Parliamentary Committees



Environmental Protection and Other Legislation Amendment Bill 2022

Report No. 27, 57th Parliament
Health and Environment Committee
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Health and Environment Committee

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Acknowledgements

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All web address references are current at the time of publishing.

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Chair's foreword

On behalf of the Health and Environment Committee, I present this report on the committee's examination of the Environmental Protection and Other Legislation Amendment Bill 2022.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

This report summarises the committee's examination of the Bill, including the views expressed in submissions and by witnesses at the committee's public hearing.

On behalf of the committee, I thank those who made written submissions to the inquiry into the Bill and provided evidence at the public hearing. I also thank the Department of Environment and Science and our Parliamentary Service staff.

I commend this report to the House.

Aaron Harper MP
Chair

Recommendations

Executive Summary

The stated objective of the Environmental Protection and Other Legislation Amendment Bill 2022 (Bill) is to improve administrative efficiency and ensure the regulatory frameworks within the Environment portfolio remain contemporary, effective and responsive by amending the:

- *Environmental Protection Act 1994* – to support industry, streamline and clarify regulatory processes, better protect the environment and improve community input and transparency
- *Waste Reduction and Recycling Act 2011* – to make minor, technical refinements related to administrative processes and interpretation
- *Wet Tropics World Heritage Protection and Management Act 1993* and *Land Title Act 1994* – to better protect the Wet Tropics of Queensland World Heritage Area, improve user understanding, align with other legislation, and contemporise drafting.

The Health and Environment Committee (committee) received 29 submissions to its inquiry.

Submitters were concerned mainly with the Bill's proposed amendments to the *Environmental Protection Act 1994* and support for the various provisions in the Bill was mixed.

While some submitters supported proposed amendments to the environmental impact statement (EIS) process, which include to refuse an EIS process from proceeding if it is a clearly unacceptable project and for an EIS assessment report to lapse after 3 years, others opposed aspects of the proposed changes. Similarly amendments to require public notification of major amendment applications for environmental authorities for resource activities received strong support, as well as opposition. Issues were raised about most other proposed amendments and particularly in relation to changes to environmental authority, transitional environmental program and contaminated land provisions, and the provisions to support the implementation of the Commonwealth *Industrial Chemical Environmental Management (Register) Act 2021* in Queensland.

The Bill also proposes amendments to environmental offence, enforcement, and legal proceedings provisions in the *Environmental Protection Act 1994* which were supported by most submitters, with the exception of provisions to extend executive officer liability, which was a significant concern for some submitters. The committee has made a recommendation about this clause of the Bill.

Stakeholders made no submissions in relation to the *Waste Reduction and Recycling Act 2011*, and broadly supported the proposed amendments to the *Wet Tropics World Heritage Protection and Management Act 1993* and *Land Title Act 1994.*

The committee has commented on matters raised by submitters in relation to the consultation process in the development of the Bill.

The committee identified and considered issues of fundamental legislative principle in the Bill and is satisfied that sufficient regard has been given to the rights and liberties of individuals and the institution of parliament, and that any potential breaches of fundamental legislative principle are justified.

The committee also identified and considered human rights issues engaged by the Bill. Having considered the issues and the explanations provided in the statement of compatibility, the committee is satisfied that the Bill is compatible with the *Human Rights Act 2019.*

The committee has made two recommendations, that further consideration be given to the drafting of the provision amending section 493 of the *Environmental Protection Act 1994*, and that the Bill be passed.

1 Introduction

1.1 Policy objectives of the Bill

According to the explanatory notes, the policy objective of the Environmental Protection and Other Legislation Amendment Bill 2022 (Bill) is 'to improve administrative efficiency and ensure the regulatory frameworks within the Environment portfolio remain contemporary, effective and responsive' by amending the:

- *Environmental Protection Act 1994* (EP Act) to support industry, streamline and clarify regulatory processes, better protect the environment and improve community input and transparency
- *Waste Reduction and Recycling Act 2011* (WRR Act) to make minor, technical refinements related to administrative processes and interpretation
- *Wet Tropics World Heritage Protection and Management Act 1993* (Wet Tropics Act) and *Land Title Act 1994* in response to a review of the Wet Tropics Management Plan 1998. The changes better protect the Wet Tropics of Queensland World Heritage Area (Wet Tropics World Heritage Area), improve user understanding, align with other legislation, and contemporise drafting.[1]

1.2 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

After examining the Bill, including its policy objectives, and the evidence and information provided by the Department of Environment and Science (department/DES), submitters and witnesses, the committee recommends that the Bill be passed.

Recommendation 1

The committee recommends the Environmental Protection and Other Legislation Amendment Bill 2022 be passed.

2 Examination of the Bill

2.1 Submissions to the inquiry

The committee received 29 submissions to the inquiry.[2] Issues raised by submitters in relation to proposed amendments to the EP Act, the Wet Tropics Act and the *Land Title Act 1994* are outlined in the following sections. Submitters were concerned mainly with the Bill's proposed amendments to the EP Act.

2.2 Amendments to the *Environmental Protection Act 1994*

Sections 2.2.1 to 2.2.8 below summarise submitters' concerns with specific proposed amendments to the EP Act.

1 Explanatory notes, p 1.

2 See https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=169&id=4196.

2.2.1 Environmental harm

The Bill proposes to increase the threshold amount:

- for material environmental harm from $5,000 to $10,000 for the financial year ending 30 June 2023, and to provide for the annual indexation of the threshold amount in accordance with the consumer price index (cl 4)
- for serious environmental harm from $50,000 to $100,000 for the financial year ending 30 June 2023, and to provide for the annual indexation of the threshold amount in accordance with the consumer price index (cl 5).

Submitters commented on the potential for fewer harmful activities to reach the increased threshold amounts[3] and whether an exception should be included for circumstances where a threshold amount may not be able to be determined, or the nature of the harm is significant even though it is not valued at $10,000, or $100,000.[4]

2.2.1.1 *Department's response*

The department advised that 'the amendment will only impact on whether something is considered material or serious environmental harm. It will have limited impact on the ability of the department to enforce against environmental harm' and that 'comments about an exception and thresholds for penalties are outside the scope of the Bill'.[5]

2.2.2 Environmental impact statements

The Bill proposes to remove the requirement for an 'environmental management plan' from the environmental impact statement (EIS) process (cl 6, 7) and instead require a summary of adverse environmental impacts to be submitted with draft terms of reference for an EIS (cl 8), and require an EIS assessment report to address the adequacy of any monitoring, planning or other measures for minimising adverse environmental impacts of a project (cl 19).

Gecko Environment Council (Gecko), the Environmental Defenders Office (EDO), Environment Council of Central Queensland (ECoCeQ), and the Alliance to Save Hinchinbrook (ASH) were concerned by the proposal to remove the requirement for an environmental management plan and instead require a summary of adverse environmental impacts to be submitted with draft terms of reference for an EIS, submitting that:

- an environmental management plan is a useful and practical way for the community to understand the activities of a proposal and the proposed management of environmental impacts, amidst more detailed EIS documents[6]
- more information than 'a summary' of the potential adverse environmental impacts of a project should be required to be submitted with draft terms of reference[7]
- the Bill should be more specific about the type of information that is needed for the terms of reference to be meaningfully developed for an EIS for a project[8]

3 Submission 18.

4 Submission 21.

5 Department of Environment and Science, correspondence, 3 November 2022, pp 57, 58.

6 Submissions 14, 15, 18, 24.

7 Submission 14.

8 Submission 18.

- impacts should be fully described in terms of cumulative, combined and consequential impacts to ensure their consideration at the outset of the process.[9]

2.2.2.1 *Department's response*

In response to these concerns the department advised that 'the amendment will not have any substantive impact. The same information about environmental impacts and subsequent management and mitigation measures will continue to need to be provided in an EIS. The only difference is that the term 'environmental management plan' is no longer being used to refer to this information'.[10]

The Bill proposes changes to the EIS process to enable the early refusal for an unacceptable project, including:

- amending the process for a decision on draft terms of reference, to require the chief executive to refuse a draft from proceeding if it is unlikely the project could proceed under the EP Act or another law, and to allow a proponent to resubmit a draft terms of reference if the chief executive decides to not allow a draft to proceed to public notification (cls 9, 10)
- setting timeframes (not more than 12 months, unless extended by a maximum of 6 months) for when a public interest evaluation report must be given to the administering authority (cl 11)
- amending the process for a decision on whether an EIS may proceed, with or without conditions, including requiring the chief executive to refuse an EIS from proceeding if it is unlikely the project could proceed under the EP Act or another law, or there is a regulatory requirement for the chief executive to refuse an EIS from proceeding (cls 11, 12, 15)
- requiring a proponent to publish a notice to allow an EIS to proceed without conditions, on a website for 2 years (currently 1 year) (cl 14)
- removing the ability for a proponent to apply to the Minister to review the chief executive's decision to refuse to allow an EIS to proceed (cl 13), or a submitted EIS to proceed (cl 17).

Gecko, EDO, ECoCeQ, ASH, the Wilderness Society, Mackay Conservation Group, and Healthy Land and Water (HLW) supported these amendments to the EIS process, with some of these submitters also suggesting:

- there should be greater focus on the integrity of information on environmental impacts that is put forward by a proponent at the time of assessment to improve environmental decision-making and outcomes[11]
- more detailed definition of what constitutes unacceptable adverse impact on an area of cultural heritage significance and environmental significance would assist[12]
- clearer criteria are needed for the chief executive to be satisfied that it is unlikely a project could proceed under the EP Act or another law[13]
- the provisions in cl 9 should be amended so that it is clear that a project must be substantially revised prior to resubmitting draft terms of reference.[14]

9 Submissions 3, 24.

10 Department of Environment and Science, correspondence, 3 November 2022, p 21.

11 Submission 18.

12 Submission 21.

13 Submission 15.

14 Submission 18.

The Australian Prawn Farmers Association (APFA), the Australian Barramundi Farmers' Association (ABFA), the Association of Mining and Exploration Companies (AMEC), the Australian Petroleum Production & Exploration Association (APPEA), Idemitsu Australia (Idemitsu), and the Queensland Resources Council (QRC) opposed these provisions. These submitters made the following comments on the changes to the EIS process:

- AMEC stated that the purpose of the EIS is to allow for scientific and evidence-based decision-making by the regulator, however this proposed provision is a shift away from that principle and the paradigm of ecologically sustainable development and sends a strong signal to the resources sector and investors[15]
- APPEA noted that the amendments would introduce assessment of compliance with any Commonwealth or Queensland law including matters that are outside the remit of the EP Act, duplicating decision-making and assessment requirements of many other laws including the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)[16]
- APPEA suggested that the Bill be amended to continue holistic consideration of the adverse and beneficial environmental, economic and social impacts, and to remove regulatory consideration outside of the immediate EIS (EP Act) framework[17]
- APFA submitted that the provisions would remove due process, denying the applicant the opportunity to fully assess the impacts and develop mitigation and/or prevention strategies to remove the risk of environmental harm[18]
- ABFA contended that the provisions would allow a proposal to be rejected on a subjective, premature, and cursory assessment based on a rudimentary understanding of aquaculture within DES, creating untenable investment risk.[19]

QRC objected to the proposed provisions providing new 'decision points' for refusal to allow an EIS to proceed where the chief executive is satisfied that the project is unlikely to be approved, for the following reasons:

- the proposed ground for refusal that the project 'would have an unacceptable adverse impact on an area of cultural heritage significance' (see proposed new s 41A(3)(iv)) is an 'extremely ambiguous' criterion
- the existing definition in the EP Act for 'material environmental harm' includes that the harm 'is not trivial or negligible in nature, extent or context' which sets 'a very low threshold' for some grounds for refusal. Similarly refusal on the basis of unacceptable adverse impact on matters of state environmental significance alone, rather than the grounds being focused on matters of national environmental significance, would set a very low threshold (see proposed new s 41A(3)(iii))
- 'regulatory requirements' as grounds for early refusal 'leaves open an opportunity for the Department to impose further grounds of early refusal by regulation'
- the requirement that the chief executive make a decision, based on preliminary information only, that a project would be 'unlikely' to achieve approval would involve a judgement based on speculation about the balance of probabilities for the project
- the provisions fail to set out a limited list of the grounds for early refusal, which is inconsistent with a requirement that the chief executive 'must' refuse the project based on such grounds

15 Submission 26.

16 Submission 28.

17 Submission 28.

18 Submission 2.

19 Submission 8.

- the Bill uses the term 'unacceptable risk' in the example of grounds relating to serious or material environmental harm, but otherwise uses the term 'unacceptable adverse impact' and neither of these terms is defined (see proposed new s 41A(3))
- there has been insufficient consultation and no regulatory impact assessment for 'vague and open-ended' early refusal provisions which 'are obviously major amendments with significant consequences for both industry and submitters'.[20]

QRC stated that it did not oppose, in principle, early decision points that an EIS should not proceed, 'provided that the grounds and related determination criteria are strictly objective and limited'.[21]

QRC recommended that all early refusal provisions in the Bill be replaced by a provision that is consistent with s 54J(3)(c) of the *State Development and Public Works Organisation Act 1971,* so that an application for a project within the scope of the bilateral agreement with the Commonwealth must not be assessed if the project is 'an action the Commonwealth Minister has decided the EPBC Act, part 7, division 1A applies to because the action would have unacceptable impacts on an environmental matter protected'.[22]

The Local Government Association of Queensland (LGAQ), Agforce, the Queensland Water Directorate (qldwater), APPEA, APFA, and ABFA submitted that Ministerial review of the chief executive's decision to refuse to allow an EIS proceed should be retained in the EP Act, observing:

- removal of Ministerial review denies proponents procedural fairness[23]
- review by the Minister would provide a more efficient and less costly process than judicial review[24]
- the department has not provided any grounds for the reform or evidence of issues caused by current legislative processes.[25]

2.2.2.2 *Department's response*

The department's response to issues raised about proposed amendments to the EIS process included the following advice:

- The proponent is only permitted to resubmit the draft terms of reference once. While it is noted this does not prevent a proponent preparing a new draft terms of reference for submission under section 41, this is restarting the EIS process for the project and the chief executive would need to be satisfied that the project is likely to be able to proceed under some law.
- The EP Act already provides the ability to stop an EIS from proceeding, however these powers apply later in the EIS assessment process (under sections 49 and 56A). Allowing an EIS to progress at the draft terms of reference stage when it is probable that it is to be refused at a later stage would be wasteful of resources.
- The environmental authority assessment process is separate to an EIS. The amendments in the Bill apply to EIS and not to the environmental authority assessment. Since aquaculture activities are not subject to EIS assessment under the EP Act, aquaculture operators will not be subject to the refusal provisions proposed in the Bill.

20 See submission 17, pp 8-13.

21 Submission 17, p 8.

22 Submission 17, p 13.

23 Submissions 2, 8.

24 Submission 29.

25 Submission 28.

- The Minister review powers have never been used. The amendment replaces Minister review with internal review and appeal rights, which will create consistency with how other decisions are managed under the EP Act.
- The Bill requires that the chief executive refuse to allow an EIS from proceeding if satisfied that it is unlikely the project could proceed under some law. The reference to a project having an unacceptable adverse impact on an area of cultural heritage significance is just an example of where a project may not be able to proceed because of the operation of some law.
- The EP Act already contains an unlimited discretion for the chief executive to refuse an EIS from proceeding. The Bill simply adds an additional decision point at an earlier stage of the EIS process and also prescribes two circumstances where the chief executive *must* refuse.
- The term 'unacceptable risk' is used in other provisions of the EP Act without definition; what is unacceptable will depend heavily on the circumstances of each case.[26]

The Bill provides that an EIS assessment report would lapse after 3 years so that it is no longer valid for making an application for an environmental authority for the project. This period may be extended by the chief executive at any time before the EIS assessment report lapses (cl 20).

While supporting the Bill's provision for EIS assessment reports to lapse after 3 years,[27] some submitters questioned the extension of the period of validity before the EIS assessment report lapses, suggesting there be no extension available,[28] or limiting extension to one time for a maximum of one year,[29] or providing for a maximum extension period.[30]

QRC and Idemitsu did not object in principle to the intent of reviewing whether an EIS process has become outdated after a period of time has elapsed, but suggested a period of 5 years would be more suitable.[31] QRC also noted that the Bill includes the power for the chief executive to allow an unlimited extension timeframe for the lapsing of the report. APPEA objected to this provision, contending that 'an arbitrary 3 year 'expiry date' does not reflect the needs of 'large projects' or projects to be developed over a long period of time or requiring substantial investment'.[32]

Submitters also noted:

- there are a range of valid reasons why an environmental authority application may not be made within three years
- environmental values are unlikely to change significantly in 3 years
- the EP Act currently contains provisions (e.g. ss 125, 226A) which can be used to identify and address any environmental values that may have changed since the completion of an EIS
- the proposed provisions will result in additional risk for investment across all sectors and will prevent future large projects because of the time needed to secure funding once an EIS is approved.[33]

26 Department of Environment and Science, correspondence, 3 November 2022, see pp 28-37.

27 Submissions 5, 9, 15, 18, 21.

28 Submission 21.

29 Submission 15.

30 Submission 18.

31 Submission 13, 17.

32 Submission 28, p 6.

33 See submissions 17, 26, 28.

2.2.2.3 *Department's response*

The department advised the following in response to the issues raised by submitters about the proposed provision for an EIS assessment report to lapse after 3 years:

- There may be valid reasons why an extension should be granted. Guidance can be developed around the circumstances where the chief executive may grant an extension.
- Three years provides a significant amount of time to prepare an environmental authority application. Where there is a valid reason why an environmental authority application could not be made in 3 years, the Bill provides discretion for the chief executive to extend that timeframe.[34]

2.2.3 Environmental authorities, progressive rehabilitation and closure plans and environmentally relevant activities

The Bill proposes amendments to environmental authority provisions in relation to trial or research activities including:

- relaxing specific information requirements for applications for short-term (3 years maximum) environmental authorities for trial or research activities relating to prescribed environmentally relevant activities (ERAs) (cl 21)
- preventing transfer of an environmental authority which has a term of less than 3 years and where the environmental authority was for trial or research activities and the application did not include all information normally required because the application was for trial activities (cl 35).

LGAQ and qldwater supported the proposed changes to requirements for pilot/research projects.[35]

HLW submitted that it expected that the proposed change to the requirements would only be suitable where there was a detailed research methodology with the involvement and oversight of a research institution and corresponding ethics considerations.[36] EDO however strongly opposed the reduction in information required of applications for prescribed ERAs of any kind, as it considered the application requirements are already sufficiently adaptable to the nuances of a proposed project.[37]

APPEA, QRC, Idemitsu, and Agforce queried aspects of these provisions:

- QRC noted that the department 'already has the statutory power to grant short-term environmental authorities and to impose trial schedules that have a sunset clause within an existing environmental authority'[38]
- QRC queried whether the intention of the amendment was to continue to enable trial projects for resource projects to be undertaken in the same way as currently occurs, or whether the proposed amendment meant that resource projects, and agricultural ERAs, are no longer encouraged to undertake trial projects[39]
- APPEA submitted that the provision should be expanded to equally apply to all ERAs, suggesting that the proposed amendment is unnecessarily limited to prescribed ERAs, creating a disadvantage to the many industries operating as agricultural and resource ERAs[40]

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34 Department of Environment and Science, correspondence, 3 November 2022, see pp 24-27.

35 Submissions 10, 23.

36 Submission 21.

37 Submission 18

38 Submission 17, attachment 1, p 3.

39 Submission 17.

40 Submission 28.

- APPEA highlighted that testing for greenhouse gas mitigation measures such as Carbon Capture, Utilisation, and Storage (CCUS) would not be eligible for the proposed streamlined application requirements as this activity is not a prescribed ERA, noting that 'streamlined assessment processes are essential for all abatement technologies including CCUS'[41]
- Agforce was concerned that the proposed amendment preventing transfer of an environmental authority where the application was for trial activities (cl 35) may be an impediment to agricultural ERAs where there is a change in staff or organisation conducting the research on an ERA, as a new environmental authority application would be required for a research project to continue[42]
- QRC also submitted its 'serious concern' about the restriction on transfer rights in cl 35 if a holder has relied on the new exemption proposed in cl 21, suggesting that removal of transfer provisions could discourage rescue by more financially secure purchasers if the holder was experiencing financial difficulty.[43]

2.2.3.1 *Department's response*

In response to the issues raised by submitters about amendments to environmental authority provisions in relation to trial or research activities, the department advised:

- The amendment will support the undertaking of trial activities, with the potential that the trial could lead to better environmental standards that can be adopted throughout a particular industry. The department will use existing powers to appropriately condition the trial activities which could increase monitoring requirements to limit risks of environmental harm.
- Given the practical difficulties in applying these provisions to resource activities (e.g. an environmental authority for a resource activity needs to have a resource tenure and granting a resource tenure for 3 years may not be feasible) the amendments have been restricted to prescribed ERAs. Environmental authority amendment provisions are currently used effectively to approve trials associated with resource activities. It is intended that this current approach is retained.
- The provisions do not prevent new operators from applying for a new environmental authority for the operation. The exemption for transfers is intended to ensure that the provisions are not misused.[44]

Other amendments to environmental authority provisions in the EP Act proposed in the Bill include:

- allowing the administering authority to approve a progressive rehabilitation and closure planning (PRCP) schedule with amendment (cl 24)
- for an application for a mining activity relating to a mining lease, preventing an applicant that gives notice to the administering authority that it does not intend to request referral of the application to the Land Court, from later making a request to refer its application to the Land Court (cl 25)
- allowing the amendment of environmental authorities in more situations, including following the acceptance of an enforceable undertaking (cl 28)
- changing the environmental authority suspension provisions to provide that there are specific provisions of the EP Act that continue to apply to suspended environmental authorities, and to clarify that an existing suspension may be extended (cls 36-45).

41 Submission 28, p 3.

42 Submission 29.

43 Submission 17.

44 Department of Environment and Science, correspondence, 3 November 2022, pp 10-11.

APFA submitted that it did not support cl 28, which would permit the department to amend an environmental authority or PRCP schedule because of a matter related to the acceptance, withdrawal, variation, amendment or suspension of an enforceable undertaking, as such 'amendments may include "intensity/yield" measures'.[45]

2.2.3.2 *Department's response*

The department advised that it 'regulates proportionate to risk. There is no intent to condition according to a load-based system. However, prescriptive conditions could be imposed where an outcome-focused condition does not adequately address the risks posed by the activity'.[46]

The Bill proposes to require public notification for all amendment applications for an environmental authority for a resource activity where the assessment level decision is that the amendment is a major amendment (cls 29, 31, 32).

ECoCeQ, HLW, and EDO supported this amendment. EDO stated that the proposed provision 'will greatly reduce uncertainty and wasted resources in advocating for major amendment applications to be notified'.[47]

Cement Concrete & Aggregates Australia (CCAA), AMEC, APPEA, and QRC opposed the proposed amendment to require all resource project major amendment applications to be publicly notified:

- CCAA explained that the proposed amendment to the definition of 'minor amendment (threshold)' (cl 29), would mean that any change to a condition that results in a change to impacts on an environmental value (whether this be a reduction of impact, or insignificant change to an impact) would be captured as a 'major amendment', because the definition of 'environmental value' is potentially very broad.[48]

  CCAA suggested that 'this poses significant cost and administrative burden for operators and the regulator for potentially little to no benefit to environmental values'.[49]

- AMEC submitted that the proposed amendment will increase the time and cost in making environmental authority amendment applications related to the resources industry, 'noting that applications related to other industries are not required to undergo public notification at all'.[50]

  AMEC advised that in recent years the department has often determined that mining-related environmental authority amendments 'are major, even where there is no associated increase risk of environmental harm, or the other statutory criteria have not been met' citing examples of amendments seeking to refine conditions around the operational requirements for existing structures, 'even where no physical changes to those structures are involved, and it has been plainly demonstrated that there is no associated increased environmental risk'.[51]

  AMEC suggested the addition of an automatic public notification requirement 'will likely lead to increased disputes between operators and the regulator, and potentially lead to companies electing to litigate assessment level decisions'.[52]

45 Submission 2, p 3.

46 Department of Environment and Science, correspondence, 3 November 2022, p 14.

47 Submission 18, p 7.

48 Submission 7, p 2.

49 Submission 7, p 3.

50 Submission 26, p 4.

51 Submission 26, pp 4-5.

52 Submission 26, p 5.

- APPEA and QRC also submitted that the amendments in cls 31 and 32 would result in 'significant' and 'unnecessary' increases in costs, delays in approvals, and uncertainty 'for various types of applications that, in practical terms, ought to have been regarded as minor'.[53]

  APPEA and QRC reported problems over several years with definitions of major and minor amendment applications and 'inconsistent interpretations'[54] and 'unpredictable use of public notification processes'[55] by the department, noting that the department had acknowledged the issues and commenced a process to resolve them.

- APPEA submitted that the proposed mandatory requirement for public notification for all major amendments would apply irrespective of whether such amendments have any impact on environmental values, there are potential material impacts on a third party, or the amendments relate to development that has already been through public notification processes.

  Further, APPEA noted the government's commitment in the Queensland Resources Industry Development Plan to a review of objection processes, including processes in the EP Act, to be conducted by the Queensland Law Reform Commission, and suggested that no amendments relating to objections processes be progressed until the recommendations of the Queensland Law Reform Commission are finalised.[56]

- APPEA and QRC recommended the amendments in cls 31 and 32 be withdrawn, requesting that the department review the definitions and attempt to resolve ambiguity in the definitions of major and minor amendments.[57]

2.2.3.3 *Department's response*

The department's response to the issues raised by submitters about the proposal to require public notification of major amendment applications for resource activities included the following advice:

- Generally speaking, amendments to standard conditions should be assessed as a major amendment because the standard conditions are intended to be best practice for the activity and have been subject to extensive consultation with both industry and the community.
- It is likely that more major amendments for resource environmental authorities will require public notification under the proposed changes, however this is important to ensure robust assessment if there are significant changes to how resource activities are carried out or to their impact on environmental values.
- Public notification promotes community awareness and understanding of the implications of an application. Community involvement in the application process can also improve environmental outcomes.
- Existing provisions are not clear that public notification of major environmental authority amendments is necessary where there is significant disturbance or clearing caused by the amendment, where there may be impacts on threatened species or habitat, where there are changes to high-risk activities, or where there may be a significant risk to an area of public interest; for example, under current legislation, an amendment to significantly expand the number of wells authorised under a conventional petroleum environmental authority within a sensitive environmental area may not require public notification. Other amendments such as addition of a petroleum lease to an existing environmental authority, increase in the size of

[53] Submissions 28, p 2; submission 17, p 14.

[54] Submission 17, p 14.

[55] Submission 28, p 2.

[56] Submission 28, p 2.

[57] Submissions 17, 28.

regulated structures, or a change to a mine's footprint/area of disturbance, currently do not trigger public notification.

- A delay in the commencement of these provisions may extend existing uncertainty around public notification requirements for certain major amendment applications (e.g. where the amendment will result in significant disturbance or clearing, where there may be impacts on threatened species or habitat, where there are changes to high-risk activities or where there may be a significant risk to an area of public interest).
- Industry has previously agreed that there has been inconsistency and administrative confusion in practice about what constitutes a substantial increase in the risk of environmental harm under the amended environmental authority. By removing this decision point, the department is providing more certainty around public notification requirements.
- The department is committed to undertaking a review of its guideline *Major and minor amendments* to support consistent and transparent assessment level decisions on environmental authority amendment applications.
- The proposed amendment is not counter-productive to the planned review of objection processes, rather it helps clarify when notification processes apply, and ensures adequate opportunities for community participation.[58]

2.2.4 Estimated rehabilitation costs for resource activities and estimated rehabilitation cost decisions

Proposed amendments in the Bill regarding applications for estimated rehabilitation costs (ERCs) for resource activities include:

- allowing the administering authority to extend the information request period during an ERC decision-making process (cl 48)
- inserting a process for changing an application for an ERC decision (cl 49)
- allowing the administering authority to issue temporary authorities where this is deemed reasonable because of an emergency situation (cl 53).

In regard to these amendments, AMEC stated that the current and proposed operation of the ERC and PRCP frameworks 'will only continue to appropriately deal with those organisational and environmental authority holders that have very large-scale footprints and multiple operational linkages' and that 'while ERC and PRCP are a step in the right direction for independent calculated value of rehabilitation, it is critical that there is a degree of flexibility, and understanding for those matters and sites that don't neatly fit within the calculated values' such as 'the emerging junior and mid-tier mineral (non-coal) operations'.[59]

EDO supported cl 48, which would allow the department to extend the period within which it can request information from an applicant, although noted that the provisions are still restricted[60] (the amendment provides for the administering authority to make one extension of the information request period by a maximum of 10 business days without the applicant's agreement).

EDO suggested that cl 49, relating to 'minor change' to an ERC application, be redrafted to show 'that the level of change allowed under this provision is tangibly inconsequential rather than being open to the whim of the office of DES'.[61]

58 Department of Environment and Science, correspondence, 3 November 2022, see pp 13-20.

59 Submission 26, p 2.

60 Submission 18.

61 Submission 18, pp 7-8.

In relation to the new provisions allowing temporary authorities for emergency situations (cl 53), QRC submitted that while the department 'probably intends the new 'temporary authorities' mechanism to be helpful in emergencies', QRC did not support the provisions because 'there are many situations in which it would simply create unnecessary red tape during an emergency, and there are numerous unintended consequences of the drafting of this Part'.[62] QRC also suggested that:

- s 23 of the EP Act (which lists 7 Acts that override the EP Act to the extent of any conflict with the other Act) should not be overridden by cl 53
- conditions imposed on a temporary authority under proposed new s 316GE(2) should be subject to review and appeal.

In contrast, qldwater and WRIQ supported cl 53, although WRIQ recommended the following changes to the provision:

- the definition of 'emergency situation' be expanded to include a localised disaster situation for the waste and recycling industry, to make allowance for situations where a significant weather event in a localised area requires a substantial clean-up effort and debris/rubbish needs to be stockpiled before it can be properly disposed of
- there be flexibility to extend the end date of 4 months after the day the temporary authority is granted, for situations where waste cannot be properly managed in that time
- in the event that a temporary authority application is refused, any information provided by a proponent to the administering authority in support of its application cannot be used in enforcement action pursued by the administering authority against the proponent.[63]

2.2.4.1 *Department's response*

In response to the issues raised by WRIQ about temporary authorities for emergency situations, the department advised that 'more than one temporary authority may be granted in relation to the same relevant ERA' and 'operators may apply for a new temporary authority, in place of extension provisions'.[64]

The department also advised in relation to cl 49, relating to 'minor change' to an ERC application, that the drafting is consistent with the definition of 'minor change' for an application for a proposed PRCP schedule and that 'the department will need to be satisfied to a reasonable standard that it is not a change that would adversely affect its ability to assess the change application'.[65]

2.2.5 Environmental management

The Bill inserts provisions to support the implementation of the national approach for managing the environmental risk posed by industrial chemicals under the Commonwealth *Industrial Chemicals Environmental Management (Register) Act 2021* (Cth) (ICEMR Act). The amendments are expected to be consistent with legislation in other jurisdictions when all states and territories implement the ICEMR Act within their jurisdictions.[66]

The Bill proposes that a person does not comply with the general environmental duty (s 319) in the EP Act if the person does not comply with any risk management measures for a chemical scheduled on the Industrial Chemicals Environmental Management Standard (IChEMS) Register under the ICEMR Act, even if any other reasonable and practicable measures may have been undertaken (cl 54).

62 Submission 17, p 20.

63 Submission 11, pp 4-5.

64 Department of Environment and Science, correspondence, 3 November 2022, p 41.

65 Department of Environment and Science, correspondence, 3 November 2022, p 38.

66 Explanatory notes, p 13.

QRC, Idemitsu, APFA, ABFA, LGAQ, and WRIQ raised the following issues in relation to cl 54:

- APFA and ABFA did not support the provision, 'when adequate legislation and penalties already exist' under the ICEMR Act[67]
- QRC opposed these amendments as 'while QRC has no issues with amending the EP Act to acknowledge the iChEMS national scheme, we do not agree with the proposal to remove the defence in s493A ie. if you do not comply with iChEMS relevant risk management measures, you have not complied with the general environmental duty'[68]

  QRC also submitted that the provision does not appear to allow time for reasonable steps to be taken for compliance.[69]

- WRIQ objected to cl 54 'primarily on the basis that it undermines the certainty of operating under an approved environmental authority', noting that 'it is difficult to predict what risk management measures under the national scheme will be required' and that 'it is foreseeable that significant changes to operations and even infrastructure may be required on short notice and at considerable cost'.[70]

  WRIQ requested that the department:

  - clarify that the application of the IChEMS system is intended only to schedule storage and use of chemicals of concern and that it will not be relevant for end-stream recipients such as landfills
  - clarify that consideration of compliance with the general environmental duty is at the time of any alleged incident, and that the risk management measures will not apply retrospectively
  - provide for a minimum time-period, not less than 6 months (preferably 12 months to accommodate budget cycles), to take reasonable steps to comply with any new risk management measures
  - clarify that if there is a conflict between a condition of an environmental authority and a risk management measure, the environmental authority prevails to the extent of the inconsistency.[71]

2.2.5.1 *Department's response*

The department provided the following comments in response to the issues raised by submitters about the provisions to support the implementation of the ICEMR Act:

- The Queensland Government has consistently supported the development of the IChEMS and has committed to implement IChEMS through Queensland's existing regulatory framework. The proposed amendments will enable the implementation of IChEMS in Queensland and provide certainty on the acceptable standard to comply with the existing general environmental duty.
- Public consultation on scheduling decisions is required by the legislation. Relevant Queensland stakeholders will always have an opportunity to put forward a submission which must be considered by the Commonwealth Minister before the making, variation or revoking of a scheduling decision.
- The ICEMR Act also allows for risk management measures to commence from a particular day, enabling the measures to be implemented after a suitable notification period if this is

67 Submission 2, p 3; submission 8, p 3.

68 Submission 17, p 4.

69 Submission 17, p 4.

70 Submission 11, p 3.

71 Submission 11, pp 3-4.

considered necessary. For example, this may occur in response to industry feedback received during the required consultation on risk management measures.

- The proposed amendments to implement IChEMS commence on assent, and do not include retrospective application.[72]

The Bill contains amendments relating to contaminated land and audits, including:

- clarifying when the duty to notify of environmental harm applies (cls 55–57)
- expanding the purposes of environmental evaluations (cl 58)
- allowing environmental investigations to be conducted if the administering authority is satisfied or suspects hazardous contamination of land, irrespective of the concentration of the contaminant (cl 59)
- providing the administering authority with the power to include land that it is satisfied or suspects is contaminated land in the environmental management register (cl 85).

HLW supported the recognition in cl 59 that many contaminants have the potential to cause serious environmental harm or material environmental harm irrespective of their concentration.[73]

However APFA, ABFA, LGAQ, WRIQ, and qldwater did not support cl 59, suggesting that:

- the current wording of this provision of the EP Act is sufficiently strong, and the amendment would be a change from a fit-for-purpose investigative approach towards a 'one-size-fits-all' solution that would put regional and remote service providers at a particular disadvantage[74]
- it would be possible for the department 'to require an environmental evaluation based on mere supposition and speculation, albeit a reasonably held opinion' which would be likely to increase the number of investigations and be onerous for industry and landowners[75]
- the amendment negates the need for the administering authority to define its grounds for an environmental investigation and there would need to be 'a high level of administrative transparency to exclude inappropriately proportioned environmental risk on individual Local Government-owned Environmental Authority holders'.[76]

2.2.5.2 *Department's response*

In response to the comments from submitters about amendments relating to contaminated land the department advised:

- The requirement to suspect 'on reasonable grounds' is considered to be a relatively high standard, requiring the establishment of objective circumstances constituting reasonable grounds.
- The amendment does not negate the need for the administering authority to define grounds for an environmental investigation. The amendment will ensure that an environmental investigation can be required for hazardous contaminants with the potential to cause serious or material environmental harm regardless of concentration.[77]

[72] Department of Environment and Science, correspondence, 3 November 2022, see pp 50-53.

[73] Submission 21.

[74] Submission 23.

[75] Submission 11, p 5.

[76] Submission 10, p 2.

[77] Department of Environment and Science, correspondence, 3 November 2022, see pp 38-40.

The Bill proposes to change the application process for transitional environmental programs (TEPs) from submission by the applicant, to the administering authority being responsible for drafting a TEP (cls 61–64).

While EDO supported this amendment,[78] ABFA, WRIQ, QRC, Idemitsu, and APPEA opposed the change, noting that:

- in most situations, an operator is in a better position to understand the operational opportunities and constraints for options to improve an environmental management issue over a period of time as the department does not have the technical and commercial expertise/resources to develop TEPs[79]
- as an instrument designed to facilitate the transition from noncompliance to compliance on a voluntary basis, changes to this TEP system may result in fewer TEPs being made, which in turn may defeat the purpose of TEPs[80]
- there may be some limited circumstances where a holder does not have the relevant skills and is unable to engage suitable consultants, and an option to request the department to prepare a voluntary TEP may assist, but this should not be at the expense of removing the existing process as the other alternative.[81]

2.2.5.3 *Department's response*

The department advised the following in response to the issues raised by submitters about changes to the application process TEPs:

- The amendments are expected to lead to better TEPs with improved conditions and enforceability. Under the existing provisions of the EP Act, the ability of the administering authority to amend what was proposed by the applicant has been limited. The operator will continue to provide the same information it provided under the existing provisions so the administering authority can continue to rely on its knowledge of the land.
- Consultants could still be used to prepare the application and provide all of the information that would have previously gone in the draft TEP. If the TEP application is approved, then the administering authority will use this information in drafting the TEP.[82]

In relation to environmental protection orders under the EP Act, the Bill proposes:

- enabling environmental protection orders to be issued in relation to any activity that has caused, or is causing, or is likely to cause, serious or material environmental harm, rather than only in relation to ERAs (cl 81)
- clarifying that direction notices may be issued to require remedy of the matter relating to a contravention, including cleaning up, fixing or rectifying environmental harm caused by the contravention (cls 82–83)
- streamlining the process for land owners to ask for particulars of their land to be included in a land register, by clarifying that an 'owner' includes a department responsible for managing certain state land (cl 84).

ABFA submitted that provisions that create the opportunity for the department to amend existing environmental authority conditions 'should be governed by an objective framework that minimises

78 Submission 18.

79 Submissions 8, 11, 17, 28.

80 Submission 11.

81 Submission 17.

82 Department of Environment and Science, correspondence, 3 November 2022, see pp 49-50.

interpretation and is supported by an independent appeals process', stating that the department may issue a direction notice to a proponent with a request they cease an activity, and in issuing a direction notice, the department 'reserves the right to retrospectively amend' an existing environmental authority in other ways, 'even without evidence of environmental harm, which serves to reduce that farm's productivity, and value, by an equivalent amount'.[83]

2.2.5.1 *Department's response*

In response to these comments, the department advised that 'none of the amendments in the Bill will operate retrospectively. Amendments to an environmental authority apply only to activities occurring after the amendment is made. Environmental authority amendments are subject to both an internal review and a court appeal process'.[84]

2.2.6 Compliance, investigation and enforcement

In regard to the clauses of the Bill amending enforcement provisions in the EP Act, AMEC, APPEA and QRC noted that the amendments propose changes to provisions that are within the terms of reference of the independent review into the adequacy of existing powers and penalties under the EP Act currently being conducted by retired Judge Richard Jones.[85] These clauses include:

- environmental investigations (e.g. cl 59)
- environmental protection orders (e.g. cls 81–83)
- offences related to environmental requirements (e.g. cls 92–93)
- powers of authorised persons for vehicles and places (e.g. cls 98–100)
- special evidentiary provisions for particular emissions and orders against persistent offenders (e.g. cls 104, 108).[86]

AMEC, APPEA and QRC suggested the proposed changes to enforcement provisions of the EP Act should not be progressed prior to completion of the independent review, which is expected to conclude in late 2022,[87] and queried why the amendments in the Bill 'are considered so urgent that they cannot await the outcome of the review'.[88]

Further specific comments from submitters about the Bill's amendments to various offence, investigation, enforcement, and legal proceedings provisions are outlined below.

The Bill amends environmental offence provisions in the EP Act including:

- combining provisions regarding offences of contravening any aspect of a TEP including conditions and requirements (cls 92, 93)
- clarifying the application of noise standards by local governments and providing that boats at jetties and pontoons are subject to the default noise standard for the operation of a power boat engine (cls 94, 97).

Redland City Council submitted a concern that the amendments relating to enforcement of noise standards for boats at jetties and pontoons raised jurisdictional issues as local governments may have limited powers and experience investigating and enforcing standards on the water, or 'create dual regulation' with other state government departments 'who do have authority to exercise powers on

83 Submission 8, pp 3-4.

84 Department of Environment and Science, correspondence, 3 November 2022, p 54.

85 See https://environment.des.qld.gov.au/management/policy-regulation/independent-review.

86 See submission 28.

87 Submissions 17, 28.

88 Submission 17, attachment 1, p 6.

the water (Queensland Police Service, Maritime Safety QLD)'.[89] Redland City Council recommended that cl 97 be amended to clarify that local governments are to enforce matters on premises where they hold the appropriate powers for investigation and enforcement.[90]

The LGAQ also requested further consultation with local government to clarify how noise standards are to be implemented at the local level, noting that 'differences in legislation between local and State-owned land (e.g. state schools)' has been identified by local government as a key source of complaints from residents.[91]

2.2.6.1 *Department's response*

The department advised that 'investigation and enforcement of noise from boats at jetties and pontoons will be very similar to existing investigation and enforcement of noise so local government officers are likely to already hold the appropriate skills and powers'.[92] The department also confirmed that it 'would welcome providing local governments with clarification on noise standards'.[93]

In relation to enforcement powers, the Bill proposes:

- explicitly allowing authorised persons to take unmanned aerial vehicles (UAVs) into places when exercising entry powers (cl 98) and to use body-worn cameras (cl 102)
- inserting a power to allow authorised persons to require a corporation to nominate an executive officer or employee to answer questions on behalf of the corporation (cls 99, 100)
- allowing criminal history reports to be obtained from the Police Commissioner in specific circumstances to support the safety of authorised persons (cl 101).

ECoCeQ, EDO and Mr Jason Hudson expressed their support for these amendments to enforcement powers as providing greater protection for officers and assisting authorised persons in performing their duties.[94] The LGAQ and Mr Hudson queried whether the power to obtain criminal history checks (cl 101) extended to the chief executive officer of a local government, and strongly recommended that this be the case.[95]

QRC stated that it 'supports the use of body-worn cameras only in circumstances where the administering authority is reasonably satisfied that illegal activity is occurring, dangerous conditions are anticipated or similar circumstances when entering a site for compliance purposes', but for routine site access, QRC would discourage the use of body-worn cameras for its potential to undermine open dialogue with operators and landholders. QRC also suggested the publication of procedures and guidance material, including how recordings are used, stored and protected.[96]

2.2.6.1 *Department's response*

In response to the comments from submitters in relation to amendments to enforcement powers the department advised:

- Body-worn cameras play a number of important purposes, not only in deterring aggressive behaviour and capturing evidence. They also can be used for training purposes. The comment regarding publication of procedures and guidelines is noted as a suggestion for implementation.

89 Submission 25, p 1.

90 Submission 25, p 2.

91 Submission 23, p 2.

92 Department of Environment and Science, correspondence, 3 November 2022, p 55.

93 Department of Environment and Science, correspondence, 3 November 2022, p 68.

94 Submissions 4, 15, 18.

95 Submissions 4, 23.

96 Submission 17, attachment 1, pp 5-6.

- The power to obtain criminal history reports does not extend to the chief executive officer of a local government. However, the chief executive of the department can delegate the power to the chief executive officer of a local government.[97]

In regard to legal proceedings, the Bill proposes:

- providing that maps, charts or plans made by an authorised person may be taken as evidence in proceedings under the EP Act (cl 103)
- providing for special evidentiary provisions for proceedings concerning contraventions of environmental authority conditions related to particular emissions that cause environmental nuisance (cl 104)
- enabling courts to order persistent offenders to stop carrying out particular activities and making it an offence to breach such an order (cl 108).

The Environment Institute of Australia and New Zealand (EIANZ) submitted that the amendment in cl 103 'appears to any give map, chart or plan prepared by an authorised person the force conclusive evidentiary proof of the matters to which they relate' and 'places the onus on any defendant to disprove any matters set out in the map, chart or plan'.[98]

EIANZ also queried cl 104, submitting that in introducing a new definition of 'relevant condition' that does not require any qualitative or quantitative measurement of an emission, nor its impact to the environment, to determine that an environmental nuisance has occurred, 'the amendments give the subjective (and potentially unqualified) views of an authorised officer credibility'.[99]

Agforce expressed concern about the application of cl 108, recommending exemption for agricultural ERA standards for breaches related to 'persistently not keeping records required for an Agricultural ERA Standard' contending that 'environmental harm cannot be assumed from a lack of record-keeping'.[100]

2.2.6.2 *Department's response*

In relation to these concerns, the department advised:

- The maps, charts and plans need to be certified by the administering executive so it is expected that a particular standard will apply in ensuring accuracy.
- Evidence received under section 491 (cl 104) is not conclusive and the defendant may still rebut the evidence.
- Exempting one type of operator is not appropriate or reasonable. The courts will make the decision on whether an order under section 506A (cl 108) is appropriate depending on all of the facts and circumstances of each case.[101]

The Bill proposes to amend the EP Act to make it clear that executive officers can be held liable if they were in office at the time an act or omission happened that eventually results in the commission of an offence (cl 105).

97 Department of Environment and Science, correspondence, 3 November 2022, pp 59, 60.

98 Submission 22, p 2.

99 Submission 22, p 2.

100 Submission 29, p 3.

101 Department of Environment and Science, correspondence, 3 November 2022, pp 60, 61.

QLS, QRC, Idemitsu, AMEC, and APPEA did not support cl 105 as currently drafted, particularly in the absence of amendments to the defences in s 493 of the EP Act.[102]

The explanatory notes state that amendments to s 493 'are intended to expand the existing operation of the provision' and are to ensure 'that those individuals who are actually responsible for the offence can be held liable and cannot leave office to avoid liability'.[103] Under s 493, evidence of a corporation's offence is deemed to be evidence against each of the executive officers of the corporation.

The explanatory notes further state that the defences in s 493(4) are intended 'to provide a defence if a former executive officer was not in a position to influence the acts or omissions that led to the commission of the offence, or where the officer was in a position to influence but took all reasonable steps to ensure the corporation complied with the relevant provision of the EP Act'.[104]

QLS submitted that the proposed amendments, which would substantially extend liability to historical acts or omissions taken by a broad group of individuals, fail to consider knowledge of the executive officer at the time of a decision and any potential intervening events or advancements. The proposed amendment does not require that the former executive officer knew or ought reasonably to have known that the act or omission would result in the corporation failing to comply with the EP Act.[105]

QLS explained that the amendment would impose liability on an executive officer who makes a decision based on the best available information or advice at the time in an effort to ensure that the decision will not lead to a failure to comply with the EP Act, but despite these efforts, environmental harm results. Further, liability would also be imposed in circumstances where the executive officer could not reasonably have known that acts or omissions following that decision would cause an offence to be committed.

QLS noted that there may be a significant time gap between the act or omission happening and the offence being committed, during which events may occur to exacerbate or improve the situation although the former executive officer could not influence the outcome, such as:

- new information, technological or other advancements, or changes to industry practice
- further information coming to light that the act or omission was based on factual inadequacies or inaccuracies
- following the executive officer's departure, steps taken to comply with the EP Act being discontinued or not implemented in the way in which the executive officer anticipated.

QLS observed that defences under s 493(4) may be relevant in some circumstances but that:

- the defences are not adequate in circumstance where a former executive officer is charged in connection with acts and omission which the executive officer did not know or could not have known would lead to an offence against the EP Act
- a former executive officer will find it difficult to establish the defences where they no longer have access to the records and employees of the corporation
- there is a question as to whether the defences will apply if an executive officer resigns in protest at a decision because the executive officer fears that environmental harm might result but is unable to change the corporation's course of action.[106]

[102] Submissions 13, 16, 17, 26, 28.

[103] Explanatory notes, p 52.

[104] Explanatory notes, p 52.

[105] Submission 16.

[106] Submission 16, p 3.

QLS told the committee:

> From a legal perspective, simply casting the liability net to every executive officer of a corporation, potentially since the formation of that company, lacks that relevant connection. It needs to be brought together so that it is the people who contributed directly to the actual acts that caused the offence who are the ones held liable.
>
> …There is the defence provision that they had no power to influence the company or that they reasonably complied with the act. They are good defences, but they are really considered in the context of someone who is currently in the job. They are not really well suited to somebody who was in the job some time ago and may, for example, now have significant difficulty in accessing records and information of the company to prove their innocence.
>
> …There is a need to come back and do quite a bit more work in the circumstances and also to understand how the existing chain-of-responsibility provisions could play a role in this particular circumstance...
>
> The explanatory notes talk about the COAG governance principles, and there is quite a lot of work in that. There is a lot of balancing of individual factors required. …There is some complexity in terms of balancing and considering what resources are available to former officers, what evidence they should be able to achieve, what evidence they should be able to attain, and who is best placed to provide that evidence.[107]

Also objecting to the extension to executive officer liability without the creation of a corresponding extension to the available defences, QRC suggested the Bill be amended to include a defence that 'if the act or omission that took place while the person was an executive officer of the company was only one event in a chain of causation for an offence that happens when the executive officer has left the corporation, but was not a proximate cause of the offence, the executive officer is not liable'.[108]

QLS, QRC and AMEC noted that the amendment would also likely make it increasingly difficult for officeholders to obtain liability insurance and potentially discourage individuals from taking on executive officer roles given individual liability would extend (potentially indefinitely) after their time at a corporation.[109]

2.2.6.3 *Department's response*

In response to issues raised by submitters in relation to cl 105, the department advised:

- The department does not agree that the amendments constitute a significant widening of the scope of the executive officer liability provisions. Former executive officers have been prosecuted under the currently drafted provision. The amendment is concerned with 'when' the harm crystallises.[110]
- Under the current provision, there is no explicit requirement for the executive officer to have known or ought reasonably to have known that the act or omission would result in the corporation failing to comply with the EP Act. The amendment does not change that. An executive officer will have available a defence under section 493(4), in circumstances where they were either 'not in a position to influence the conduct of the corporation in relation to the offence', or if they were, that they took 'all reasonable steps'. In all cases, the facts and circumstances underlying an individual's role in any offending are considered in deciding whether it would be in the public interest to prosecute that individual.
- The existing defences in section 493(4) apply to the amendments. The defence provision in section 493(4) is not being amended as the existing defences available to executive officers are adequate. Any amendments to section 493(4) are likely to diminish the current intent of the

[107] Public hearing transcript, Brisbane, 7 November 2022, pp 7, 8.

[108] Submission 17, p 24.

[109] Submission 16, 26.

[110] Department of Environment and Science, correspondence, 3 November 2022, see pp 43-48.

legislation, which is for executive officers to be accountable for taking all reasonable steps to ensure a corporation complies with the EP Act.

Committee comment

The committee acknowledges the concerns of submitters about the implications of the proposed amendments to extend executive officer liability to an executive officer who is not in office when an offence is committed, but who was an executive officer when an earlier act or omission happened that caused the offence to be committed.

The committee supports the policy intention to ensure corporate executive officers are held accountable for serious environmental harm. However the committee notes stakeholders' concerns about the potentially significant unintended consequences of the amendment as proposed.

The committee also notes the contrast between the rationale for the Bill's proposal in clause 20 that EIS assessment reports lapse after 3 years so that environmental impact assessments reflect contemporary environmental standards and policies rather than being based on outdated environmental knowledge, and the proposal in clause 105 that former executive officers continue to be liable for decisions made on the basis of knowledge or technology available at a time in the past when they may not have known that actions following that decision would cause environmental harm. Stakeholders are concerned that the defences available in the EP Act would be insufficient in this situation, as well as being difficult for former executive officers to establish without access to records.

It is the committee's view that the issues raised about the current drafting of this amendment warrant further consideration. Consequently the committee recommends that the Minister address the issues raised about the proposed amendment and the adequacy of defences in section 493 of the EP Act.

Recommendation 2

The committee recommends the Minister for the Environment and the Great Barrier Reef and Minister for Science and Youth Affairs take note of the committee's comments and, in her second reading speech, address the issues raised about the proposed amendment in clause 105 of the Bill and the adequacy of defences in section 493 of the *Environmental Protection Act 1994*.

2.2.7 Administration

The Bill proposes changes to administration matters in the EP Act including:

- allowing the removal of personal information from a public register if the administering authority is satisfied that someone's personal safety would be at risk (cl 111)
- amending provisions relating to auditors' functions and requirement for making a complaint against an auditor (cls 114–120)
- making it an offence for authorised persons, public service employees and particular other persons to use or disclose confidential information obtained in the course of performing functions under the Act (cl 121).

Agforce and QFF supported the removal of personal information from a public register for personal safety and minimise risk to agricultural activities.[111]

2.2.8 Transitional provisions

The department advised that the amendments to clarify the application of transitional provisions for PRCPs[112] are the most urgent provisions in the Bill. The Bill inserts transitional provisions to clarify how

[111] Submissions 27, 29.

[112] Bill, cl 122.

environmental authority holders are to transition into the PRCP framework as intended under *Mineral and Energy Resources (Financial Provisioning) Act 2018*. The current transitional provisions in the EP Act provide for the administering authority to issue a notice to relevant environmental authority holders to prepare and submit a PRCP up until 1 November 2022. The department advised that the department 'is working closely with those environmental authority holders that are required to submit a PRCP over coming months to ensure they do not inadvertently fall into non-compliance' and that these amendments to the PRCP provisions 'will ensure the department has suitable processes and tools available to transition any remaining resource activity sites to the PRCP requirements while avoiding significant regulatory impacts'.[113]

2.3 Amendments to the *Waste Reduction and Recycling Act 2011*

The Bill proposes the following amendments to the WRR Act:

- allowing the sale of banned single-use plastic items to community corrections offices and corrective services facilities
- clarifying the take effect date for a decision by the chief executive to amend an end of waste code
- aligning the period for deciding certain end of waste approval applications with the period for requiring additional information
- clarifying that the chief executive may seek advice from a technical advisory panel when deciding an amendment to an end of waste approval
- inserting a definition of 'stockpile', in relation to waste, to include liquid in a container or a dam, pond or other depression.

Stakeholders made no submissions in relation to specific amendments to the WRR Act.

2.4 Amendments to the *Wet Tropics World Heritage Protection and Management Act 1993* and *Land Title Act 1994*

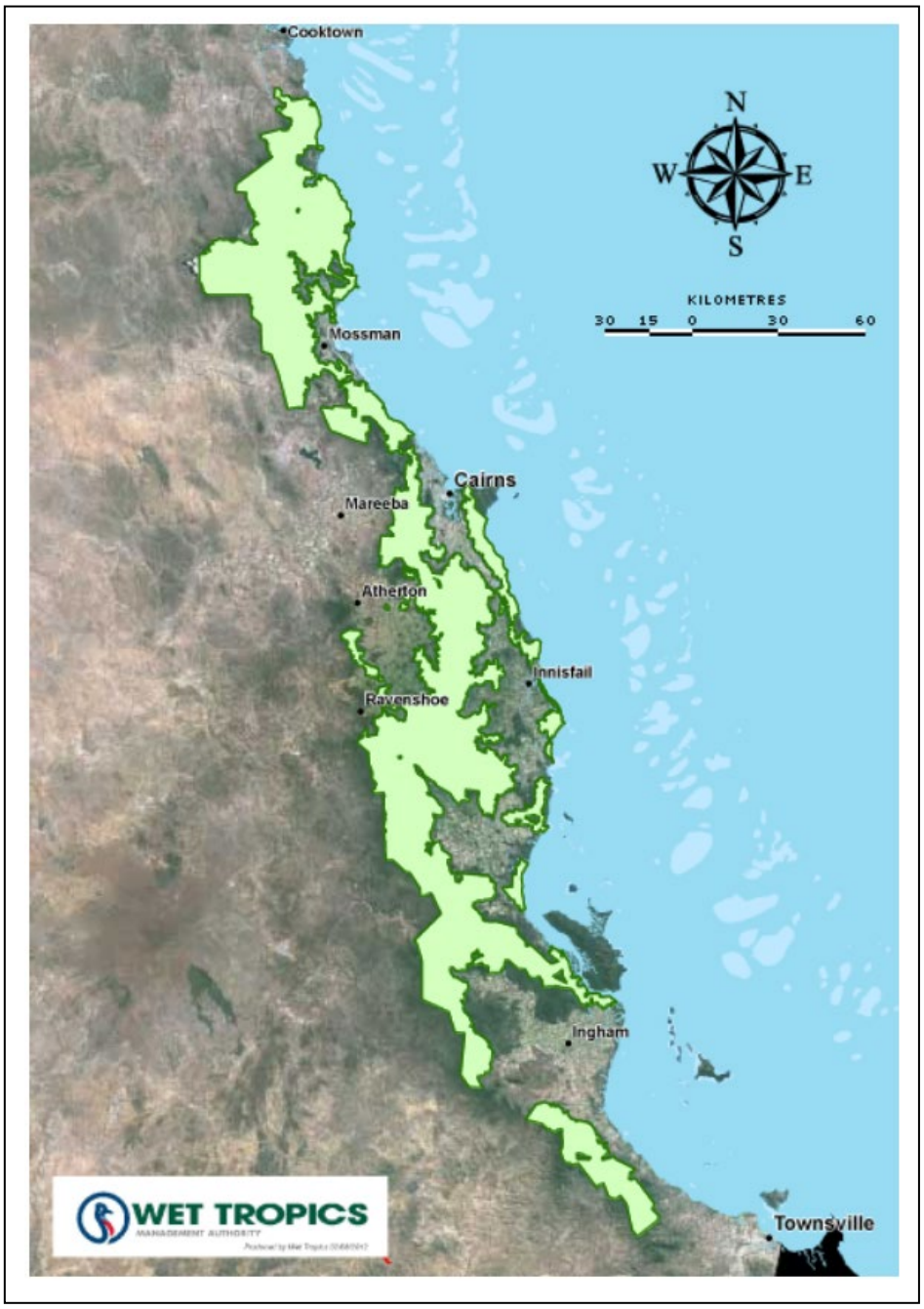
Proposed amendments to the Wet Tropics Act and the *Land Title Act 1994* include:

- removing a mining and mining exploration exemption for the Wet Tropics World Heritage Area
- ensuring a plan of subdivision for reconfiguring a lot in the Wet Tropics World Heritage Area is not registered under the *Land Title Act 1994* without consent being given by the Wet Tropics Management Authority
- clarifying the meaning of 'Aboriginal Tradition' as used in the Wet Tropics Act and the Wet Tropics Management Plan 1998
- clarifying the relationship between cooperative management agreements made under the Wet Tropics Act and the Wet Tropics Management Plan 1998
- clarifying the maximum consecutive years of appointment allowed for directors on the Wet Tropics Management Authority board
- removing inconsistencies between a management plan under the Wet Tropics Act and a conservation plan, management plan, management program or management statement made under part 7 of the *Nature Conservation Act 1992*
- making an administrative change to the Wet Tropics Act to remove the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) and instead reference the document by referring to the UNESCO website.

[113] Department of Environment and Science, correspondence, 20 October 2022, p 3.

The amendments proposed are mainly in response to a public review of the Wet Tropics Management Plan 1998. Figure 1 shows the boundary of the Wet Tropics World Heritage Area.

Figure 1: Wet Tropics World Heritage Area, Queensland



Source: Wet Tropics Management Authority, https://www.wettropics.gov.au/maps.

Submitters expressed support for cl 141 removing an exemption and consequently prohibiting mining in the Wet Tropics World Heritage Area.[114]

Agforce was concerned that current landowners 'not be penalised, or subject to reduced financial gain, nor prevented from appropriate sustainable subdivision due to their proximity to the Wet Tropics

[114] Submissions 12, 21, 24.

World Heritage Area' noting that the proposed amendment does not provide guidelines for parcels of land partially in the Wet Tropics World Heritage Area and partially outside the area.[115]

2.4.1.1 *Department's response*

The department advised that 'the Wet Tropics legislation and regulation extend only to the boundaries of the Wet Tropics of Queensland World Heritage Area, therefore does not impact on land outside of the Area'.[116]

2.5 Consultation on the draft Bill

Submitters were critical of the department's consultation process in the development of the Bill, emphasising concerns that consultation on the draft Bill involved engagement with selected stakeholders only, and only on specific parts or versions of the draft legislation, and was conducted under strict confidentiality arrangements, including requiring representatives of identified organisations to sign confidentiality deeds which prevented circulation of draft materials to members for feedback. Submitters complained of short timeframes for responses to versions of documents restricting their capacity to respond fully. Submitters expressed concern about the possibility that the department, or departments more broadly, might adopt this approach for the future.[117]

Some submitters also noted that the Bill contains significant amendments likely to be of broad interest to the community and industry, and that some provisions would have benefitted from significantly more consultation.

The department provided the committee the following information about the timeline for consultation on the draft Bill:

- Consultation with key industry, government, community, and conservation stakeholders commenced with briefings in August 2021.
- In October 2021 the department made a targeted release of a consultation paper.
- Following the release of the consultation paper, briefings on the proposed amendments were undertaken with representatives from key stakeholder groups.
- Further briefings were held with key stakeholders in March 2022.
- In April 2022, key stakeholders were provided with an exposure draft of the Bill (prior to receiving the exposure draft, stakeholders were required to sign a confidentiality deed).
- A supplementary exposure draft of amendments which were not ready for consultation earlier was provided to key stakeholders in May 2022.
- Additional briefings were held with key stakeholders upon request.
- In June 2022, a final exposure draft of the Bill was provided to key stakeholders (stakeholders were required to sign a revised confidentiality deed to receive the final exposure draft, which enabled them to share the final exposure draft of the Bill with their nominated member groups).
- Feedback from key stakeholders on the final exposure draft closed on 30 June 2022.[118]

The department also provided the following advice on the purpose of the confidentiality deeds:

> Prior to receiving the [first] exposure draft, stakeholders were required to sign a confidentiality deed given the confidentiality required due to the preliminary nature of the exposure draft. The deed was designed to ensure that the department could maintain confidentiality on sensitive information and was

[115] Submission 29, p 4.

[116] Department of Environment and Science, correspondence, 3 November 2022, p 65.

[117] See submissions 2, 10, 16, 17, 22, 26, 27, 28.

[118] Department of Environment and Science, correspondence, 20 October 2022, p 4.

able to track which stakeholders had received the exposure draft and associated documents, and which stakeholders were expected to provide responses.

… Stakeholders were required to sign a revised confidentiality deed to receive the final exposure draft, which enabled them to share the final exposure draft of the Bill with their nominated member groups.[119]

Committee comment

The committee notes the dissatisfaction of stakeholders with the department's consultation process for the Bill, as articulated in submissions to the committee's inquiry and in evidence given at the public hearing. In their evidence, stakeholders advised that the time and confidentiality constraints of the consultation process for the draft legislation limited their ability to properly canvass the views of their respective members. They stated that this was ultimately detrimental to the quality of feedback they could provide during the stages of consultation. Submitters' comments about the process have been noted by the department in its response to submissions to the inquiry.

While practicalities may constrain ideal processes from being possible every time, the committee encourages open consultation with stakeholders and the general public, over timeframes that facilitate an effective legislative process.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of parliament.

The committee has examined the application of fundamental legislative principles to the Bill. The committee brings the following to the attention of the Legislative Assembly.

3.1.1 Rights and liberties of individuals

3.1.1.1 *Administrative power is sufficiently defined and subject to review—Clauses 9, 11, 12, 13, 15, 17, 53 and 89 (sections 41A, 41B, 49, 49A, 50, 56A, 56B, 316GC–316GG and 379A–379G of the EP Act)*

Legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.[120]

The Bill proposes a range of amendments, which involve administrative decision-making and the related process. For example, cl 9 proposes to insert provisions applicable to the chief executive's decision on draft terms of reference. The amendments include appropriate notice provisions, appear to set out clear criteria and provide for a fair process, including an opportunity for a proponent to resubmit in specified circumstances.

Importantly, the provision provides that, if the chief executive refuses to allow the draft to proceed to public notification, the chief executive must give the proponent an information notice for the decision that also states certain matters. The EP Act defines 'information notice' about a decision to mean a written notice stating the decision, and (if the decision is a decision other than to impose a condition on an environmental authority) the reasons for the decision, and the review or appeal details.

[119] Department of Environment and Science, correspondence, 20 October 2022, p 4.

[120] *Legislative Standards Act 1992*, s 4(3)(a).

In amending the existing provisions relating to decisions on whether an EIS may proceed and decisions on the assessment of the adequacy of a response to submissions and a submitted EIS, cls 11 and 15 adopt a similar process to that proposed by cl 9, including similar refusal criteria and requiring provision of an information notice.

Clause 13 proposes to omit existing s 50 of the EP Act, removing the proponent's ability to apply to the Minister to review a chief executive's decision, under s 49, to refuse to allow an EIS to proceed. Although omitting an existing right of review, the explanatory notes explain that the chief executive's decision to refuse to allow an EIS to proceed will be an 'original decision' to provide review and appeal rights for proponents (in accordance with amendments to schedule 2 in the Bill) and, upon application, the decision may be subject to judicial review. Clause 17 proposes similar amendments.

Clause 53 proposes to insert new ss 316GC – 316GG of the EP Act, which provide for a person to apply for a temporary authority to carry out a relevant ERA in relation to an emergency situation on a temporary basis. The amendments appear to set out an appropriate administrative process, including an information notice requirement, and are addressed in the explanatory notes as follows:

> The Bill inserts new provisions in the EP Act that allow the administering authority to approve temporary authorities where it is a necessary and reasonable response to an emergency situation. If the administering authority refuses a request from a person for a temporary authority, there is no ability for the person to appeal the decision or have the decision reviewed under the EP Act. This raises the FLP that legislation should make rights and liberties of individuals dependent on administrative power only if the power is sufficiently subject to appropriate review. The amendments clearly outline the matters that the administering authority must be satisfied of to issue a temporary authority. If the administering authority refuses the application for a temporary authority, the person may apply for an environmental authority for the activity through the existing processes in the EP Act which has its own appeal and review rights. Given the interim nature of temporary authorities, the absence of an application fee and the option for a person to apply for an environmental authority under the existing processes as an alternative, any breach of FLPs is considered justified. In addition, where the administering authority refuses to issue a temporary authority to a person under the EP Act, the person may have the decision reviewed under the *Judicial Review Act 1991*.[121]

Clause 89 proposes to insert ss 379A – 379G into the EP Act, providing for the voluntary inclusion of land in the relevant register. The provisions appear to include appropriate requirements governing the decision-making process, again including criteria for the decision and requiring that an information notice be provided to the land owner, where there is a decision to refuse.

According to the explanatory notes, cl 89 streamlines the process for including land in the relevant land register by providing a new process for situations where an owner provides the administering authority with a request asking for their land to be included in a relevant land register:

> In deciding the request, the administering authority must consider the grounds for including particulars of land in the relevant register under s 371 and s 372, the inclusion request provided by the owner and any additional information received in response to a request made by the administering authority. Once a decision has been made on the inclusion request, the administering authority must give an information notice to the land's owner about the decision. The decision to refuse the owners request has been included as an original decision, providing for the right to review. This addresses any potential breaches related to the FLP that legislation should only make rights and liberties, or obligations, dependent on administrative power only if subject to appropriate review.[122]

[121] Explanatory notes, pp 9-10.

[122] Explanatory notes, p 8.

In its section addressing the Bill's consistency with fundamental legislative principles, the explanatory notes identify additional proposed amendments that the notes consider relevant as to whether administrative power in the Bill is sufficiently defined and subject to appropriate review.[123]

Committee comment

The committee is satisfied that in the circumstances, the proposed amendments have sufficient regard to the rights and liberties of individuals.

3.1.1.2 *Restrictions on ordinary activities must be justified—Clause 97 (section 440ZA of the EP Act)*

Abrogation of rights and liberties (in the broadest sense of those words) from any source must be justified, whether the rights and liberties are under the common law, statute law or otherwise. Committees have adopted the view that legislative restrictions on ordinary activities must be justified.

Clause 97 proposes to amend s 440ZA of the EP Act to expand existing restrictions on the operation of a power boat engine at premises to include a jetty or pontoon, and to provide that a boat at a jetty or pontoon must not be operated in a way that makes an audible noise for more than a continuous period of five minutes, during specified times.[124]

The explanatory notes state that this amendment raises the fundamental legislative principle that ordinary activities should not be unduly restricted without sufficient justification:

> It is common for a person to operate a power boat engine for commercial and recreational activities at jetties and pontoons outside of the allowable hours prescribed under s 440ZA. Therefore, a restriction on these activities may be considered unjustified. However, given that audible noise means noise that can be clearly heard by an individual who is an occupier of an affected building and the restriction only applies where the boat engine noise is for a continuous period of more than five minutes, s 440ZA will not have a significant impact on most persons operating a power boat engine at a jetty or pontoon. The intent is to limit the noise of power boat engines in residential areas and the restriction is considered reasonable as it does not prohibit the operation of all power boat engines outside of the allowable hours.[125]

Committee comment

The committee is satisfied that the provision has sufficient regard to the rights and liberties of individuals.

3.1.1.3 *Reversal of onus of proof—Clauses 53, 103, 104 and 105 (sections 316GB, 490, 491 and 493 of the EP Act)*

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.[126]

Legislation should not reverse the onus of proof in criminal matters, and it should not provide that it is the responsibility of an alleged offender in court proceedings to prove innocence.[127]

> Generally, for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt.[128]

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123 Explanatory notes, see pages 8-11.

124 Being on a business day or Saturday before 7am or after 7pm, or on any other day before 8am or after 6:30pm.

125 Explanatory notes, p 7.

126 *Legislative Standards Act 1992*, s 4(3)(d).

127 Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental Legislative Principles: The OQPC Notebook*, p 36.

128 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 36.

Clause 53 proposes to insert new s 316GB into the EP Act, which provides that, despite s 23 and any requirements stated in a prevailing Act mentioned in that provision, a person commits an offence against s 426[129] if they do not have an environmental authority or temporary authority for a relevant ERA. The new section provides for a defence, if the person proves it would not be reasonable to have complied with s 426 having regard to the requirement they are subject to under the prevailing Act.

The explanatory notes observe that this provision raises the fundamental legislative principle that legislation should not reverse the onus of proof in criminal proceedings without adequate justification, but seeks to justify this potential breach:

> …the subject matter of the defence is likely to be within the particular knowledge of the defendant. Defendants are likely to be obligated to carry out a relevant ERA under the prevailing Act where directed and are therefore well positioned to disprove guilt in relation to a breach of s 426 in these circumstances.[130]

Clauses 103 – 105 propose to amend ss 490, 491 and 493 of the EP Act, respectively to:

- provide that a map, chart or plan is evidence of the matters stated or shown in the map, chart or plan if the prosecutor produces the specified certificate, and there is no evidence to the contrary (s 490)
- expand the existing types of proceedings captured by s 491[131] to include a proceeding for an offence against s 430[132] in which it is claimed the defendant, by the making of an emission causing environmental nuisance, has contravened a relevant condition of an environmental authority — under s 491, an authorised person may give evidence, without any need to call further opinion evidence, that the authorised person formed the opinion based on the authorised person's own senses
- provide that if the corporation fails to comply with the EP Act, each of the executive officers of the corporation are also deemed to have committed the offence of failing to comply — cl 105 amends s 493 to clarify that executive officers can be held liable, if they were in office at the time an act or omission happened, that results in the commission of an offence.

The explanatory notes observe that the amendment to s 490 could potentially reverse the onus of proof by placing the onus on the defendant to prove that the maps, charts and plans are proof of the evidence stated or shown in the maps, charts and plans, but consider this potential breach of fundamental legislative principle justified:

> The certificate is only to be treated as evidence and is not conclusive proof of the matters stated in the map, chart of plan. As soon as there is evidence to the contrary, the certificate will cease to be evidence of the matters stated. The certificate is an evidentiary aid that will improve administrative efficiency by avoiding the need to put evidence about basic matters before courts. The provision is limited in that it

[129] Existing s 426 of the *Environmental Protection Act 1994* provides that a person must not carry out an environmentally relevant activity unless the person holds, or is acting under, an environmental authority for the activity. The maximum penalty is 4,500 penalty units, which is currently equivalent to $620,325.

[130] Explanatory notes, p 11.

[131] Currently s 491 applies to a proceeding for an offence against ss 440 or 440Q in which it is claimed the defendant caused environmental nuisance or contravened a noise standard by an emission made from a person, place or thing.

[132] Section 430 of the *Environmental Protection Act 1994* applies to a person who is the holder of, or is acting under, an environmental authority and provides that the person must not wilfully contravene a condition of the authority (maximum penalty of 6,250 penalty units, currently, equivalent to $861,562.50, or 5 years imprisonment), and must not contravene a condition of the authority (maximum penalty of 4,500 penalty units, currently equivalent to $620,325).

> only applies to maps, charts and plans made by authorised persons and certified by the administering executive.[133]

The explanatory notes state that, whilst the amendment to s 493 raises the fundamental legislative principle that legislation should not reverse the onus of proof in criminal proceedings without adequate justification, the amendment does not reverse the onus, as it does not fundamentally alter the manner in which the onus of proof operates:

> Rather, the amendment expands the scope of persons to which s 493 can apply. There are a number of matters the prosecution must prove before an executive officer can be deemed to have committed an offence. For example, the prosecution must first prove that a corporation committed the offence. While the accused may have the evidential burden to adduce evidence of a defence under s 493(4), the prosecution still retains the legal onus.[134]

Committee comment

The committee is satisfied that in the circumstances, the proposed amendments have sufficient regard to the rights and liberties of individuals.

3.1.1.4 *Right to privacy and confidentiality—Clauses 85, 101, 102, 109-111 and 121 (sections 371, 484A–484C, 486A, 540A, 542, 542A and 579D of the EP Act)*

The right to privacy, the disclosure of private or confidential information, and privacy and confidentiality issues, have generally been identified by committees as relevant to consideration of whether legislation has sufficient regard to individuals' rights and liberties.[135]

Clause 85 proposes to amend s 371 of the EP Act to expand the existing powers of an administering authority to record particulars of land in the environmental management register, to include where the authority is satisfied or suspects, on reasonable grounds, the land is contaminated land.

Although not addressed in the explanatory notes in the discussion of consistency with fundamental legislative principles, the notes state that the amendment:

> …ensures that the administering authority is afforded some discretion in listing land on the environmental management register if, for example, an audit of a contaminated land investigation document determines that land was removed from the environmental management register based on incomplete or inaccurate information.[136]

Despite the administrative nature of the example included in the explanatory notes, the proposed amendment expands the authority's discretion to record information on a public register, which may disclose private and confidential information, and may have other consequences, such as a potential impact on the market value of land.

Clauses 101 and 102 propose to insert new ss 484A – 484C (constituting Part 5A 'Obtaining criminal history reports') and 486A, into the EP Act. Proposed s 484A provides that the purpose of Part 5A is to help an authorised person decide whether their entry of a place or vehicle would create an unacceptable level of risk to their safety. In accordance with new s 484C, the chief executive may ask the commissioner of the police service for a written report about the criminal history of a relevant person that includes a brief description of the circumstances of a conviction mentioned in the criminal history, with which the commissioner of police must comply.

The explanatory notes acknowledge that this power raises a possible fundamental legislative principle issue as to whether the legislation has sufficient regard to the rights and liberties of individuals, but

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133 Explanatory notes, p 10.

134 Explanatory notes, p 10-11.

135 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 113.

136 Explanatory notes, p 44.

that any erosion of the privacy of the individual and the policy of the *Criminal Law (Rehabilitation of Offenders) Act 1986* is 'considered to be justified and reasonable given it supports the safety of an authorised person when entering a place or vehicle under the EP Act'.[137]

According to the notes, the request for a criminal history report is appropriately limited:

> A request can only be made where an authorised person reasonably suspects that the person may be present at a place or vehicle when they enter the place or vehicle, and their presence may create an unacceptable level of risk to the authorised person's safety. Safeguards have also been included within new s 484C(7) to ensure that disclosure is sufficiently limited to the purposes for which it is required. This subsection states that the chief executive must ensure the report, and any information in the report given to the authorised person in writing, is destroyed as soon as practicable after the report is no longer needed for the purpose for which it was requested.[138]

Proposed s 486A provides for an authorised person to use a body-worn camera to record images or sounds while the authorised person is exercising a power. The explanatory notes state that this power raises a possible fundamental legislative principle, including as to whether the legislation has sufficient regard to the right to privacy and confidentiality. Whilst observing reasons for the use of body-worn cameras, and that the existing law provides that a person may record a private conversation if they are a party to it, the notes concede that:

> …there may be circumstances where a body-worn camera inadvertently, unexpectedly, or incidentally captures images or sounds to which the authorised person is not a party to. It is considered reasonable that an authorised person be protected from liability if the body-worn camera is being used in accordance with the authority provided in new s 486A. A safeguard is provided through the insertion of a new provision in the EP Act (s 579D) which makes it an offence for an authorised person to use or disclose confidential information obtained in performing functions or exercising powers under the Act. Further, all recordings made by an authorised person while exercising a power under the EP Act will become a record under the *Public Records Act 2001*. The recordings must be retained in accordance with information privacy obligations to which public servants are subject, including the Information Privacy Principles in schedule 3 of the *Information Privacy Act 2009*.[139]

Clause 109 proposes to amend s 540A to expand the matters required to be kept in a register by the chief executive. These expanded matters may include private or confidential information.[140] The explanatory notes do not comment on the amendments in the context of fundamental legislative principles, but state that the amendment 'increases the types of EIS information available on the public register with the intent of improving the transparency of the EIS process'.[141]

By way of expanding the existing inspection provisions, cl 110 proposes to amend s 542 to provide that, if kept on a website, the public register must be on the website.

Clause 111 inserts new s 542A to provide that, where satisfied that someone's personal safety would be at risk, the relevant entity must ensure personal information[142] is not included in the public register and is not included in an extract or copy of information from the register.

Although not addressed in terms of fundamental legislative principles, the explanatory notes state that the amendment will:

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137 Explanatory notes, p 5.

138 Explanatory notes, pp 5-6.

139 Explanatory notes, p 6.

140 The expanded matters include: proponents' responses to the comments given to the chief executive about draft terms of reference, written summaries of submissions given to the chief executive about submitted EISs, proponents' responses to those submissions, and EIS amendment notices.

141 Explanatory notes, p 53.

142 For example, the person's address or other contact details.

> …ensure sensitive personal information can be removed from the register, reducing the risks to persons whose position or occupation requires a high level of security, or persons who have a genuine risk of violence or harm (e.g. victims of domestic violence, police informants, judges, or senior police officers). If the relevant entity becomes aware that there is already some specific information on the register that raises a legitimate personal safety risk, the relevant entity will have to remove it. If, before putting information on the register, the relevant entity becomes aware that making the information public would raise a legitimate personal safety risk, the relevant entity must not put it on the register. These obligations only relate to the specific information that causes a personal safety risk, which means that generally the relevant entity would need to redact the information from a document rather than not putting a whole document on the register.
>
> The new provision only applies once the relevant entity has decided it is satisfied there is a risk, whether that decision comes about because of information received directly from the person concerned or the department's own procedures or enquiries. This provision does not impose any requirement for the department to conduct enquiries into someone's personal safety risk.[143]

In the context of the confidentiality of the information, the committee notes that cl 121 proposes to insert s 579D, which makes it an offence for particular persons to use or disclose confidential information obtained in the course of performing functions under the EP Act. According to the explanatory notes, this is intended to safeguard a person's confidential information:

> A person is not limited in using or disclosing confidential information where there are other laws that enable the release of the confidential information, such as provisions about keeping information or documents on the public register under the EP Act.[144]

Committee comment

The committee is satisfied that in the circumstances, the proposed amendments have sufficient regard to the privacy of individuals and the confidentiality of information.

3.1.1.5 *Penalties should be reasonable and proportionate—Clauses 108, 120 and 121 (sections 506A, 574M and 579D of the EP Act)*

Consequences imposed by legislation should be proportionate and relevant to the actions to which the consequences relate.[145] The Bill proposes the inclusion and amendment of several offence provisions.

Clause 108 proposes to insert s 506A into the EP Act, which makes it an offence for a person[146] to contravene a court order made specifically to stop the person from committing further serious environmental offences. The provision includes a maximum penalty of 3,000 penalty units (currently, equivalent to $413,550) or 2 years imprisonment.

In considering the application of fundamental legislative principles, the explanatory notes state that the offence is justified:

> …as a deterrent is needed to ensure a person with a history of convictions does not continue to commit other serious environmental offences. The penalty for the offence… is of an appropriate level and considered necessary to discourage a person from repeat offending. The penalty is comparable to other penalties for similar environmental offences under the EP Act and other Queensland legislation.[147]

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143 Explanatory notes, p 54.

144 Explanatory notes, p 57. New s 579D also states that it does not apply to the extent ss 316PE or 318U applies to a person, which the explanatory notes state is intended to avoid a potential overlap as ss 316PE and 318U also contain offences for the use or disclosure of confidential information.

145 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 120.

146 Being a person convicted of a serious environmental offence who has been convicted of the same, or a different, serious environmental offence at least 2 other times in the previous 5 years.

147 Explanatory notes, p 6.

Clause 120 proposes to amend s 574M to expand the existing offence provisions to provide that it is an offence for an auditor to make a report, provide a certification or make a declaration that the auditor knows, or ought reasonably to know, is false or misleading in a material particular.

Although not explicitly addressing fundamental legislative principles, the explanatory notes observe that the addition of the words 'ought reasonably to know' aligns this offence provision with other similar false or misleading offence provisions in the EP Act, such as s 480.[148]

As noted in section 3.1.1.4 above, cl 121 is a new provision relating to the confidentiality of information. Clause 121 also creates an offence where a person uses or discloses the confidential information, unless it is used or disclosed in the performance of a function or exercise of a power under the EP Act, or with the consent of the person to whom the information relates, or where otherwise required or permitted by law. The provision includes a maximum penalty of 100 penalty units, currently equivalent to $13,785.

According to the explanatory notes, the offence is justified as a deterrent to releasing sensitive personal information without due reason, and the penalty is of an appropriate level: 'It is the same as the penalty for existing offences in the EP Act for release of confidential information (s 316PE and s 318U)'.[149]

Committee comment

The committee is satisfied that the penalties proposed for the provisions are reasonable and proportionate.

3.1.1.6 *Retrospectivity—Clause 122 (sections 797 and 804 of the EP Act)*

Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.[150] Changes in the law that merely rely on conduct or events that happened before a provision existed are not retrospective.[151] In contrast, changes in the law relating to past events are objectionable if they alter the legal nature of a past act or omission in itself.[152]

Clause 122 provides for transitional provisions, including by inserting proposed s 797 into the EP Act, which the explanatory notes state clarifies how chapter 13, part 27[153] applies in relation to the holder of an environmental authority that has been issued under s 195, but has not yet taken effect under s 200:

> This section clarifies that a reference to an environmental authority in part 27 includes, and has always included, a reference to an environmental authority granted under s 195, regardless of when the authority takes effect under s 200. It also clarifies that s 751- s 756 apply in relation to the holder, even if the environmental authority has not yet taken effect under s 200. This removes any ambiguity relating to whether the administering authority can give these holders a notice under s 754, thus ensuring the original intent of chapter 13, part 27 is achieved.[154]

In addressing these transitional provisions in terms of fundamental legislative principles, the explanatory notes state that legislation should not adversely affect rights and liberties, or impose

148 Explanatory notes, p 57.

149 Explanatory notes, p 7.

150 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 55.

151 OQPC, *Principles of good legislation: OQPC guide to FLPs, Retrospectivity*, p 9.

152 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 55.

153 *Environmental Protection Act 1994*, chapter 13 'Savings, transitional and related provisions', part 27 'Transitional provisions for *Mineral and Energy Resources (Financial Provisioning) Act 2018*'.

154 Explanatory notes, p 59.

obligations retrospectively, but conclude that the amendments are not retrospective, as the obligation to rehabilitate the land is an existing requirement on all environmental authorities:

> The PRCP transitional provisions in chapter 13, part 27 were inserted to ensure a consistent and equitable approach was applied to all existing environmental authorities issued for a site-specific application relating to a mining lease. Under chapter 13, part 27 holders of an authority for an existing mine are asked to submit a PRCP upon receiving a notice from the administering authority. Some ambiguity exists with regards to the issuing of this notice to certain environmental authority holders. The Bill seeks to address this ambiguity by clarifying the application of chapter 13, part 27 in this respect. The Bill ensures that the policy intent of the *Mineral and Energy Resources (Financial Provisioning) Act 2018* is achieved.[155]

Committee comment

Given the intention to clarify the operation (and ensure the original intent) of existing transitional provisions in the EP Act, and given the subject provisions relate to the rehabilitation of land leased for mining, the committee is satisfied that any retrospective adverse effect on rights and liberties, or imposition of obligations, is justified in the circumstances.

3.1.2 Institution of Parliament

3.1.2.1 *Delegation of legislative power—Clauses 9, 11 and 15 (sections 41A, 49 and 56A of the EP Act)*

Fundamental legislative principles include requiring that legislation have sufficient regard to the institution of parliament. Legislation should allow the delegation of legislative power only in appropriate cases and to appropriate persons.

The Bill includes amendments in cls 9, 11 and 15 which relate to decision-making by the chief executive. The decision-making criteria in ss 41A, 49 and 56A include that the chief executive must make a refusal decision, if the chief executive is required to make a decision to refuse under a regulatory requirement.

According to the explanatory notes, the proposed amendments raise a fundamental legislative principle regarding the institution of parliament:

> The inclusion of these powers to prescribe additional decision-making matters in subordinate legislation is justified as flexibility is required to add matters if circumstances warrant a change. Given the technical nature of the decisions to be made in relation to EIS projects, it is not considered possible to foresee all matters that would warrant a decision to refuse the EIS from proceeding. Providing the ability to prescribe additional matters by regulation will facilitate the effective administration of the legislation.[156]

Committee comment

The committee is satisfied that the proposed amendments have sufficient regard to the institution of parliament.

3.2 Explanatory notes

Part 4 of the LSA requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Committee comment

Explanatory notes were tabled with the introduction of the Bill. The notes contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

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155 Explanatory notes, p 11.

156 Explanatory notes, pp 11-12.

4 Compliance with the *Human Rights Act 2019*

The portfolio committee responsible for examining a Bill must consider and report to the Legislative Assembly about whether the Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the statement of compatibility tabled for the Bill.[157]

A Bill is compatible with human rights if the Bill:

(a) does not limit a human right, or

(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13 of the HRA.[158]

The HRA protects fundamental human rights drawn from international human rights law. Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

4.1 Human rights compatibility

The statement of compatibility which was tabled by the Minister when introducing the Bill identified a number of limitations on human rights arising from provisions of the Bill.

The committee has examined the Bill in relation to its compatibility with the HRA. The following comments relate to amendments to the EP Act.

4.1.1 Clause 53 – Temporary authorities for emergency situations

Clause 53 proposes use of 'temporary authorities' where it is 'a necessary and reasonable response to an emergency situation' (e.g. pandemic, flood event or a marine pollution event).

Proposed new s 316GC permits an application to carry out an ERA on a temporary basis, or to seek authority for an existing ERA that has increased, or is likely to increase in intensity or scale due to an emergency situation, by bypassing the requirement to obtain an ERA through the usual EP Act application process.

Proposed ss 316GD – 316GF set out the application process, the conditions that can be imposed on a temporary authority and the steps required to grant a temporary authority, and are designed to ensure temporary authorities remain as consistent as possible with the objectives of the EP Act whilst enabling timely approvals for ERAs in emergency situations.

If inconsistent, conditions of a temporary authority prevail over an existing environmental authority.

A temporary authority will essentially allow an activity that may/will cause environmental harm or nuisance to be carried out lawfully, to stop a potentially greater harm (e.g. a temporary authority could allow a higher volume of sewage to be treated at sewage treatment facility in order to stop an overflow of raw sewage).

A temporary authority can be granted subject to conditions aimed at mitigating potential for harm/nuisance.

4.1.1.1 *Human rights issue – Cultural rights*

Section 28 of the HRA recognises and protects the rights of Aboriginal and Torres Strait Islander peoples in respect of their identity and cultural heritage, including traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings.

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157 *Human Rights Act 2019*, s 39.

158 *Human Rights Act 2019*, s 8.

Relevant to this Bill, s 28(d) of the HRA recognises the right of Aboriginal and Torres Strait Islander peoples to 'maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom'. Section 28(2)(e) extends this right to 'conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources'. These rights are those protected by Articles 25, 29 and 32 of the *United Nations Declaration on the Rights of Indigenous Peoples.*

The changes proposed in cl 53 do not directly limit human rights, but have potential to indirectly impact rights. Where a temporary authority may permit activity causing environmental harm or nuisance to be carried out lawfully, they may limit the s 28 cultural right of Aboriginal and Torres Strait Islander peoples to 'conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources'. For example, if a temporary authority is used to authorise an ERA that responds to flood waters in a particular river system with cultural significance to Aboriginal people, that temporary authority could modify previous/existing authorities given for ERAs relating to that river system in a way that excludes or limits the ability of Aboriginal people to exercise their protected cultural rights.

The explanatory notes advise that the North Queensland Land Council was consulted on proposed amendments during the development of the Bill.[159]

Committee comment

The committee acknowledges that the granting of a temporary authority might impact on the ability of Aboriginal or Torres Strait Islander peoples to exercise their protected cultural rights to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.

The committee notes however that the granting of a temporary authority is in response to an emergency situation and aims to mitigate the risk of a greater environmental nuisance or harm that might otherwise permanently diminish the exercise of those rights for current and future generations.

Given the emergency context in which a temporary authority may be granted, the committee considers that any (temporary) limitation on the exercise of cultural rights is justified in the circumstances.

4.1.2 Clause 85 – Listing particulars of land on the environmental management register

Section 371 of the EP Act currently provides that the administering authority may record particulars of land in the environmental management register at any time if the authority is satisfied that either a notifiable activity has been, or is being, carried out on the land, or the land is contaminated land.

Clause 85 of the Bill proposes to amend this section by allowing the administering authority to list particulars of land on the environmental management register where there is *a reasonable suspicion* that the land is contaminated land. Because of this, the proposed amendment may engage the right to property contained in s 24 of the HRA, in so far as it may affect the future use and/or value of the land listed on the environmental management register.

4.1.2.1 *Human rights issue – Property rights*

Section 24 of the HR Act protects the right of all persons to own property (alone or with others) and prohibits the arbitrary deprivation of a person's property. The property rights protected in s 24 are based on Article 17 of the *Universal Declaration of Human Rights* (UNDHR).[160] The right to property is

[159] Explanatory notes, p 12.

[160] Queensland Human Rights Commission (QHRC), Fact Sheet on s 24, https://www.qhrc.qld.gov.au/your-rights/human-rights-law.

conventionally understood as a 'negative' obligation that protects individuals against arbitrary expropriation and regulation of private property, rather than a positive right *to* property, or a right to compensation if a person is lawfully deprived of their property.[161]

Property rights can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Nature and purpose of the limitation

The environmental management register is a public register kept by the administering authority under s 540A(1)(c)(i) of the EP Act. As the statement of compatibility notes, the purpose of the environmental management register is to 'protect public health and the environment by ensuring the community are well informed of land that is, or is likely to be, contaminated'.[162] The amendments expand the criteria for listing land on the environmental management register from the current requirement of *satisfaction* that the land is contaminated land, to the proposed requirement of *reasonable suspicion* that the land is contaminated land. This change is described as necessary to provide the administering authority with 'some discretion in listing land on the environmental management register if, for example, an audit of a contaminated land investigation document determines that land was removed from the environmental management register based on incomplete or inaccurate information'.[163] As a result, the changes proposed in cl 85 have the potential to engage the right to property protected by s 24 of the HRA, for example by resulting in a public indication that the property is less valuable because it is, or is reasonably suspected to be, contaminated land.

Relationship between the limitation and its purpose

As the statement of compatibility explains, the establishment and maintenance of the environmental management register is an essential component of the EP Act. It identifies to the community, land that is contaminated and ensures that it is managed in a way that protects public health and the environment. The extension of the listing criteria to 'land on reasonable grounds to be contaminated' is directly connected to this purpose. Although the proposed changes introduce an element of discretion into the listing process – with the corresponding potential to broaden the circumstances in which land is included on the environmental management register – the changes are proposed within the context of pre-existing provisions that are designed to ensure land owners are given the opportunity to contest their property being listed on the environmental management register.

Whether there are less restrictive and reasonably available ways to achieve the purpose

It is important to note that s 24 of the HRA only prohibits a deprivation of property that is carried out *unlawfully*. In other words, a program or a policy may deprive a person of his or her property but *only if* it occurs under powers that are conferred by legislation or the common law, and if the deprivation of property occurs under discretionary powers, those powers should be confined and structured rather than arbitrary or unclear.

In this case, the process of listing property on the environmental management register is prescribed by law. The existing provisions within the EP Act that require the administering authority to issue a show cause notice to the owner of the land, which provides them with the opportunity to make representation about whether or not they agree that their land should be listed on the environmental management register, continue to apply. This suggests that the proposed amendments do not have

[161] QHRC, Fact Sheet on s 24, https://www.qhrc.qld.gov.au/your-rights/human-rights-law. See also Victorian Government Website, Charter Act Guidelines Part 2, https://files.justice.vic.gov.au/2021-06/CharterActGuidelinesPart2.pdf; Durham Holdings Pty Ltd v New South Wales (2001) 205 CLR 399.

[162] Statement of compatibility, p 2.

[163] Statement of compatibility, p 2.

the qualities of 'arbitrariness' or 'unlawfulness' required to engage the protections continued in s 24 of the HRA.

Balance between the importance of the purpose of the limitation and the importance of preserving the human right

Although the changes proposed in cl 85 have the potential to engage the right to property protected by s 24 of the HRA, they appear to fall within the scope of justifiable limitations on the right. Section 24 of the HRA only prohibits a deprivation of property that is carried out *unlawfully*. In this case, the process for listing property on the environmental management register (and hence subjecting the property owner to potential loss of land value) is prescribed under the EP Act, which includes procedural safeguards such as those contained in s 375 of the EP Act.

Committee comment

The committee is satisfied that while the proposed amendments in clause 85 may potentially engage the right to property protected by section 24 of the HRA, they fall within the scope of justifiable limitations on the right.

4.1.3 Clause 101 – Obtaining criminal records

Clause 101 of the Bill proposes to insert a new chapter 9, part 5A into the EP Act. The clause engages the right to privacy by allowing the chief executive to have access to personal information, specifically the criminal history of an individual, without that individual's consent.

4.1.3.1 *Human rights issue – Privacy and reputation*

Section 25 of the HRA protects the right of a person not to have their 'privacy, family, home or correspondence unlawfully or arbitrarily interfered with'[164] and not to have their personal reputation unlawfully attacked.[165] This right is based on Article 17 of the ICCPR and is broad in scope, intersecting with other rights protected in the HRA including the rights relating to families and children, as well as rights to freedom of expression. The Queensland Human Rights Commission has explained that the right protects personal information and data collection as well as interreference with a person's 'physical and mental integrity, including appearance, clothing and gender; sexuality and home'.[166]

The rights protected in s 25 can be subject to justifiable limitations when reasonably necessary to do so in a free and democratic society based on human dignity, equality and freedom.

The right to privacy is also protected by the *Invasion of Privacy Act 1971*, *Information Privacy Act 2009*, *Criminal Law (Rehabilitation of Offenders) Act 1986*, and by the *Privacy Act 1988* (Cth), all of which contain detailed rules about how public and private bodies should collect, share and disclose personal information. For example, the *Criminal Law (Rehabilitation of Offenders) Act 1986* (CLROA) regulates the disclosure of information about a person's criminal history. If a matter falls within the definition of a person's 'criminal history' under the CLROA, the person is not required to disclose the matter other than in prescribed circumstances and other persons are prohibited from disclosing it. In addition, under the *Information Privacy Act 2009*, a person's criminal record is classified as 'sensitive information' and is subject to a range of protective measures under that Act.

Nature and purpose of the limitation

Proposed new s 484C of the EP Act empowers the chief executive to ask the Police Commissioner for a written report about the criminal history of a person if certain criteria are met. These criteria are that (1) the person subject to the criminal history report is 'present at the place or vehicle that an

164 *Human Rights Act 2019,* s 25(a).

165 *Human Rights Act 2019,* s 25(b).

166 QHRC, Fact Sheet on s 25, https://www.qhrc.qld.gov.au/your-rights/human-rights-law/right-to-privacy-and-reputation.

authorised person enters as part of their duties under the Act', and (2) the person subject to the criminal history report creates an 'unacceptable level of risk to the authorised person's safety'. The proposed new section further provides that:

> (5) The chief executive must examine the report and identify, to the extent it is reasonably practicable to do so, offences involving conduct, behaviour or circumstances that suggest the relevant person's presence at the place or vehicle may endanger the authorised person's safety.
>
> (6) The chief executive may give the authorised person information in the report about the offences identified under subsection (5).

Certain conditions apply to the use and sharing of the report, for example, the chief executive must ensure the report, and any information in the report given to an authorised person in writing, is destroyed as soon as practicable after the report is no longer needed for the purpose for which it was requested.[167] Confidentiality requirements are also contained in proposed amendments to chapter 12, part 4C of the EP Act (and are discussed below).

As noted above, these amendments have the potential to have a significant impact on the right to privacy protected under the HRA. This is because they authorise the chief executive and an authorised person to have access to sensitive personal information, specifically the criminal history of an individual, without that individual's consent.

The purpose of the amendment proposed in cl 101 is 'to help an authorised person to decide whether the authorised person's entry of a place or vehicle under this chapter would create an unacceptable level of risk to the authorised person's safety'.[168] The statement of compatibility goes on to explain that:

> Protecting the personal safety of an authorised person performing their duties under the EP Act supports that individual's right to life and human dignity. Protecting the safety of an authorised person can be supported by obtaining information about a person's criminal history which may suggest whether the presence of that person may endanger the authorised person.[169]

In other words, the proposed amendment is designed to equip the chief executive with information about the past criminal activities of another person in order to improve their ability to assess any risks to the safety of authorised persons undertaking their duties pursuant to the EP Act.

Relationship between the limitation and its purpose

The explanatory notes explain that the limitations described above constitute a necessary component of the EP Act's inspection and compliance regime as they help guard against endangering the safety of authorised officers as they undertake their statutory duties.

While this risk mitigation purpose is common among other legislative and regulatory regimes designed to protect vulnerable people from harm (such as requiring criminal history checks for persons working with children)[170] or when appointing persons to positions of trust and authority (such as appointment of individuals to oversight boards or complaints bodies),[171] it is less common in the context of investigative operations in environmental protection regimes.

The statement of compatibility notes that 'more recently, criminal history reports have been increasingly used by government agencies to safeguard the safety of administrative investigators in

167 Bill, cl 101, proposed new s 484C(7).

168 Bill, cl 101, proposed new s 484A.

169 Statement of compatibility, p 4.

170 See for example *Working with Children (Risk Management and Screening) Act 2000*.

171 See for example *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020,* Part 3.

the performance of their duties',[172] without providing any specific examples. However, in the Office of the Queensland Parliamentary Counsel's *Principles of good legislation: OQPC guide to FLPs: Criminal History* publication[173] examples are provided of previous legislative regimes that empower authorised investigators to access another person's criminal history to help decide whether the unaccompanied entry to the premises would create an unacceptable level of risk to the authorised officer's safety. These include the *Fair Trading Inspectors Act 2014*, which permits the chief executive to ask the commissioner of the police service for a written report about the criminal history of a person if an inspector reasonably suspects that person may be present at a place when the inspector enters (in accordance with other provisions of the Act) and may therefore create an unacceptable level of risk to the inspector's safety.[174] Similar provisions can be found in the *Water Supply (Safety and Reliability) Act 2008*. This Act also allows authorised officers to enter premises to conduct investigations and empowers the chief executive to request a criminal history report in relation to a person who an authorised officer reasonably suspects might be present at a relevant place.[175]

Whether there are less restrictive and reasonably available ways to achieve the purpose

As noted above, the right to privacy extends to the right to control the dissemination of information about one's private life, and to be protected from *arbitrary* interference with a person's private and home life. The use of the term 'arbitrary' in s 25 is important. It denotes unlawful interference with privacy, but also actions which may be lawful but are 'unreasonable, unnecessary or disproportionate' in the circumstances. As the federal Parliamentary Joint Committee on Human Rights (PJCHR) has explained, 'to be a proportionate limitation on the right to privacy, the limitation should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards'.[176] In order for a limitation not to be arbitrary, it must pursue a legitimate objective, and be rationally connected to, and a proportionate means of achieving, that objective.[177] The PJCHR has suggested that when assessing proportionality, it is important to consider matters including how the personal information might be used or shared; whether there are other, less rights restrictive, methods for achieving the same legitimate ends; the nature of the information, documents or things that may be required to be disclosed or shared; and what safeguards apply.[178]

In this case, cl 101 sets out a range of criteria that must be fulfilled before covert access to criminal history information can take place. There must be an assessment, for example, by the chief executive that an authorised person faces and unnecessary risk of harm as result of the presence of a particular person. The changes proposed in cl 101 are also accompanied by prescribed conditions that limit the circumstances in which the criminal history information can be used and disclosed, as well as provisions that impose consequences for unauthorised use or disclosure.

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172 Statement of compatibility, p 5.

173 OQPC, *Principles of good legislation: OQPC guide to FLPs: Criminal History*, 2013, https://www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Criminal_history.pdf.

174 *Fair Trading Inspectors Act 2014*, ss 62-64.

175 OQPC, *Principles of good legislation: OQPC guide to FLPs: Criminal History*, 2013, https://www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Criminal_history.pdf, p 17.

176 Parliament of Australia, Parliamentary Joint Committee on Human Rights, Report 1 of 2020.

177 Parliament of Australia, Parliamentary Joint Committee on Human Rights, Report 1 of 2020.

178 See for example Parliamentary Joint Committee on Human Rights, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, *Report 13 of 2018*, pp 69-71 and 81-84; Parliamentary Joint Committee on Human Rights, Identity-matching Services Bill 2018, *Report 5 of 2018,* p 133; Parliamentary Joint Committee on Human Rights, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, *Report 13 of 2018,* p 92; and Parliamentary Joint Committee on Human Rights, *Report 4 of 2018*, My Health Records (National Application) Rules 2017 [F2017L01558], p 43.

For example, cl 101 includes the requirement that the chief executive must ensure that the report is destroyed as soon as practicable when it is no longer needed for the purpose for which it was requested.[179] In addition, proposed new s 579D of the EP Act makes it an offence for the chief executive or an authorised person to disclose confidential information (including criminal history information) obtained when administering, or performing functions or exercising powers under the EP Act. However, the same section makes it clear that these penalties do not apply if undertaken 'in the performance of a function or exercise of a power under this Act'. Given the wide range of powers and functions contained in the EP Act, this constitutes a significant exception to the safeguard against disclosure of criminal history information obtained pursuant to proposed new s 484C.

These features of the proposed amendments suggest that the interference with the right to privacy in these circumstances is not 'arbitrary' for the purposes of s 25 of the HRA. However, the potential scope of the category of persons who could be 'authorised persons' for the purposes of this part of the EP Act,[180] coupled with the broad exceptions that apply to the confidentiality related offences in proposed new s 579D of the EP Act potentially dilute at least some of the safeguards listed above. For example, no specific reference is provided within proposed new s 579D to the special care that may be required to be taken with respect to criminal history information, nor is any requirement included to ensure that disclosure of such information is only permitted for specific purposes, such as those contained in proposed new part 5A of chapter 9 of the EP Act. This approach can be contrasted with the existing confidentiality protections contained in s 316PE of the EP Act which circumscribe the purposes for which certain disclosures can be made in the exercise of functions under the Act.

Balance between the importance of the purpose of the limitation and the importance of preserving the human right

The statement of compatibility provides that 'the importance of ensuring the safety of an authorised person by protecting authorised persons from physical harm justifies the limitation imposed on the right to privacy'.[181] This is an important and legitimate purpose, particularly in the context of authorised officers who are unarmed and may work in remote areas with sometimes little assistance should they be confronted with a violent or dangerous situation. The power to request disclosure of criminal histories could provide an opportunity for the authorised officer to request to be accompanied by a police officer or other appropriate support person if it is considered that unaccompanied entry to a place would create an unacceptable level of risk to the authorised officer's safety.

However, as discussed above, the impact of the proposed provisions on the right to privacy is also significant, particularly given the criminal history information can be accessed covertly, having regard to the relatively broad category of person who can be 'authorised officers' under the EP Act, and in light of the scope of exceptions relating to the prohibition of disclosure of sensitive personal information contained in proposed new s 579D.

In order for this balance to be justified as within the scope of permissible limitations on the right to privacy contained in s 13 of the HRA it is necessary to be satisfied that the changes proposed in cl 101:

- are accompanied with detail protections of individual privacy
- include stringent safeguards to protect the confidentiality of the information disclosed, and
- are sufficiently justified in the materials accompanying the Bill, having regard to the potential for the provisions to authorise unnecessary collection of private information.[182]

179 Statement of compatibility, p 6.

180 See *Environmental Protection Act 1994,* s 445.

181 Statement of compatibility, p 6.

182 OQPC, *Principles of good legislation: OQPC guide to FLPs: Criminal History*, 2013, https://www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Criminal_history.pdf.p 17.

As noted above, in this case the proposed changes authorising access to criminal history information are accompanied by: (a) the requirement that specific, prescribed criteria be met prior to accessing criminal history information, (b) strict limits on the purposes for which the criminal history information can be used and disclosed, (c) requirements for criminal history reports to be destroyed immediately following their authorised used, and (d) penalties for misuse or unauthorised disclosure of criminal history information obtained under the proposed provisions. In addition, as noted above, criminal records are classified as 'sensitive information' in the *Information Privacy Act 2009* and are therefore given additional privacy protections under that legislation.[183] All recordings made by an authorised person while exercising a power under the EP Act also become a record for the purposes of the *Public Record Act 2001*, attracting relevant provisions relating to storage and disclosure including the Information Privacy Principles in Schedule 3 of the *Information Privacy Act 2009*.

Committee comment

The committee is satisfied the changes proposed in clause 101 constitute a justifiable limitation on the right to privacy, pursuant to section 13 of the HRA, and aligns with past examples of similar provisions introduced in other administrative investigative contexts in Queensland.

4.1.4 Clause 102 – Body-worn cameras

Clause 102 of the Bill proposes to insert a new s 486A into the EP Act that would permit the use of body-worn cameras and drones by authorised persons when undertaking inspection functions under the Act. This proposed amendment could result in authorised persons recording images and sounds of an individual without their consent and therefore engages the right to privacy and reputation protected by s 25 of the HRA.

4.1.4.1 *Human rights issue – Privacy and reputation*

The nature of the right to privacy and reputation protected by s 25 of the HRA is described above with respect to cl 101 (obtaining criminal records). The right to privacy is also protected by the *Invasion of Privacy Act 1971*, *Information Privacy Act 2009* and by the *Privacy Act 1988* (Cth), all of which contain detailed rules about how public and private bodies should collect, share and disclose sensitive personal information, including video recordings of their voice or image. For example, the *Invasion of Privacy Act 1971* makes it an offence for a person to audio record a private conversation they are not involved in.[184] A person is involved in a conversation if they are part of it, for example, having a face to face or phone conversation with someone or involved in a group discussion. Exceptions apply for police or other authorised persons to use listening devices under other legislation.[185] Section 227A of the *Criminal Code Act 1899* also makes it an offence to video record people without their consent in places where they would expect to be private.

Nature and purpose of the limitation

Proposed new s 468A of the EP Act would provide that it is lawful for an authorised person to use a body-worn camera to record images or sounds while the authorised person is exercising a power under chapter 9 of the EP Act, which relates to investigation and enforcement. The proposed new provision makes it clear that it intends to cover recordings that are 'inadvertent or unexpected' or 'incidental', and that this provision fits within the scope of exceptions to the prohibition on the use of listening devices provided in *Invasion of Privacy Act 1971*, s 43(2)(d).

183 Statement of compatibility, p 7.

184 *Invasion of Privacy Act 1971,* s 43.

185 *Invasion of Privacy Act 1971,* s 43(2)(d).

This amendment is described in the Minister's explanatory speech as needed to 'ensure the safety of officers in the environmental regulator by explicitly permitting authorised persons to use body-worn cameras and to take drones into places when exercising entry powers'.[186]

There is a clear connection between the purpose of the proposed amendment and the overall objectives of the EP Act, which are designed to prevent, investigate and address environmental harm.

Relationship between the limitation and its purpose

By making it lawful for an authorised officer to wear a body-worn camera or operate a drone when conducting certain functions under the EP Act, cl 102 has the potential to have a significant impact on the right to privacy protected by s 25 of the HRA. This is because the recording devices worn or operated by authorised officers could capture conversations, voices or images that belong to individuals who are not party to a conversation with the authorised officer, including vulnerable people such as children. The use, disclosure, storage and destruction of this type of sensitive personal information under the proposed amendments may also engage the right to privacy, particularly if access to this information is not subject to strict safeguards.

In order for the amendments proposed in cl 102 to fit within the scope of permissible limitations on human rights set out in s 13 of the HRA, it is necessary to ensure that any interference with the right to privacy is prescribed by law and proportionate in impact having regard to the legitimate policy objectives underpinning the proposed change. These aspects of proposed new s 468A are considered below.

Whether there are less restrictive and reasonably available ways to achieve the purpose

Proposed new s 468A is accompanied by safeguards designed to limit how the information obtained by body-worn cameras or drones can be used, shared and destroyed. These include proposed new s 579D of the EP Act which prohibits the use or disclosure of confidential information (such as voice or image recordings) gained by a person in administering or performing a function under the EP Act unless expressly authorised. In addition, all recordings made by an authorised person while exercising a power under the EP Act will become a record under the *Public Records Act 2001*, which means that they must be retained in accordance with information privacy obligations to which public servants are subject, including the Information Privacy Principles in schedule 3 of the *Information Privacy Act 2009*.[187]

These provisions offer some protection against the potential misuse or unauthorised disclosure of sensitive personal information obtained under the proposed amendments. However, as discussed above with respect to criminal history information, it is important to note that pursuant to proposed s 579D, the prohibition on use and disclosure of confidential information does *not* apply in circumstances where the use or disclosure is 'in the performance of a function or exercise of a power under this Act'. Given the broad and varied purposes of the EP Act, this exception is potentially significantly broad in scope.

In addition, the proposed amendments relating to body-worn cameras do not include a requirement for the authorised officer to inform a person that their voice or image has been recorded, for example if the camera captures images of a person who is present at the property where an inspection is taking place but is not themselves involved in a conversation with an authorised officer. There is no justification provided in the explanatory notes or statement of compatibility as to why this requirement has not been included. Without such a requirement, the positive rights impacts associated with the use of body-worn cameras, including the fair trial rights of persons questioned

186 Queensland Parliament, Record of Proceedings, 12 October 2022, p 2609.

187 Explanatory notes, p 6.

during an investigation under the EP Act, may not be realised in practice. In addition, the privacy protections described above may not be able to be accessed by third parties.

The human rights impact of body-worn cameras has been considered in other contexts in Queensland, including in the *Queensland Corrective Services, Safety and Security Equipment Body Worn Cameras* document.[188] While this publication deals with the use of body-worn cameras in a correctional context, many of the prescribed standards and safeguards remain relevant to the proposed use of this technology under the EP Act. The statement of compatibility does not consider the extent to which safeguards or standards of this nature are or should be included as part of these proposed new additions to the EP Act. Such information would greatly assist in the determination of whether the limitations imposed on the right to privacy and reputation by cl 102 are proportionate given the other rights-enhancing aspects of these proposed amendments.

Balance between the importance of the purpose of the limitation and the importance of preserving the human right

The authorised use of body-worn cameras, and in particular, the ability for authorised officers to make contemporaneous audio or video recordings of encounters with relevant persons in the context of undertaking an investigation or enforcement action, can have positive and negative impacts on the human rights protected under the HR Act and related human rights instruments. Positive rights impacts include the promoting the safety of authorised officers and guarding against risk of physical harm (protected by ss 16 and s29 of HRA) and facilitating access to procedural fairness for any person facing legal consequences as a result of an inspection or enforcement action taken under chapter 9 of the EP Act (protected by s 31 of the HRA).

These rights-enhancing features of the proposed amendment contained in cl 102 should be taken into account when considering the potential impact of the use of body-worn cameras on the privacy rights of people who may have their sensitive personal information recorded, potentially without their knowledge, and made available for use for the purposes of the EP Act.

As noted above, under s 43(2)(a) of the *Invasion of Privacy Act 1971*, it is already lawful to record a private conversation provided the person using the listening device is a party to that conversation. This may cover the vast majority of people who will have their voice or images recorded under proposed new s 486A who are likely to be party to conversations with an authorised officer. However, there remain instances in which a body-worn camera may capture images or sounds relating to conversations or other activities which the authorised person is not a party to. This risk of capturing sensitive information with respect to persons not party to a conversation with an authorised officer is heightened by the fact that proposed new s 468A specificly provides that it intends to cover recordings that are 'inadvertent or unexpected' or 'incidental' to the authorised officer's investigative and enforcement functions under the EP Act. For this reason, the quality of the safeguards provided in proposed new s 579D become particularly important.

These safeguards provide important protection against unauthorised use or disclosure of personal information, including that collected via body-worn cameras. However, this proposed new safeguard would continue to permit the use of sensitive information relating to third parties to potentially be used or disclosed *for the purposes of the EP Act,* including in circumstances where the relevant third parties have not been informed that their sensitive personal information has been recorded. Further information should have been provided in the statement of compatibility to justify: (a) why it is necessary that the proposed provisions cover recordings that are 'inadvertent or unexpected' or 'incidental' to the authorised officer's investigative and enforcement functions, (b) the scope of the

[188] Queensland Corrective Services, *Safety and Security Equipment Body Worn Cameras*, Version 06, (2022), https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/eef5bafe-bf8d-48bb-b336-e60a2e1a08d2/safety-and-security-equipment-body-worn-cameras.pdf?ETag=2f01a14393fdad3561d64d7b28c25538.

exceptions set out in proposed new s 579D relating to prohibited disclosure of confidential information, and (c) and the absence of any requirement for authorised officers to take reasonable steps to inform third parties that their voice or images have been recorded under proposed new s 486A.

Committee comment

The committee is satisfied that the potential negative effects on human rights under the HRA brought about by the use of body-worn cameras in prescribed circumstances is balanced by positive rights impacts, most notably promoting the safety of authorised officers and guarding against the risk of physical harm to them.

4.1.5 Clause 105 – Orders against persistent offenders

Clause 108 of the Bill proposes to introduce a new s 506A into the EP Act that would enable the court to make an order prohibiting a person from carrying out a particular activity, such as an ERA, and impose criminal penalties of up to 2 years imprisonment for failing to comply with such an order. This power would be available to the court if the person has been conviction of multiple serious environmental offences within the previous 5 years, and the court considers it necessary to prevent the person from committing further serious environmental offences in the future. By suggesting that a person may commit future offences based on past offences committed, the proposed provision empowers the court to make a post-sentence order with respect to a persistent environmental offender. In this way, the proposed provision has the potential to engage at least 2 rights protected under the HR Act.

4.1.5.1 *Human rights issue – Privacy and reputation; Right not to be tried or punished more than once*

The nature of the right to privacy and reputation protected by s 25 of the HRA is described above with respect to cl 101 (obtaining criminal records).

Clause 108 also engages the right not to be tried or punished more than once, protected by s 34 of the HRA. This right is derived from ICCPR Article 14(7) and the principle that a person must not be tried or punished more than once for an offence in relation to which the person has already been finally convicted or acquitted in accordance with law.[189] As the Queensland Human Rights Commission explains, this principle, also known as 'double jeopardy', applies to criminal offences. It does not apply to civil trials which may result in civil liability. Sanctions and penalties imposed by professional disciplinary bodies are not usually considered a breach of this right.[190]

Like all rights in the HRA, the right to not to be tried or punished more than once can be limited, but only where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Although this particular right has yet to be interpreted by courts in Queensland, it has been tested in Victoria in the case of *Psychology Board of Australia v Ildiri.*[191] In this case, Ildiri had been found guilty of numerous fraud offences under the *Crimes Act 1958* (Vic). The Psychology Board of Australia knew of the findings. As a result, they ruled that Ildiri had also engaged in unprofessional conduct under the *Health Professions Registration Act 2005* (Vic). The Tribunal found this did not violate the right not to be tried more than once under s 26 of the Charter (equivalent of s 34 of the Queensland HRA). This was because the aim of the disciplinary proceedings was 'primarily to protect the public, and not to punish the practitioner'. This case suggests that the right not to be

189 QHRC website, 'Right not to be tried or punished more than once', https://www.qhrc.qld.gov.au/your-rights/human-rights-law/right-not-to-be-tried-or-punished-more-than-once.

190 QHRC website, 'Right not to be tried or punished more than once', https://www.qhrc.qld.gov.au/your-rights/human-rights-law/right-not-to-be-tried-or-punished-more-than-once.

191 *Psychology Board of Australia v Ildiri [2011] VCAT 1036.*

tried or punished more than once was only relevant where the purpose of the penalty was *punitive* rather than *protective* in nature.

The right not to be tried or punished more than once is engaged by cl 108 of the Bill in so far as proposed new s 506A of the EP Act will enable a court to issue a further restriction on the rights and freedoms of a person on the basis of their past criminal conduct, for which they have already been tried and punished.

Nature and purpose of the limitation

The statement of compatibility explains that the purpose of the amendment proposed in cl 108 is 'to prevent persistent offenders from carrying out an activity if the court considers it necessary to stop that offender from committing further offences'. It notes that in some cases,[192] there can be a high risk of repeat offending and preventing these offenders from engaging in a specific activity may be necessary to stop the person from committing further offences under the EP Act.

The statement of compatibility further provides that by enabling the court to make an order of this type, the proposed amendment strengthens the effectiveness of environmental regulation 'by aiming to prevent further environmental offences from occurring' and contributes to meeting the objectives of the EP Act, which is to protect the environment.[193]

The risk of repeat or persistent re-offending in the context of environmental offences has been well documented in research and scholarship,[194] however no statistical or other information is provided in the statement of compatibility that would indicate the prevalence of this form of offending in Queensland.

Relationship between the limitation and its purpose

The scope of orders that can be made by the court under proposed s 506A is extensive, with wide-ranging consequences for that person's capacity to undertake activities that may be pertinent to their professional reputation, family life or livelihood, potentially engaging the person's freedom of movement, freedom of association and or right to property. As the statement of compatibility notes, this amendment also engages the right to reputation by suggesting that the person may be more likely to continue to commit an environmental offence.[195]

Whether there are less restrictive and reasonably available ways to achieve the purpose

The statement of compatibility argues that there is no less restrictive approach that would 'achieve the same result of preventing the potential for further environmental offences from repeat offenders'. It also points to the fact that the provision includes criteria to ensure that the restrictive orders can only be issued with respect to a person who has been convicted of a serious environmental offence at least twice in the previous 5 years.[196]

However, insufficient information is provided in the statement of compatibility as to the extent to which the existing provisions of the EP Act are ineffective at preventing or deterring persistent offending. For example, the proposed new provision would sit alongside existing provisions of the EP Act that empower the court to make wide-ranging orders preventing a person from engaging or continuing to engage in certain activity (s 506) and orders remedy or restrain an offence against the EP Act (s 505). It is unclear on the information currently provided why these provisions cannot be used

192 Statement of compatibility, p 4.

193 Statement of compatibility, p 5.

194 See for example, A Nurse, '*Contemporary* Perspectives on Environmental Enforcement' (2022), *International Journal of Offender Therapy and Comparative Criminology*, pp 327–344.

195 Statement of compatibility, p 5.

196 Statement of compatibility, p 6.

to achieve the important policy aim of 'preventing the potential for further environmental offences from repeat offenders'.[197]

Balance between the importance of the purpose of the limitation and the importance of preserving the human right

It is clear that the proposed new s 506A is designed to advance the legitimate aim of equipping the court with additional powers to prevent or address persistent serious environmental offending. This aligns with the overall objectives of the EP Act. However, given the significant impact post-sentence orders can have on the rights of individuals, including impacts on their right to not be punished more than once for past criminal activity and their reputation as a person likely to commit a further offence, is it incumbent on the proponents of this Bill to articulate with further detail why the existing provisions of the EP Act are insufficient to address the risk of persistent offending.

When post-sentence orders have been introduced to target persistent offending in different contexts, such as serious and organised crime or child-sex offending, they have been met with considerable concern on the basis that they undermine the presumption of innocence, and the principle of double jeopardy. Post-sentence orders in these contexts, which can give rise to preventative detention and other restrictions on a person's liberty, are clearly punitive, as well as protective, in character.

While the EP Act operates in a substantially different context, it is important to consider whether the orders that can be made under proposed s 506A could have a punitive impact on a person, as well as protective impact in terms of the environment. On the one hand, proposed s 506A appears to have a *protective* rather and *punitive* character. It does not permit, for example, the court to make orders that would result in the detention of a person (although criminal penalties can apply for breach of the orders). On the other hand, proposed s 506A appears to invest the court with almost limitless discretion to make an order to prevent a future serious environmental offence from taking place, including orders that could restrict a person's freedom of movement, freedom of association and right to property. If such orders are made, they may be considered to have a punitive as well as protective effect, enlivening the protection of s 34 of the HR Act. Such a provision could only be considered to fall within the permissible scope of limitations set out in s 13 of the HR Act if sufficient justification is provided as to why alternative mechanisms, including existing provisions such as ss 505 and 506, are ineffective at achieving the proposed protective aim.

Committee comment

The committee is satisfied that clause 108, when considered alongside the limited circumstances available to the court to make an order against persistent offenders, is a justifiable limitation to sections 25 and 35 of the HRA.

4.2 Statement of compatibility

The HRA requires that a member who introduces a Bill in the Legislative Assembly must prepare and table a statement of the Bill's compatibility with human rights. The committee is required to consider the statement of compatibility and report to the Legislative Assembly about the statement.[198]

The committee notes that in some instances the statement of compatibility contained a limited level of information to facilitate understanding of the persistent offenders provisions and their compatibility with the right not to be tried or punished more than once protected by s 34 of the HRA. The statement of compatibility did not address the cultural rights potentially engaged by cl 53 of the Bill relating to temporary authorities for emergency situations.

[197] Statement of compatibility, p 7.

[198] *Human Rights Act 2019*, ss 38, 39.

Other provisions contained in the Bill which also have the potential to engage human rights and were not discussed in the statement of compatibility include:

- clause 111 of the Bill, which seeks to insert a new s 542A into the EP Act that would require person information to be removed from a register mentioned in ss 540(1) or 540A(1) in certain circumstances. This clause engages s 25 of the HRA (right to privacy and reputation) in a *positive* way as it provides increased protection for the rights of someone whose personal safety may be put at risk if particular information (for example, the person's address or other contact details) were to be included, or allowed to remain, on the register
- clause 105 which amends s 493 of the EP Act, which expands the scope of liability that applies under the existing offence provision, potentially engaging s 32 of the HRA given the provision's approach to onus of proof. Onus of proof issues may also arise with respect to the changes proposed in cl 53, in particular proposed new s 316GB.

Committee comment

The committee considers that the statement of compatibility tabled with the Bill contains a minimum level of information to facilitate understanding of the Bill in relation to its compatibility with the full range of human rights issues potentially enlivened by the proposed amendments to the EP Act.

The committee notes the statement of compatibility could have been more fulsome but otherwise complies with section 38 of the HRA.

Appendix A – Submitters

Sub #	Submitter
1	Confidential
2	Australian Prawn Farmers Association Inc
3	Pamela Jones
4	Jason Hudson
5	Christine Carlisle
6	Australian Contaminated Land Consultants Association Queensland
7	Cement Concrete & Aggregates Australia
8	Australian Barramundi Farmers' Association
9	The Wilderness Society
10	Queensland Water Directorate
11	Waste Recycling Industry Association Queensland
12	Name withheld
13	Idemitsu Australia
14	Gecko Environment Council
15	Environment Council of Central Queensland
16	Queensland Law Society
17	Queensland Resources Council
18	Environmental Defenders Office
19	Confidential
20	Mackay Conservation Group
21	Healthy Land and Water
22	SEQ Division of the Environment Institute of Australia and New Zealand
23	Local Government Association of Queensland
24	Alliance to Save Hinchinbrook Inc
25	Redland City Council
26	Association of Mining and Exploration Companies
27	Queensland Farmers' Federation
28	Australian Petroleum Production & Exploration Association
29	AgForce Queensland

Appendix B – Officials at public briefings

Brisbane – 24 October 2022, 11.00am

Department of Environment and Science

- Geoff Robson, Executive Director, Environment and Conservation Policy and Legislation, Environmental and Heritage Policy and Programs
- Claire Andersen, Executive Director, Operational Support, Environmental Services and Regulation
- Simon Hausler, Policy Manager, Waste Avoidance and Recovery Policy, Office of Circular Economy, Environment and Heritage Policy and Programs
- Scarlett Stephan, Principal Policy and Legislation Officer, Environment and Conservation Policy and Legislation, Environment and Heritage Policy and Programs
- Louise Karle, Principal Environmental Officer, Operational Support, Environmental Services and Regulation

Brisbane – 7 November 2022, 12.30pm

Department of Environment and Science

- Geoff Robson, Executive Director, Environment and Conservation Policy and Legislation, Environmental and Heritage Policy and Programs
- Claire Andersen, Executive Director, Operational Support, Environmental Services and Regulation
- Scarlett Stephan, Principal Policy and Legislation Officer, Environment and Conservation Policy and Legislation, Environment and Heritage Policy and Programs
- Louise Karle, Principal Environmental Officer, Operational Support, Environmental Services and Regulation

Appendix C – Witnesses at public hearing

Brisbane – 7 November 2022

Australian Prawn Farmers Association

- Kim Hooper, Executive Officer

Australian Barramundi Farmers' Association

- Jo-Anne Ruscoe, Chief Executive Officer

Queensland Law Society

- Kara Thomson, President
- Matt Dunn, General Manager – Advocacy
- Phil Vickery, member of the Queensland Law Society Corporations Law Committee

AgForce Queensland

- Michael Guerin, Chief Executive Officer
- Marie Vitelli, Senior Policy Officer

Queensland Resources Council

- Ian Macfarlane, Chief Executive
- Frances Hayter, Policy Director, Environment

Australian Petroleum Production & Exploration Association

- Matthew Paull, Queensland Director
- Joshua O'Rourke, Queensland Policy Manager

Waste Recycling Industry Association Queensland

- Dr Georgina Davis, Chief Executive Officer
- Kurt Whalan, General Counsel, JJ Richards

Healthy Land & Water

- Stephen Robertson, Chairman
- Julie McLellan, Chief Executive Officer
- Dr Andrew O'Neill, Chief Operations Officer
- Joel Bolzenius, Strategic Partnerships Manager

Statements of reservation

Statement of Reservation – Opposition Committee Members

As a constructive Opposition, the LNP will support genuine efforts to conserve our environment. This legislation does improve some environmental protections in our state but the mismanagement of the Bill and its consultation process by the Environment Minister is something we believe the Committee's report did not adequately address.

While some stakeholders were first consulted late last year, they were only told the amendments included in this Bill would be minor in nature. Yet when the first exposure draft was presented this year, a number of key representatives reported it had much more significant changes than what was anticipated including giving the Department the power 'to wind back retrospectively existing environmental approvals, licenses, and permits to slash production capacity'.

The leak of these plans to The Australian quoted an industry source as saying *"it's frankly outrageous. It would give power to a bureaucrat to unilaterally and retrospectively close businesses. It's sovereign risk of the highest order".*

Further, the unprecedented and tight confidentiality deed they had to sign meant peak bodies could not consult with their members, and the frustration that ensued led to leaks, fear and confusion.

As the head of the Queensland Resources Council Ian Macfarlane said, *"it's not transparent governance...It's very opaque, and it increases the likelihood of bad outcomes".*

The Australian Prawn Farmers Association (APFA), summed it up well, saying in their submission, *"Given the extremely short period of time for industry to digest this information and understand its practical implications, and the amount of detailed commentary on the amendments, there is some real confusion about the nature and extent of some of the changes that are proposed and how they will operate in practice… The APFA is a significant stakeholder in this Bill on behalf of our Queensland members and the adhoc and restrictive nature of consultation taken with the Exposure Draft (which is different to the Bill tabled) by the Department and now the time between the introduction of the Bill on the 12th October 2022 and the closing date for submissions on the 26th October 2022 also being extremely short, the timing does not allow a measured and considered response developed through consultation with our members."*

Waste Recycling Industry Association Queensland stated in their submission, *"Unfortunately, the short consultation period on such a complex but important piece of proposed legislation has reduced our ability to provide detailed responses or levels of evidence to support those responses; nor have we been able to facilitate detailed feedback from our members."*

QRC further submitted, *"It is critical for industry confidence in an open, transparent, consultative government that such arrangements do not become the standard modus operandi for government processes. As a minimum there should be a reasoned explanation of why such a process is occurring, beyond simply stating that it is an exposure bill and thus not finalised government policy. For example, what content is particularly sensitive and why? If the changes are considered so minor that they did not justify a RIS, what is the rationale for the stringent confidentiality requirements?"*

The Association of Mining and Exploration Companies also said, *"AMEC also considers the manner in which consultation has been undertaken, combined with consistently short timeframes for responses to various iterations of documents, necessarily means the policy development behind the Bill will suffer from a lower quality and smaller breadth of responses that would otherwise likely be provided. AMEC would be very concerned if the Department, or indeed the Queensland Government more broadly, were to adopt such practices more broadly moving forward."*

Finally, the Environmental Institute of Australia and New Zealand stated, *"The following feedback is provided on a number of proposed amendments to the Environmental Protection Act 1994 noting*

again that in the limited time available more constructive consideration of all provisions has not been possible."

This all could have been prevented if we'd seen better communication and a Government that was willing to be transparent.

Combined with the short turnaround for consultation on a Bill of this length has resulted in disappointing engagement with the people who know how this Bill will operate practically in our state.

The importance of consultation should not be undervalued, it will lead to the best outcomes and genuine progress towards environmental protection.

The State Government needs to view these stakeholders as our partners because we won't achieve anything meaningful if we don't work with them.

It was remarkable for the Environment Minister to introduce the speech in saying the Bill would *"improve community input and transparency"* when the State Government has done exactly the opposite in bringing the Bill forward.

This third-term Labor government cannot be surprised this is the way people react when they treat them with such little respect.

The Opposition members of the Committee support the recommendations in this report but again highlight the fact that recommendation 2, about the confusion and concerns regarding the executive liability provisions, could have been avoided if the Environment Minister engaged properly with stakeholders and not botched the process.

Given so many stakeholders raised so many legitimate concerns in their submissions to the Committee, we further ask the Minister to belatedly exercise some openness and transparency by addressing all of these issues at length when the Bill returns to Parliament.

Transparency is apparently something this government struggles with as shown by the recent revelations of contamination near the former Linc Energy site on the Darling Downs. There was an 18-month delay between the Minister being told about the detection of cyanide and benzene and the publication of those results for Queenslanders to see.

This only happened after neighbouring landholders and brave whistle-blowers from within the Department raised concerns in the media. When the Environment Minister was first asked about the contamination, her first response was to not comment and to palm it off to the Department. It would appear that once the story was published the Minister realised it was actually an issue. After repeated comments from landholders, the Minister agreed to publish the test results on the Department's website. It should not take all of that for the State Government to be open and transparent.

Sam O'Connor MP
Member for Bonney
Shadow Minister for Environment and the Great Barrier Reef
Shadow Minister for Science and Innovation
Shadow Minister for Youth

Rob Molhoek MP
Member for Southport
Deputy Chair

STATEMENT OF RESERVATION

ENVIRONMENTAL PROTECTION AND OTHER LEGISLATION AMENDMENT BILL 2022

Stephen Andrew, MP for Mirani

This Bill introduces significant changes to the *Environmental Protection Act 1994* and other legislation and has implications for all those organisations who hold environmental approvals, as well as the general community more broadly.

These changes range from amendments to the Environmental Impact Statement (EIS) process, increasing monetary thresholds to reducing the information requirements for research and development, Environmental Approval applications, including amendments that are specific to the resources industry and other enforcement regimes.

SECTION 493

In their submission, QLS raised a number of serious concerns in relation to the amendment extending executive officer liability, including insurance implications:

"If this amendment is passed in its current form, an executive officer will remain indefinitely liable for historical acts or omissions until a contravention of the act crystallises. Moreover, the amendments could render historical acts or omissions of the executive officers uninsurable or, alternatively, prohibitively expensive when obtaining director and officer run-off liability insurance."

Another concern is the breadth of that liability, because, on the face of it: "every officer within that broad definition back to basically the inception of the company is facing exposure".

Moreover the bill's defences for former officers are "not particularly clear, are untested and are not used in other areas of the law, creating uncertainty".

More consultation is needed with the insurance industry around this.

There is a real risk the bill's amendment could have a chilling effect on the willingness of qualified people to accept executive positions in companies affected by such provisions.

This would be a disappointing outcome all round.

The amendments should be redrafted to ensure that it will only be those people directly responsible for the actual act that caused the offence who can be held liable.

EARLY REFUSAL OF PROJECTS

There are also a number of legitimate concerns with the early EIS refusal of projects provisions, as the criteria for an early refusal are highly ambiguous and with no specific grounds stipulated in the Bill.

Few people would object to **early refusal powers** based on limited objective grounds, such as the project being illegal under the law.

However, I agree with the QRC's comment that any 'early refusal of projects' should be strictly limited. The conditions are too broad and subject to misinterpretation and misuse by government for political reasons.

CLAUSE 31

Clause 31 amends Section 230 of the Act to make public notification of all major amendments for resource activities an automatic requirement.

Again, there is a real problem of ambiguity when it comes to differentiating between major and minor amendments.

The Department itself acknowledged in its own Consultation Paper that: 'Uncertainty about the 'minor amendment' definition for EAs and PRCPs' has implications for determining whether a proposed amendment is major or minor.'

This issue of ambiguity was flagged by QRC as potentially having a "significant adverse impact on the resources industry in Queensland".

APPEA also highlighted concerns that the change was likely to cause "uncertainty for industry should this amendment proceed" and may result in "significant and unnecessary increases to costs, delays in approvals and uncertainty for investors during a critical time for the east coast energy market".

Property Rights - amendments to the *Land Title Act 1994*.

Clause 127 of the EPOLA Bill amends the *Land Title Act 1994*, to require subdivision applications in the Wet Tropics World Heritage area to obtain consent from the Wet Tropics Management Authority.

The amendment will impact around 2,500 properties around the Wet Tropics World Heritage area.

According to Agforce, property owners were not adequately consulted and there is considerable concern around diminished property rights in that area which need to be addressed by the government.

The regulation of private land to achieve environmental goals without adequate consultation or compensation in Queensland, needs to stop.

<u>CONCLUSION</u>

Other concerns centre around the new 'policy direction' being pursued by the department with this bill.

According to **the Australian Prawn Farmers Association and Australian Barramundi Farmers Association,** the first exposure draft of the bill made reference to "**explicit prescription of intensity or yield limits".**

According to both submitters, the first exposure draft was extremely concerning:

"It talked about control of yields. That is akin to telling a banana farmer how much they can produce as a crop… We have significant concerns about the direction that this bill takes the policy framework."

Even with the changes, they felt there were still opportunities in the bill for the department to have an overreach in terms of its on-farm regulation and the removal of a transparent and fair process of appeal.

Which could allow the department to put limits on the company's yield or intensity.

"It should not matter what happens on-farm; it is about what comes out of farm. That is where the jurisdiction should be and not whether we have five ponds or whether we have 500 ponds."

I found these comments alarming. It is most certainly NOT the Government's role to dictate production levels or 'on-farm' practices and I sincerely hope the government in not intending to pursue such policies via subordinate legislation.

REGULATORY IMPACT ANALYSIS

Given the significant impacts of these changes on industry, and most likely, increased costs for government, it is hard to understand why a proper regulatory impact process was not carried out by the department.

Apart from the unnecessary delays and the increased cost to industry from these legislative amendments, a regulatory impact process is needed to assess the likely increase in administrative and legal costs to the Department.

The impact of certain parts of the Bill on investor sentiment towards Queensland should also have been looked at.

LACK OF PROPER CONSULTATION WITH KEY STAKEHOLDERS

The government's consultation process was, according to the QRC's submission, one characterised by "rushed timeframes" and miscommunication.

"In the first round on the exposure draft, targeted stakeholder groups were initially given only five days for consultation, running into the Easter break."

The government also seems to have given some stakeholders the assurance that the changes included in the Bill would only be minor and then 'slipped in' major changes as part of a lengthy draft and introduced Bill.

This lack of transparency serves only to undermine people's trust in government, and investor confidence, particularly within the resources sector.

CONFIDENTIALITY

The Department also required stakeholders to execute a confidentiality deed before a copy of the first draft Exposure Bill was released to them.

This confidentiality deed was disastrously restrictive, not even allowing peak industry organisations to circulate the draft Bill to members for their comments.

It severely impacted the ability of stakeholders to obtain normal feedback from their members.

No plausible explanation has been provided as to why all the secrecy around the bill's consultation processes was regarded as necessary.

It is something I found particularly hard to fathom given that, according to the Explanatory Notes, one of the Bill's policy objectives was to "improve community input and transparency".

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Stephen Andrew, MP
Mirani
Date: 23 November 2022