommendation: Introduce a new statutory criterion into the Mineral Resources Act 1989 and Environmental Protection Act 1994 requiring decision-makers to consider the rights of Aboriginal peoples and Torres Strait Islander peoples when deciding a mining lease application and associated environmental authority</th></tr>
<tr><th>Key considerations (and relevant implications)</th></tr>
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- In the current process, cultural heritage rights and native title rights held by Aboriginal peoples and Torres Strait Islander peoples must be considered by decision-makers, indirectly and/or to a limited extent,. Under the Native Title Act 1993 (Cth) future acts regime, native title holders have a right to negotiate an agreement (for example, an Indigenous Land Use Agreement) with an entity that wants to develop a mine on land that has a native title determination. For the grant of a mining lease application to be valid, an agreement must be executed (Explanatory Memorandum to the Native Title Amendment Bill 1997 [1.6]). The existence of an agreement will be taken into consideration by the Mining Minister. Cultural heritage will be considered, to a limited extent, by the chief executive of the Environment Department, only in relation to an EIS (when it is required for an environmental authority). Specifically, an EIS will not be allowed to proceed beyond initial stages if the chief executive considers it is unlikely the project could proceed with an 'unacceptable adverse impact on an area of cultural heritage significance' (Environmental Protection Act 1994 ss 41A(3)(a)(iv), 49(3A)(iv), 56A(4A)(a)(iv); CP2 [86]).
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• Our research and consultation suggests that a siloed approach is taken to considering cultural rights, that presumes that native title and cultural heritage laws adequately 'deal with' requirements to consider cultural rights of Aboriginal peoples and Torres Strait Islander peoples and therefore don't need to be considered as part of the current process. • Human rights that may be engaged and limited by a mining lease application or associated environmental authority, which includes rights held by Aboriginal peoples and Torres Strait Islander peoples, must be considered by decision-makers under their s 58 Human Rights Act 2019 obligations. Anecdotal evidence shared in confidence with the QLRC indicates that decision-makers have relied upon the human rights assessments of the Land Court to date, in making recommendatory decisions following an objections hearing, and that the current capacity of decision-makers, or their delegates, to assess human rights engaged and limited by a mining lease application or associated environmental authority is limited (Department of Resources consultation; Department of Environment, Science and Innovation consultation). • The cultural rights of Aboriginal peoples and Torres Strait Islander peoples are not always contextualised in relation to mining lease applications and associated environmental authorities, which may impact good decision-making. • The statutory criterion is framed broadly to allow for the evolution of considerations that could be taken into account. Broad framing also acknowledges that multiple rights, not only cultural rights, may be engaged by a mining lease application and associated environmental authority. Such framing would require the consideration of relevant rights and interests of Aboriginal peoples and Torres Strait Islander peoples, not only peoples who hold native title over subject land (Queensland Conservation Council, Submission 32; Koala Action Inc, Submission 20). • Recognising that the statutory criterion is broad in its framing, it would be important to provide decision-makers with a list of relevant factors to take into account when considering the criterion (see Draft Recommendation 6). Policy guidance on approaching the consideration of the statutory criterion may also support good decision-making (see Draft Recommendation 7). • The statutory criterion should enable the Minister to deal comprehensively and finally with all matters relevant to the rights of Aboriginal peoples and Torres Strait Islander peoples impacted by a mining lease application. Deferral of matters to a later time may result in matters being left unaddressed, duplication, or give rise to inconsistencies between obligations (for example, native title and cultural heritage laws) or between obligations and authorised activities (Bar Association of Queensland, Submission 1). • Implementation of the statutory criterion would need to be resourced with appropriate expertise and experience to allow transparent, high-quality and timely decision-making (Australian Energy Producers, Submission 11). This action would fall within the remit of the existing native title unit within the Resources Department. • The decision-makers' consideration of the new statutory criterion would need to be supported by relevant information generated though the participation process. Consideration would need to be given to how Aboriginal peoples and Torres Strait Islander peoples could provide information relevant to their rights and interests directly to decision-makers, to give effect to their rights to self-determination, free, prior and informed consent, and cultural rights. Further, Aboriginal peoples and Torres Strait Islander peoples who have the cultural authority to speak for Country, and whose rights and interests are affected by a mining lease application and associated environmental authority, need to be correctly identified so they can participate in the decision-making process and provide information to decision-makers (Hopevale Congress Aboriginal Corporation, Submission 21). Traditional owners are uniquely qualified to make decisions, and at a minimum, to provide the advice necessary for decision-makers to apply the criteria properly (Queensland South Native Title Service, Submission 39). • Draft Recommendation 2, to expand the ability to request reasons for decision, would support transparency and accountability in decision-making by requiring decision-makers to explain how they considered the statutory criterion focused on the rights of Aboriginal peoples and Torres Strait Islander peoples. This could include the information that was relied upon in taking into account relevant considerations.

Arguments in support	**Counter-arguments**
• The criteria for deciding a mining lease application and associated environmental authority do not currently require decision-makers to consider, expressly, the rights of Aboriginal peoples and Torres Strait Islander peoples, despite these peoples	• The statutory criterion is too broad. This may lead to consideration of factors that are not relevant, which may in turn, form a ground of appeal.

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often being disproportionately affected by a decision to approve mining lease and associated environmental authority.
• The new criterion contextualises rights to mining-specific activity.
• The new criterion signals the importance of the rights of Aboriginal peoples and Torres Strait Islander peoples.
• The new criterion builds on existing rights by making the rights of Aboriginal peoples and Torres Strait Islander peoples a relevant consideration for decision-makers.
• The new criterion strengthens the enforceability of rights by creating a basis for appeal.
• Consideration of all matters relevant to the rights of Aboriginal peoples and Torres Strait Islander peoples impacted by a mining lease application under the new criterion could be comprehensive and final, addressing duplication and inconsistencies.
• Alongside Draft Recommendation 2, the new criterion increases transparency and engagement in decision-making as decision-makers would more often be required to demonstrate how they considered the criterion.
• The new criterion clarifies that each decision-maker must (already) consider the rights of Aboriginal peoples and Torres Strait Islander peoples.
• The new criterion could support nuanced consideration of the rights of Aboriginal peoples and Torres Strait Islander peoples, under the Mineral Resources Act 1989 and Environmental Protection Act 1994, that takes into account the object of each Act.
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• The statutory criterion would create duplication, delay projects, and create an unfair and unbalanced assessment process (Association of Mining and Exploration Companies, Submission 5; Energy Resources Law, Submission 12; Queensland Resources Council, Submission 36).
• It may not be possible for decision-makers to deal comprehensively and finally with all matters relevant to the rights of Aboriginal peoples and Torres Strait Islander peoples, leading to duplication and complexity.
• The rights and interest of Aboriginal peoples and Torres Strait Islander peoples, with regards to mining lease applications and associated environmental authorities, are dealt with under the Native Title Act 1993 (Cth) future act regime, right to negotiate process, and cultural heritage laws.
• The cultural rights of Aboriginal peoples and Torres Strait Islander peoples are already considered through an assessment under s 58 of the Human Rights Act 2019.
• Consideration of the statutory criterion under both the Mineral Resources Act 1989 and Environmental Protection Act 1994, for the mining development, is duplicative.
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<td colspan="2">Alternatives not proposed</td>
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• Implement the new statutory criterion in only one of the Acts.
• Assessment of rights under this criterion would be
• A novel assessment under the statutory criterion is not required if an Indigenous Land Use Agreement has been negotiated between the applicant and a RNTBC or RNTC, or if actions have been taken under the Cultural Heritage Acts (for example, Cultural Heritage Management Plan).
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<td colspan="2">The Commission approved of the draft recommendation as proposed.</td>
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6. Factors relevant to considering the rights of Aboriginal peoples and Torres Strait Islander peoples

Draft recommendation: Factors relevant to considering the rights of Aboriginal people and Torres Strait Islander peoples under a proposed new statutory criterion under the Mining Resources Act and the Environmental Protection Act 1994, should be listed

Key considerations (and relevant implications) for stating relevant factors

- Decision-makers who are required to consider a new statutory criterion on the rights of Aboriginal peoples and Torres Strait Islander peoples under the Mineral Resources Act 1989 and Environmental Protection Act 1994 may be uncertain of relevant factors to be considered, particularly in the absence of jurisprudence.
- Relevant factors that could be inserted into primary legislation, for example, include:
  - Consideration of information provided by Aboriginal peoples or Torres Strait Islander peoples whose rights and interests would be directly impacted by the granting of a mining lease or the associated environmental authority
  - Consideration of information provided by the proponent about their engagement with Aboriginal peoples or Torres Strait Islander peoples whose rights and interests would be directly impacted by the granting of a mining lease application or the associated environmental authority, and the outcomes from the engagement process
  - Consideration of human rights engaged, including cultural rights protected under s 28 of the Human Rights Act 2019, and potentially limited by the mining lease application or associated environmental authority per obligations under ss 58 and 13 of the Human Rights Act 2019
  - UNDRIP rights and principles (for example, right to self-determination, participation rights, right to free, prior and informed consent)
  - Ensure requirements under the Native Title Act 1993 (Cth) future acts regime, including the right to be notified, the right to negotiate, and the execution of an Indigenous Land Use Agreement or ancillary agreement, have been met
  - Ensure requirements under the Aboriginal Cultural Heritage Act 2003 or the Torres Strait Islander Cultural Heritage Act 2003 are met, including where relevant, all reasonable and practicable measures have been taken to ensure that Aboriginal and Torres Strait Islander cultural heritage is not harmed
  - Any other relevant factors.
- The Queensland Legislative Handbook, under fundamental legislative principles, recognises the value of undertaking significant consultation with Aboriginal and Torres Strait Islander representative bodies on proposed legislation which impact on Aboriginal tradition or Island Custom [Queensland Legislative Handbook [7.2.10]).
- If there is support for Draft Recommendations 5 and 6, there remains the question of where to best situate relevant factors. For instance, relevant factors could be situated in primary legislation (see Option 1) or in subordinate legislation (see Option 2). The ALRC has articulated four overarching principles to guide legislative design: democratic accountability and legitimacy, durability and flexibility, clarity and predictability, and coherence and navigability (ALRC Report 141 [4.37]-[4.42]). These principles are applied in the analysis below.
- Policy guidance could support consideration of relevant factors by decision-makers (see Draft Recommendation 7).
- This recommendation was not proposed in the QLRC's consultation papers. Minimal community consultation has taken place on this draft recommendation to date, although the recommendation was workshopped with senior lawyers at the Queensland Human Rights Commission.

Arguments in support	Counter-arguments

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- Support implementation of the new statutory criterion proposed in Draft Recommendation 5 by specifying to decision-makers factors that are relevant to consider in relation to the rights of Aboriginal peoples and Torres Strait Islander peoples.
- Support objective decision-making.
- Help to ensure that the rights of Aboriginal peoples and Torres Strait Islander peoples are being properly considered with respect to the grant of a mining lease and associated environmental authority.
- Promote transparency in decision-making.
- Provide clarity to Aboriginal peoples and Torres Strait Islander peoples on how rights will be considered by decision-makers.
- Provide clarity to proponents to support them to better engage with Aboriginal peoples and Torres Strait Islander peoples.
- Express statement of relevant factors to be considered by decision-makers may support a right to appeal, and may narrow the ground(s) of appeal and issues in dispute, which would in turn support the effective and timely administration of justice.

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- There may be a risk that in listing relevant factors, they are treated prescriptively and exhaustively, which may result in a narrow interpretation of the right.
- A decision may be appealed on the basis that an error of law was made.
- Introduction of relevant factors may lead to (further) legislative complexity given that the rights of Aboriginal peoples and Torres Strait Islander peoples must already be considered under other laws (for example, Human Rights Act 2019, Native Title Act 1993 (Cth), Cultural Heritage Acts).

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<tr><td colspan="2">Option 1: Situate relevant factors in primary legislation</td></tr>
<tr><td colspan="2">Key considerations (and relevant implications)</td></tr>
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- Relevant factors could be situated in the same provision as the criteria for deciding a mining lease application (ss 271 and 269 of the Mineral Resources Act 1989) or associated environmental authority (for example, s 194B of the Environmental Protection Act 1994) or in a schedule (see, for example, sch 4 of the Environmental Protection Act 1994, ‘standard criteria’).

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<tr><td>Arguments in support</td><td>Counter-arguments</td></tr>
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- Transparent and reflects democratic accountability and legitimacy as an amendment to include relevant factors in the Mineral Resources Act 1989 and Environmental Protection Act 1994 would be overseen and carried out by Parliament (ALRC Report 141 [4.38]-[4.39]). Specifically, situating relevant factors in primary legislation would attract a higher degree of parliamentary scrutiny, as compared to listing relevant factors in regulations, which can be created by the Governor in Council.
- Promote accessibility as users of the law are not required to refer to multiple legal instruments. This supports the rights and liberties of individuals and promotes the

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- Situating relevant factors in primary legislation may limit the ability of the Mineral Resources Act 1989 and Environmental Protection Act 1994 to remain fit for purpose and maintain their relevance over time. Subordinate legislation may, instead, provide the flexibility to adapt to changing or unforeseen circumstances (see ALRC Report 141 [4.40]).

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fundamental legislative principles set out in the Queensland Legislative Handbook [7.2.11]. • Promote coherence and navigability by situating relevant factors in the same legal instrument as the new statutory criterion (see ALRC Report 141 [4.42]). • Promote consistency with the approach to legislative design in the Environmental Protection Act 1994, whereby 'standard criteria' are elaborated in sch 4.	
Option 2: Situate relevant factors in subordinate legislation (for example, regulations)	
Key considerations (and relevant implications)	
• Under the Mineral Resources Act 1989 and the Environmental Protection Act 1994, the Governor in Council has the power to make regulations. • Legislative amendments would be required to expand regulation-making powers: - section 417 of the Mineral Resources Act 1989 would need to be amended to include that a regulation can be made in relation to the criteria for deciding a mining lease application (ss 271 and 269(4) of the Mining Resources Act 1989); and - section 580 of the Environmental Protection Act 1994 would need to be amended to include that a regulation can be made in relation to matters to be considered in making a final decision (s 194B of the Environmental Protection Act 1994). • Regulations, as a form of subordinate legislation, are scrutinised by a portfolio committee which considers the policy to be given effect by the legislation, the application of fundamental legislative principles, the lawfulness of the legislation, and whether compliance requirements have been met (under s 93 of the Parliament of Queensland Act 2001). A portfolio committee can directly oppose an objectionable provision in subordinate legislation by asking the Legislative Assembly to support a motion to disallow the provision under s 50 of the Statutory Instruments Act 1992.	
Arguments in support	**Counter-arguments**
• Regulations may provide the flexibility to adapt to changing or unforeseen circumstances, helping to ensure that the relevant factors remain fit for purpose and relevant over time (see ALRC Report 141 [4.40]). • Reflect coherence in the hierarchy of laws, with more technical detail being in regulations.	• Situating relevant factors in subordinate legislation does not promote transparent or democratic accountability, as there would be limited legislative scrutiny of relevant factors (see ALRC Report 141 [4.38]-[4.39]).. • Situating relevant factors in subordinate legislation does not promote accessibility as users of the law are required to refer to multiple legal instruments. • Situating relevant factors in subordinate legislation does not promote coherence and navigability (see ALRC Report 141 [4.42]). • To promote consistency with the Environmental Protection Act 1994, relevant factors would be better placed in sch 4. For instance, see the definition for 'standard criteria' which includes an inclusive list of factors.

The Commission approved of the draft recommendation as proposed in option 1. One addition was to include a factor that allows for further matters to be prescribed by regulation.

7. Policy guidance for considering the rights of Aboriginal peoples and Torres Strait Islander peoples

Draft recommendation: The Queensland Human Rights Commission should issue and publish policy guidance for decision-makers on considering the rights of Aboriginal peoples and Torres Strait Islander peoples in deciding a mining lease application and associated environmental authority
Key considerations (and relevant implications)
• The rights of Aboriginal peoples and Torres Strait Islander peoples are not always contextualised in relation to mining lease applications and associated environmental authorities, which may impact good decision-making. • Human rights that may be engaged and limited by a mining lease application or associated environmental authority, which includes rights held by Aboriginal peoples and Torres Strait Islander peoples, must be considered by decision-makers under their s 58 Human Rights Act 2019 obligations. Anecdotal evidence shared in confidence with the QLRC indicates that decision-makers have relied upon the human rights assessments of the Land Court to date and that the current capacity of decision-makers, or their delegates, to assess human rights engaged and limited by a mining lease application or associated environmental authority is limited (Resources Department consultation; Environment Department consultation). On this basis, there is an apparent need for policy guidance to support decision-makers. • Policy guidance could elaborate relevant factors implemented under Draft Recommendation 6. • Policy guidance developed in consultation with Aboriginal peoples and Torres Strait Islander peoples would: - give effect to cultural rights protected under s 28 of the Human Rights Act 2019, UNDRIP rights (for example, right to self-determination, participation rights, and the right to free, prior and informed consent), and the Statement of Commitment to reframe the relationship between Aboriginal peoples and Torres Strait Islander peoples and the Queensland Government; and - align with the fundamental legislative principle to recognise the value of undertaking significant consultation with Aboriginal and Torres Strait Islander representative bodies on proposed legislation which impact on Aboriginal tradition or Island Custom [Queensland Legislative Handbook [7.2.10]). • The Queensland Human Rights Commission is well positioned to develop policy guidance for public authorities to support them to meet their obligations under s 58 of the Human Rights Act 2019. This function has already been conferred onto the Commission in relation to the incoming Respect at Work laws. Under ss 173Q and 173R of the Anti-Discrimination Act 1991 (which come into force from 1 July 2025, see: Respect at Work and Other Matters Amendment Act 2024 - Queensland Legislation - Queensland Government) the Queensland Human Rights Commission must issue and publish guidelines on how certain persons may comply with the positive duty to eliminate, as far as possible, discrimination, sexual harassment, harassment on the basis of sex and other objectionable conduct. • Consultation with the Queensland Human Rights Commission has indicated that a statutory obligation requiring the Queensland Human Rights Committee to issue and publish policy guidance (for example, on considering the rights of Aboriginal peoples and Torres Strait Islander peoples in the context of mining lease applications) would be the most effective way to ensure that resources are allocated to the development of such guidance. • Draft Recommendation 7 could be given effect through the insertion of a provision, similar to ss 173Q and 173R of the Anti-Discrimination Act 1991, into the Mineral Resources Act 1989 and Environmental Protection Act 1994.

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- Policy guidance would need to reflect the principles of 'proper consideration' set out in Thompson v Minogue [2021] VSCA 358, which were adopted by Martin J in Johnston v Commissioner of Police [2024] QSC 2.
- While it would be appropriate for policy guidance to set out how each decision-maker's discretion should usually be exercised (for example, correctly setting out the statutory task and adequately identifying the range of relevant matters to which each decision-maker should have regard), it should not take on a rule-like quality (see Minister for Home Affairs v G [2019] FCAFC 79).
- Draft Recommendation 7 was not proposed in the QLRC's consultation papers. Minimal community consultation has taken place on this draft recommendation to date, however it was workshopped with the Queensland Human Rights Commission.

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<tr><th>Arguments in support</th><th>Counter-arguments</th></tr>
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- Acknowledging that decision-makers exercise discretion, policy guidance would help to ensure that decisions are made consistently and fairly. This aligns with the guiding principles of the Review.
- The community expects public agencies to have policies and procedures to support and inform fair and consistent decision-making at all levels of government (Queensland Ombudsman, p 1). Policy guidance can help decision-makers to identify the proper procedures for making a decision and identify key issues and sources of information for consideration.
- Policy guidance on approaching the consideration of the new statutory criterion on the rights of Aboriginal peoples and Torres Strait Islander peoples would support decision-makers to meet their obligations under ss 58 and 13 of the Human Rights Act 2019, and in turn support their consideration of relevant factors (Draft Recommendation 6).
- The Queensland Human Rights Commission is well placed, with expertise in the rights of Aboriginal peoples and Torres Strait Islander peoples and developed consultation functions, to issue and publish policy guidance.

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- Policy guidance may become an impermissible constraint on a decision-maker's discretion.
- Policy guidance may be inconsistent with the objects of the Mineral Resources Act 1989 and Environmental Protection Act 1994.
- Policy guidance may be interpreted, by decision-makers and more broadly, as having legal effect.
- Policy guidance would not be subject to parliamentary scrutiny, even though it may seek to influence/inform decision-making practice.

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- The issue and publication of guidance by a different public authority (for example, Resources Department or the Environment Department).

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<tr><td colspan="2"><u>The Commission approved of the draft recommendation as proposed.</u></td></tr>
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8. Existing statutory criterion – sound land use management

Draft recommendation: Amend s 269(4)(i) of the Mineral Resources Act 1989 to clarify that the provision relates to the technical (rather than environmental) aspects of the project	
Key considerations (and relevant implications)	
• This criterion has existed unchanged in the Mineral Resources Act 1989 since its inception. When the legislation commenced, the Resources Department conducted environmental impact studies (s 7.21). This arrangement ceased when the requirement to obtain an environmental authority issued by the Environment Department was introduced by the Environmental Protection Act 1994. • Published decisions of the Land Court indicate that this criterion is often considered in conjunction with the adverse environmental impact criterion in s 269(4)(j) and focusses on environmental impacts. • Consider interaction with development plans, which are required for prescribed minerals (s 317F) and give detailed information about the nature and extent of activities to be carried out under the mining lease (s 317B). Development plans themselves must be approved by the Mining Minister (s 317L). For mining leases that propose to mine prescribed minerals (reg 97A, sch 2A), the criterion could be satisfied when a development plan has been approved. • We did not consult on this recommendation.	
Arguments in support	**Counter-arguments**
• Given environmental impacts are assessed through the Environmental Protection Act 1994 by the Environment Department, there can be duplication by having environmental statutory criterion in the Mineral Resources Act 1989. This recommendation reduces that duplication. • The Resources Department may not possess the requisite environmental expertise to assess the statutory criterion, as it has been interpreted. By reforming it to relate to an area that they do assess (through development plans) and that fits in the Mineral Resources Act 1989, this should improve decisions.	• Low priority reform that may distract from other more significant amendments.
Alternatives not proposed	
• Maintaining the status quo.	
The Commission approved of the draft recommendation as proposed.	

9. Existing statutory criterion – public interest

<table>
<tr><th colspan="2">Proposal: Make no recommendation in relation to reform of s 269(4)(k) of the Mineral Resources Act 1989</th></tr>
<tr><th colspan="2">Key considerations (and relevant implications)</th></tr>
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- Note: Section 269(4)(k) requires the Land Court, when making a recommendation, to the Minister that **an application for a mining lease be granted** (in whole or in part), shall take into account and consider **whether the public right and interest will be prejudiced**.
- A plain reading of the text at s 269(4)(k) might infer a default presumption to grant a mining lease application unless there is an adverse impact to public interest. This is not wholly consistent with the objects of the Act or Land Court interpretation which does take a default presumption or inference that granting a mining lease is ordinarily in the public interest (unless established otherwise). Would retaining the current text – to be considered by the Mining Minister without the benefit of the Land Court's pre-decision recommendation – risk the decision maker taking a negative construction of s 269(4)(k) that 'reads down' public interest considerations?
- Is the best course of action to preserve the Land Court's approach to public interest, or could there be opportunity to encourage more positive consideration of public interest?

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<tr><th>Arguments in support</th><th>Counter-arguments</th></tr>
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- Retaining s 269(4)(k) does not require reform and preserves Land Court jurisprudence.
- Reading s 269(4)(k) in context of the objects of the Act and comparative provisions referring to public interest considerations, a reasonable reading would not include a presumption to grant a mining lease.
- Case law is clear that the exercise under s 269(4) and s 269(4)(k) requires the Minister to use their discretion to consider all factors without any preceding presumption to favour granting a mining lease application. In the case of public interest, case law confirms this is almost an unfettered discretion.
- Extrinsic guidance, based on case law, can support the Minister's decision without disturbing the text of the Mineral Resources Act 1989.

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- A plain reading of the provision can reasonably allow a person to interpret that public interest considerations should be read down.
- The Mineral Resources Act1989 allows the Minister to refuse applications preceding a mineral lease (mining claims, exploration permits, mineral development licenses) if it is not in the public interest, i.e. public interest is granted a more positive construction. Changing drafting to reflect this construction would improve internal consistency.
- Any drafting changes could be described as clarification only and not to be read as varying the interpretative task adopted by the Land Court.
- The imprecise nature of public interest assessments is always difficult for courts and decision makers. Any additional ambiguity in the text of the provision and extrinsic guidance may cause confusion and could be result in court review.
- Whilst case law often interprets the task as requiring an almost unfettered discretion (one that may allow a positive or beneficial construction of assessing public interest), in practice, courts do tend to readily overcome public interest concerns when considering other criteria. A more positive construction that the mining lease should be in the public interest, may result in more rigorous evaluation of whether a mining lease is in the public interest.

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<tr><th colspan="2">Alternatives not proposed</th></tr>
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• Redrafting s 269(4) to remove 'that an application for a mining lease be granted'. • Redrafting s 269(4)(k) more consistently with other provisions to allow a more positive consideration of public interest, for example, s 267 may reject a mining lease application at any time if 'the Minister considers it is not in the public interest for the mining lease to be granted'.
The Commission approved of the draft recommendation as proposed.

10. Policy guidance for considering the public interest

Draft recommendation: The Government should be required, by law, to issue and publish policy guidance for decision-makers on the public interest, clarifying its meaning for decisions about mining leases and associated environmental authorities

Key considerations (and relevant implications)

- We are anecdotally aware that decision-makers rely on the Land Court's recommendations following mining lease objections hearing to support their consideration and decision-making about the public interest criterion for mining leases and associated environmental authorities. In the absence of a Land Court referral in the current process, or with the proposed removal of the Land Court hearing pre-decision, there is arguably value in providing decision-makers with guidance to discharge their obligations under s 271 of the Mineral Resources Act 1989 and s 194B of the Environmental Protection Act 1994.
- In our consultation papers, we noted the option for publication of departmental guidelines on the public interest, clarifying its meaning under each Act. There was support for the development of departmental public interest guidelines, to ensure clarity of what is to be considered by decision-makers (for example, see submissions by Agforce and Environmental Defenders Office).
- Policy guidance could:
  - Support decision-makers to discharge their obligations to consider this statutory criterion
  - Improve consideration of the public interest for decisions about mining leases and associated environmental authorities
  - Enhance understanding by stakeholders and the provision of appropriate information to inform decisions.
- Policy guidance could be in the form of broad guidelines that require decision-makers to consider the public interest, having regarding to:
  - The subject matter, scope and objectives of the Act
  - Stipulate that in some circumstances consideration of the public interest will require the relevant decision-maker to take certain steps
  - Provide objective examples of what is a public interest (for example, sound natural resource management; appropriate use of public resource) and what is not a public interest (for example, a private monetary benefit)
  - Explain the process the decision-maker will use to assess public interest.
- Whether a single set of guidelines, identifying key criteria for consideration, is sufficient or whether tailored guidelines would be required.
- Consideration should be given to recommending provision of adequate resourcing and support to deliver customised training to staff of the Department to increase expertise to make decisions about public interest. Training should be regular, interactive and targeted.
- Draft Recommendation 10 could be given effect through the insertion of a provision, similar to ss 173Q and 173R of the Anti-Discrimination Act 1991, into the Mineral Resources Act 1989 and Environmental Protection Act 1994.
- Examples include the OIC guidelines for disclosure of information.

Arguments in support	Counter-arguments
• Policy guidance would help to ensure that decisions are made consistently and fairly. This aligns with the guiding principles of the Review. • The community expects public agencies to have policies and procedures to support and inform fair and consistent decision-making at all levels of government	• Policy guidance may become an impermissible constraint on a decision-maker's discretion.

(Queensland Ombudsman, p 1). Policy guidance can help decision-makers to identify the proper procedures for making a decision and identify key issues and sources of information for consideration.	• Policy guidance may be interpreted, by decision-makers and more broadly, as having legal effect. • Policy guidance would not be subject to parliamentary scrutiny, even though it may seek to influence/inform decision-making practice. • Case law sufficiently clear and uniform to generate guidance for decision-makers • Importance of avoiding narrow or prescriptive approach.
Alternatives not proposed	
• Maintaining the status quo.	
The Commission approved this draft recommendation as proposed.	

Key topics for later deliberation

Note to Commission:

The two statutory criteria from the Mineral Resources Act 1989 discussed below have been separately treated, given their inter-relationship with other interacting laws and processes, which will be the subject of separate consideration.

In the context of considering the other statutory criteria, we thought it helpful to provide some background information and consideration of potential implications that reform of these criteria may have for interacting processes established under other Acts.

We will present potential reform options for these statutory criteria at the April Commission meeting, at which time all relevant interacting Queensland and Commonwealth processes will be considered.

11. Existing statutory criterion – adverse environmental impact

Key considerations (and relevant implications)
• This criterion has existed unchanged in the Mineral Resources Act 1989 since its inception. When the legislation commenced, the Resources Department conducted environmental impact studies (s 7.21). This arrangement ceased when the requirement to obtain an environmental authority issued by the Environment Department was introduced by the Environmental Protection Act 1994. • Published decisions of the Land Court indicate that this criterion is often considered in conjunction with the sound land use management criterion in s 269(4)(i).

- Environmental impact assessment is conducted through the environmental authority by the Environment Department. Arguably, there is little reason to retain a criterion in the Mineral Resources Act 1989 that focuses on environmental impacts when the Resources Department is not equipped to undertake that assessment.
- Removing this statutory criterion may be problematic. Currently, underground water rights are granted automatically upon the obtaining of a mining lease (s 334ZP). However, to exercise those rights, the proponent must comply with the chapter on underground water management in the Water Act (Chapter 3). That chapter is administered by the Environment Department (rather than the Water Department) and involves the chief executive approving an underground water impact report (s 370). While it does not appear the Resources Department have underground water expertise, it would be a peculiar situation for a mining lease to grant underground water rights in circumstances where the decision-maker cannot consider environmental impacts in deciding whether to grant the lease.

No decision was asked for or required by the Commission. Included information was to inform only.

12. Existing statutory criterion – appropriate land use

Key considerations (and relevant implications)

- Unlike most of the other statutory criteria, this criterion did not exist in the original Mineral Resources Act 1989 as passed. It was inserted very shortly after in 1990. At the time of its second reading speech, the Minister responsible commented of the inserted criterion: “some people have expressed concern that the mining industry has first call on the use of land. People are concerned that a mining operation might be located on land that is potentially more valuable for recreational use, farming purposes or something else. I can understand that concern. When considering a mining operation, any Government would certainly consider competing land uses and make a decision as to whether a mine is really required in that area or whether the competing forces for land use should dominate. That decision will always have to be made.” (Parliamentary Debates, Queensland, 6 June 1990, p 2271).
- Published decisions of the Land Court indicate that this criterion is not often thoroughly scrutinised. Many judgments dismiss it during the course of finding that mine site is economically viable and will be protected by environmental authority conditions.
- The Regional Planning Interests Act 2014 imposes a requirement for all resource activities (and some other regulated activities) that take place in areas of regional interest to obtain a regional interests development approval (‘RIDA’). An approval is granted by the chief executive of the Planning Department (s 47) and is subject to merits review in the Planning and Environment Court by the proponent or affected landowners (s 72).
    - Many consultees considered the process to obtain a RIDA as being unnecessarily duplicative.
    - Integrating the RIDA into this statutory criterion could potentially lead to effectiveness and efficiency gains.
    - There are many implications of integrating RIDA into this criterion. Among others, it would effectively shift the final decision-making power from the chief executive of the Planning Department to the Mining Minister. The forum of appeals would shift from the Planning and Environment Court to the Land Court.
- Consultees, particularly from the agricultural industry, were disappointed that the mining lease approval process does not sufficiently consider alternative land uses.

No decision was asked for or required by the Commission. Included information was to inform only.