Parliamentary Committees



Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024

Report No. 4, 57th Parliament
Health, Environment and Agriculture Committee
April 2024

Health, Environment and Agriculture Committee

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Acknowledgements

The committee acknowledges the assistance provided by the Department of Environment, Science and Innovation.

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

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Chair's foreword

This report presents a summary of the Health, Environment and Agriculture Committee's examination of the Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024.

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*.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff and the Department of Environment, Science and Innovation.

I commend this report to the House.

Aaron Harper MP
Chair

Recommendations

Executive Summary

The stated objective of the Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024 (Bill) is to ensure the powers and penalties in the *Environmental Protection Act 1994* (EP Act) are contemporary and fit for purpose by facilitating a more proactive approach to environmental risk management with enhanced regulatory responses to manage and restore environmental harm which has occurred. The Bill aims to achieve this by:

- clarifying and refining environmental policy principles
- rationalising statutory notices to ensure compliance with authorities, duties, and obligations and to respond to environmental harm events
- establishing a new duty to restore the environment and associating existing duties or obligations to offences, and
- improving evidentiary provisions relating to court proceedings.

The Health, Environment and Agriculture Committee (committee) received 20 submissions to its inquiry.

Submitters' support for the various provisions in the Bill was mixed.

Some submitters were concerned about the practical implications of the proposed inclusion of principles of environmental protection which would be applied to the general administration of the EP Act, particularly with respect to defining 'polluter' in relation to the polluter pays principle.

Issues were raised particularly in regard to the new combined environmental enforcement order (EEO), which the Bill introduces to replace the existing environmental protection orders, direction notices and clean-up notices, and the potential for this new notice to be issued to environmental authority holders complying with the conditions of an environmental authority, or to require changes to environmental authority conditions. Submitters were also concerned about the timeframes for notifying landholders of entry onto their land as part of the new EEO.

The Bill introduces a proactive duty to restore the environment which was supported by the majority of submitters. Submitters were concerned however about amendments to the duty to notify of an event causing environmental harm, particularly the insertion of the wording 'ought reasonably to have become aware of the event'. Submitters raised concerns about a lack of a clear definition or guidance regarding this provision. The Bill also introduces offences and penalties for contravening the general environmental duty and the duty to restore the environment, and for contravening a requirement of an EEO, as well as other offences relating to the administration and enforcement of EEOs.

Amendments to allow the administering authority to correct or amend a transitional environmental program, without the consent of the holder but with review and appeal rights, were opposed by some submitters.

The committee has commented on matters raised by submitters in relation to the consultation process and regulatory impact assessment 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 one recommendation, that the Bill be passed.

1 Introduction

1.1 Policy objectives of the Bill

The objective of the Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024 (Bill) is to ensure the powers and penalties in the *Environmental Protection Act 1994* (EP Act) are contemporary and fit for purpose by facilitating a more proactive approach to environmental risk management with enhanced regulatory responses to manage and restore environmental harm which has occurred. The explanatory notes state that the Bill's objective will be achieved through:

- clarifying and refining environmental policy principles
- rationalising statutory notices to ensure compliance with authorities, duties, and obligations and to respond to environmental harm events
- establishing a new duty to restore the environment and associating existing duties or obligations to offences, and
- improving evidentiary provisions relating to court proceedings.[1]

1.2 Background

The Bill amends the EP Act to implement recommendations from retired Judge Richard Jones and Barrister Susan Hedge's 2022 report, *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties*[2] (Review). The Review aimed to identify whether the tools available under the EP Act, particularly in relation to environmental nuisance, are sufficiently contemporary to address current and future challenges, and make any recommendations for improvements to better regulate Queensland's environment.[3]

The Review was initiated in part due to the significant odour nuisance issues in the Swanbank industrial area near Ipswich.[4] The review found that while the EP Act generally contained an adequate range of powers and penalties to enforce environmental obligations and reduce the risk of environmental harm, changes were required to clarify and make the operation of powers, penalties, and tools in the EP Act more proactive.[5]

The Review undertook a comparative jurisdictional analysis, and a case study approach, with the input of Department of Environment and Science (DES) staff.[6] The Review made 18 recommendations (see Table 1) and various findings from its engagement with DES officers including:

- The department's powers, particularly in respect of matters relating to persistent nuisance such as odour, dust, and gas, are limited because of the EP Act's scant reference to 'the concepts of

1 Explanatory notes, p 1.

2 R Jones and S Hedge, *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties*, 1 September 2022, https://environment.des.qld.gov.au/__data/assets/pdf_file/0016/311902/independent-review-ep-act-report.pdf.

3 Explanatory notes, p 1.

4 Queensland Parliament, Record of Proceedings, 13 February 2024, p 37.

5 Explanatory notes, p 1.

6 R Jones and S Hedge, *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties,* p 8.

human health, wellbeing and safety, and its confining of material and serious environmental harm to exclude nuisance'.[7]

- The recognition that the most significant moment to protect the environment is in the drafting of conditions for environmental authorities (EAs), given their impact on enforcement powers and proof of offences. To that end, DES have developed model conditions for EAs but is affected by legacy conditions in existing EAs.[8]
- Departmental enforcement was impacted by:
  - indecisiveness resulting from current definitions in the EP Act, and difficulty in classifying contaminants
  - determining whether and how to prosecute operators in situations where there were a number of potential sources of airborne contaminants
  - delays resulting from internal reviews and court processes which permitted contaminating entities to continue to operate
  - determining how to deal with emerging contaminants including PFAS (per-and poly-fluoroalkyl substances)
  - difficulty in adequately addressing environmental harm caused by unlicensed operators and illegal dumping, in particular because of inability to identify the culprit.[9]

1.2.1 Review recommendations

Key recommendations of the Review included:

- greater emphasis be placed on the concepts of human health, well-being and safety
- amendments to the definitions of environmental nuisance, and material and serious environmental harm to clarify that certain emissions, including odour, may also constitute material or serious environmental harm
- allowing tools such as emergency directions, environmental protection orders, clean-up notices and cost recovery notices to be utilised for some matters which would have been classified as nuisance despite their seriousness, along with higher penalties
- elevating the precautionary principle and introducing other principles in relation to polluter pays, proportionality and the primacy of prevention as environmental principles to be considered
- creating a new offence for contravening the general environmental duty (GED) to help focus on the conduct of operators, as opposed to consequential harm, by ensuring appropriate measures are employed to address risks
- broader powers to amend EA conditions to ensure they remain contemporary and effective.[10]

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7 R Jones and S Hedge, *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties,* p 9.

8 R Jones and S Hedge, *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties,* p 11.

9 R Jones and S Hedge, *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties,* p 11.

10 Queensland Government, *Government response: independent review of environmental regulator's powers and penalties*, May 2023, https://environment.des.qld.gov.au/__data/assets/pdf_file/0015/311901/govt-response-independent-review-environmental-regulators-powers-pentalties.pdf, p 2.

Table 1: Recommendations of the Independent Review of the *Environmental Protection Act 1994 (Qld)* [11]

1	The principles underpinning the EP Act should be amended to include: (a) the principle of polluter pays; (b) the proportionality principle; (c) the principle of primacy of prevention; and (d) the precautionary principle
2	Sections 8 and 9 of the EP Act should be amended to include the concept of "human health, safety and wellbeing" in the definitions of environment and environmental value
3	Section 15 or sections 16 and 17 of the EP Act should be amended to make clear that environmental harm that may constitute a nuisance at low levels, may also constitute material and serious environmental harm if it meets the definitions of those terms.
4	The threshold amounts for material and serious environmental harm should be reviewed and increased
5	Section 319 of the EP Act be amended by omitting the words "reasonable and practicable" and inserting in lieu thereof "reasonably practicable".
6	Direction notice provisions should be amended as follows: (a) amend section 363D(1) to make clear that the remedying of the contravention of a prescribed provision includes the obligation to carry out any remedial work that might be required to remedy the contravention; (b) provide powers for the administering authority to undertake remedial works and recover the costs thereof; (c) include as a prescribed provision for the purposes of section 363A offences involving the causing or risk of environmental harm or the contravention of the general environmental duty in section 319.
7	The Environmental Protection Order (EPO) provisions should be amended to: (a) remove the need to consider the standard criteria in deciding whether to issue an EPO under section 358(a)-(c) and (e) of the EP Act; (b) extend the power to issue an EPO for contravention of an offence under section 358(e) to all offences under the EP Act which relate to acts that have caused or might cause environmental harm; (c) rationalise the powers to step in to undertake remedial works and recover the costs thereof in respect of EPOs issued pursuant to section 358 of the EP Act;
8	Unless dealt with elsewhere in the Act, consideration be given to introducing an offence provision to capture obstruction of compliance with an EPO issued pursuant to section 358 of the EP Act or an offence provision that captures both related persons and persons issued an EPO pursuant to section 358.
9	The raft of requirements that are provided for pursuant to section 360(2) be included in the requirements that might be contained in a clean-up notice (section 363H).
10	The power to amend a Transitional Environmental Program (TEP) be expanded to: (a) allow the administering authority to amend without consent of the operator; (b) allow the administering authority to refuse an amendment of a TEP if it is not also satisfied that the amendment would be likely to achieve advancement of compliance with the Act.
11	In the event that a general environmental duty offence was not preferred, consideration might be given to including the general environmental duty within the scope of operation of section 505 of the EP Act, by way of example, by introducing the words "*a contravention of the general environmental duty or…*" after the words "*or restrain*" and "*or anticipated*" and before the word "*offence*" in section 505(1).
12	The power to amend Environmental Authority conditions be expanded to allow the Chief Executive or the Minister to amend conditions where the Minister or Chief Executive considers the environmental impact of the activity is not being appropriately avoided, mitigated or managed.

[11] R Jones and S Hedge, *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties,* Appendix A, pp 63-64.

13	The provisions regarding continuing obligations under cancelled or suspended Environmental Authorities be clarified to ensure that an operator must continue to comply with conditions regarding management of the site to reduce environmental risk and rehabilitation.
14	Schedule 4 of the EP Act be amended to include a contravention of sections 357I and 363E as disqualifying events for the purposes of section 318K of the EP Act.
15	Consideration should be given to creating an offence for breaching the general environmental duty.
16	The duty to notify of environmental harm provisions (Chapter 7, Division 2) be amended to include a duty to notify to a similar effect, as that provided for in section 74B of the *EMPCA (Tas)*.
17	Chapter 10, Part 1 of the EP Act be amended to expand the evidentiary aids limited to criminal proceedings to be available in civil proceedings
18	The words "*by the prosecutor*" be deleted from section 490(7)

The government response to the Review supported all recommendations.[12] Review recommendation 12, which called for expanded powers to amend existing EA conditions, was supported in principle. The government response additionally noted the potential for a legislative proposal to include a duty to restore the environment aligned with recommendation 1 regarding the polluter pays principle, and amendments to Environmental Protection Policies to assist maintaining appropriate EA conditions.[13]

Some of the Review recommendations are not being implemented by this Bill. The DES consultation paper noted that recommendations 4 and 13 were delivered by the *Environmental Protection and Other Legislation Amendment Act 2023* (EPOLA Act 2023) which was passed by the Queensland Parliament in March 2023:

> These recommendations were to review and increase the threshold amounts for material and serious environmental harm, and to clarify the conditions which continue to apply to an environmental authority (EA) after cancellation or suspension. The EPOLA Act 2023 also partially addressed recommendations 6 and 10, regarding obligations to carry out remedial work being included on direction notices and allowing the administering authority to refuse an amendment to a Transitional Environmental Program (TEP).[14]

Recommendation 15, to establish an offence for contravening the GED is being implemented in the Bill in preference to recommendation 11, an alternative technical amendment which achieved a substantively similar outcome to recommendation 15.

1.2.1.1 Review recommendation 12

This recommendation proposed to allow the Chief Executive or the Minister to amend EA conditions where the Minister or Chief Executive considered the environmental impact of the activity was not being appropriately avoided, mitigated, or managed. The government response to recommendation 12 stated:

> The Government recognises the importance of keeping EA conditions fit for purpose to protect both the environment and the community. This is important to address contemporary environmental impacts and

[12] Queensland Government, *Government response: independent review of environmental regulator's powers and penalties*, May 2023, p 2.

[13] Queensland Government, *Government response: independent review of environmental regulator's powers and penalties*, May 2023, p 2.

[14] Queensland Government, *Consultation paper: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, https://environment.des.qld.gov.au/__data/assets/pdf_file/0021/321924/independent-review-ep-act-consultation-paper.pdf, p 7.

> respond to new, cost-effective technologies that reduce emissions and pollution. Accordingly, this recommendation is supported in principle.[15]

In making recommendation 12, the Review found that in some instances, existing EA conditions were inadequate to address the risks that a serious contamination event might occur. These issues seemed to have particular significance in respect of contamination incidents involving odour and emerging contaminants.[16] The Review found that there is no provision in the EP Act which allows an EA amendment to be swiftly proposed because of a lack of appropriate mitigation or avoidance of environmental harm, and thus made the recommendation.

The government response included commentary on the need for consultation and regulatory impact analysis on the basis that the government came to accept that recommendation, however the government proposed not to directly implement recommendation 12 and instead sought to clarify and utilise existing statutory tools to respond to and address environmental harm and associated issues with EA conditions.[17] Two proposals were therefore presented in the consultation paper regarding the Review's concern that swift action required to mitigate environmental harm should not be prevented because of existing EA conditions. The DES consultation paper stated:

> The proposed amendments in relation to Recommendation 12 are to ensure that the conditions of an EA are not a barrier to the use of an environmental protection order or an environmental evaluation when responding to an environmental harm incident in a timely manner. The existing provisions for proposing an amendment to the conditions could then be relied on to respond to the issues arising from conditions.[18]

In terms of stakeholder feedback most industry stakeholders opposed recommendation 12 and advocated for a Regulatory Impact Assessment concerning the alternative government proposals. Some stakeholder feedback raised concerns that the government's proposed alternatives set out in the consultation paper did not align with its 'support in-principle' response to recommendation 12.[19] Consideration of submissions that we received about recommendation 12 are discussed further in our report at Section 2.5.2.

1.3 Legislative compliance

Our deliberations included assessing whether the Bill complies with the Parliament's requirements for legislation as contained in the *Parliament of Queensland Act 2001*, *Legislative Standards Act 1992* (LSA) and the *Human Rights Act 2019* (HRA).

1.3.1 *Legislative Standards Act 1992*

Fundamental legislative principles (FLPs) are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. These principles include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament as required by s 4 of the LSA.

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15 Department of Environment, Science and Innovation, correspondence, 26 February 2024, attachment 5, p 31.

16 Queensland Government, *Consultation paper: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, p 30.

17 Queensland Government, *Consultation report: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, https://environment.des.qld.gov.au/__data/assets/pdf_file/0025/335743/consultation-report-improving-powers-penalties-provisions-ep-act.pdf, p 23.

18 Queensland Government, *Consultation paper: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, p 7.

19 Queensland Government, Consultation report: *Improving the powers and penalties provisions of the Environmental Protection Act 1994*, p 22.

Our assessments of the Bill's consistency with the LSA considered potential issues relating to the following FLPs:

- Rights and liberties of individuals:
  - General rights
  - Penalties are proportionate to the offence
  - Protection against self-incrimination
  - Onus of proof is not reversed without adequate justification
  - Administrative power is sufficiently defined and subject to appropriate review
  - Administrative power is delegated only in appropriate places and to appropriate persons

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. Explanatory notes were tabled with the introduction of the Bill.

Committee comment

The committee is satisfied that the Bill gives sufficient regard to the rights and interests of individuals and the institution of Parliament. Our relevant considerations of FLPs are discussed in Section 2 of this report. The explanatory notes tabled with the Bill 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.

1.3.2 *Human Rights Act 2019*

The HRA protects fundamental human rights drawn from international human rights law.[20] 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.

Our assessments of the Bill's compatibility with the HRA considered potential issues related to the following human rights:

- Property rights (s 24 HRA)
- Privacy and reputation (s 25 HRA)
- Rights in criminal proceedings (s 32 HRA)

A statement of compatibility was tabled with the introduction of the Bill as required by s 38 of the HRA.

Committee comment

The committee is satisfied that any potential limits on human rights proposed by the Bill are justified in the circumstances and that the Bill is compatible with human rights. Our relevant considerations of human rights are discussed in Section 2 of this report. The statement of compatibility tabled with the Bill contains a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights.

1.4 Should the Bill be passed?

The committee is required to determine whether or not to recommend that the Bill be passed.

[20] The human rights protected by the HRA are set out in ss 15 to 37 of the HRA. A right or freedom not included in the Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included; HRA, s 12.

Recommendation 1

The committee recommends the Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024 be passed.

2 Examination of the Bill

This section discusses key issues raised by submitters during the committee's examination of the Bill. It does not discuss all consequential, minor or technical amendments. Submissions were received in respect of the following amendments to the EP Act proposed by the Bill:

- prominently include the polluter pays principle, proportionality principle, principle of primacy of prevention and the precautionary principle as the environmental policy principles to be applied to the general administration of the EP Act
- incorporate human health, well-being and safety into the EP Act's definitions of environment and environmental value
- provide that environmental nuisance (e.g. unreasonable interference from release of aerosols, fumes, light, noise, odour, particles or smoke) will no longer be precluded from being material or serious environmental harm
- introduce a new compliance tool to respond to environmental harm events by replacing environmental protection orders, direction notices and clean-up notices with a new 'environmental enforcement order' (EEO) which combines the existing powers and scope available under the current notices
- clarify that a EEO can be issued to the holder of an EA, regardless of whether the EA authorises, or appears to authorise, the activity causing harm
- specify that a failure to comply with the GED is an offence where the failure is likely to cause serious or material environmental harm
- replace the phrasing 'reasonable and practicable' with 'reasonably practicable' under the GED, and throughout the EP Act, to aid interpretation and improve consistency with other Queensland legislation
- ensure that that the duty of a person to notify of serious or material environmental harm includes circumstances where the person 'ought reasonably to have become aware of the event' giving rise to the harm
- introduce a standalone duty to restore the environment, which requires that if a person permits or causes contamination that results in environmental harm they must, as far as reasonably practicable, restore the environment to the condition it was in before the harm occurred
- allow for the administering authority to initiate and decide amendments to transitional environmental programs (TEPs), having regard to any submission by the TEP holder
- expand the evidentiary provisions currently limited to criminal proceedings to be available in civil proceedings.
- clarifying a confidentiality of information provision that was inserted in the EP Act by the EPOLA Act 2023 and ensure agencies can share information when necessary.

This section of the report sequentially responds to each of those amendments, preceded by our understanding of the consultation process which was undertaken prior to the tabling of the Bill.

2.1 Consultation

After the May 2023 release of the Review and the government's response to it, DES released a public consultation paper in September 2023 with an 8-week consultation period which included

6 information sessions across the following stakeholder groups: resources sector, regulated industries, environmental and conservation groups, local government, First Nations groups and the aquaculture sector.[21] The department received a total of 48 submissions about its consultation paper from industry peak bodies, stakeholders in the resource, waste and recycling, agricultural and aquaculture sectors, and local governments. Submissions were also received from Queensland Members of Parliament, the Environmental Defenders Office, the North Queensland Land Council, and members of the public.[22] A report on the consultation process was released in February 2024.

The Department of Environment, Science and Innovation (DESI, department) stated in its written briefing to the committee:

> All feedback submitted was reviewed and considered in finalising the proposed amendments. Ultimately, the feedback did not warrant any proposals being discontinued or significantly changed. Through the drafting of the Bill, minor variations to the Government's proposals were made to clarify the intent and purpose of the legislative amendments.[23]

Written submissions we received from the Local Government Association of Queensland (LGAQ), Queensland Resources Council (QRC), Cement Concrete & Aggregates Australia (CCAA), Queensland Renewable Energy Council (QREC), Queensland Cane Agriculture and Renewables (QCAR), and Waste Management and Resource Recovery Association of Australia, expressed disappointment that much of the feedback they provided during the consultation process was not incorporated into this Bill.[24] This concern was reiterated by those submitters and other witnesses at the public hearing, including the Waste Recycling Industry Association Queensland (WRIAQ).[25] Submitters and witnesses were particularly concerned at the lack of regulatory impact assessment of several of the proposals in the Bill. QRC noted the absence of an exposure draft of the Bill.[26]

2.1.1 Regulatory process

The department described the regulatory assessment undertaken for the Bill at a public briefing:

> The Office of Best Practice Regulation was notified as per the Queensland government better regulation policy. The regulation proposals were assessed as either minor or machinery or having no significant impacts. Therefore, a summary impact assessment statement was prepared and approved by the director-general of the department and the minister. That summary IAS has been published and is publicly available on the department's website.[27]

The impact analysis statement (IAS) identified that the proposals contained in the Bill which should be regarded as having some, but not significant, impacts included:

- making it an offence not to comply with the GED (cl 13)
- introducing a duty to restore the environment with an associated offence for non-compliance (cl 16)
- requiring a person to notify of environmental harm where the person 'ought reasonably to have become aware' (cl 17)

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21 Department of Environment, Science and Innovation, correspondence, 26 February 2024, attachment 1, p 6.

22 Department of Environment, Science and Innovation, correspondence, 26 February 2024, attachment 1, p 6.

23 Department of Environment, Science and Innovation, correspondence, 26 February 2024, attachment 1, p 6.

24 Submissions 1, 8, 11, 12, 13, and 15.

25 Public briefing transcript, Brisbane, 4 March 2024, p 23.

26 Public briefing transcript, Brisbane, 4 March 2024, p 31.

27 Public briefing transcript, Brisbane, 4 March 2024, p 8.

- introducing the new EEO compliance tool and allowing one to be issued even where an EA appears to authorise the relevant environmental harm (cl 28)
- amending environmental evaluation requirements to allow notices to be issued even where an EA appears to authorise the relevant harm (cls 23-24).[28]

At the public hearing, Ms Katie-Anne Mulder, Chief Executive Officer of QREC, submitted:

> We are concerned that there are some significant but highly technical changes in the bill that require measured consideration, especially where amendments result in a legal defence being turned into an offence. In our experience, such substantial changes to any legislation generally benefit from a more comprehensive consultation process and longer submission deadlines. The consultation process we undertook with our members was quite truncated. This was exacerbated by the lack of a clear commitment to update guidance material prior to commencement and the undertaking of a regulatory impact assessment process in preparation of the bill.[29]

QRC also submitted that the proposed change making it an offence not to comply with the GED should have been subject to further regulatory impact assessment.[30] The department's response to submissions stated:

> The GED has existed in the EP Act since 1994. The Bill does not change the GED, rather it introduces an offence for contravening the existing GED. Without the amendment, it is necessary to administratively issue a statutory notice to enforce the GED.[31]

The GED offence provision is discussed further in this report at Section 2.6.

Some submitters, including QRC, Queensland Water Directorate (qldwater), and CCAA also expressed concern that proposals in the Bill to allow EEOs and investigation notices to be issued to holders of an EA, appeared to implement Review recommendation 12, which the government had indicated would require further preliminary consultation and regulatory impact analysis.[32] Ms Claire Andersen, DESI's Acting Deputy Director-General Environmental Services, responded to this concern at a public briefing:

> I want to make it clear that the bill does not implement recommendation 12 in the form suggested by the independent review. There has been concern by some stakeholders that the bill will provide the minister with an ability to amend the conditions urgently, as recommended by the [review]. This is not the case.[33]

Submitter concerns regarding EEOs issued to EA holders are discussed further at Section 2.5.2.

Committee comment

We acknowledge the concerns of some submitters that the department's consultation process should have been more fulsome, and that some of the proposals might have significant impacts that should have been subject to a more comprehensive regulatory impact assessment. We have engaged with those issues where relevant in following sections of this report.

2.2 Environmental policy principles

In response to recommendation 1, the Bill proposes to include principles of environmental protection to be applied to the general administration of the EP Act, including for the making of regulations, policies, guidelines, and codes of practice. Clause 6 of the Bill inserts the principles of proportionality,

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28 Queensland Treasury, *Impact Analysis Statement - Environmental Protection (Powers and Penalties) Bill 2024–Improving the powers and penalties of the Environmental Protection Act 1994*, https://www.des.qld.gov.au/__data/assets/pdf_file/0032/337667/ias-ep-powers-penalties-bill-2024.pdf, p 3.

29 Public briefing transcript, Brisbane, 4 March 2024, p 26.

30 Submission 8.

31 Department of Environment, Science and Innovation, correspondence, 13 March 2024, p 4.

32 Submissions 1, 8 and 14.

33 Public briefing transcript, Brisbane, 22 March 2024, p 2.

and primacy of prevention alongside principles set out in the Intergovernmental Agreement on the Environment (IGAE),[34] including the:

- intergenerational equity principle
- conservation of biological diversity and ecological integrity principle
- precautionary principle
- improved valuation, pricing, and incentive mechanism (also known as the polluter pays principle)

Some submissions raised concerns on the practical implications of amending the principles. Logan City Council, WRAIQ and qldwater expressed concerns regarding the polluter pays principle and sought further clarification. Their concern was that waste and wastewater receivers and recyclers might be unfairly defined as polluters in the context of the polluter pays principle.[35] The polluter pays principle is defined in Section 3.54 of the IGAE and reads 'polluter pays i.e. those who generate pollution and waste should bear the cost of containment, avoidance, or abatement'.[36]

Building on that definition, qldwater proposed that polluter pays in the proposed amendments should be defined to mean the principle that:

> 'those who generate pollution, contamination, and waste, not merely having received it as an end of line user, should bear the cost of containment, avoidance, or abatement' where end of line users 'provide essential community services, acting in accordance with best practice, and may include water and wastewater service providers and waste and recycling facilities'.[37]

Alternatively, qldwater proposed that the Bill should amend the EP Act's Schedule 4 Dictionary as follows:

> **Polluter** means as an entity who generates pollution, contamination or waste. An entity does not generate pollution, contamination or waste if –
>
> (a) it is an end of line user providing essential community services, acting in accordance with best practice; or
>
> (b) the pollution, contamination or waste is identified on its premises but there is evidence that the pollution, contamination or waste migrated onto its premises.[38]

The department did not directly address the request for a definition of polluter to be included. In its response to submissions, the department provided the same response 7 times to submissions received on this theme:

> Increasing the prominence of these principles is not an introduction of new concepts considered in decision-making under the EP Act. Rather, the Bill presents a clarification, reinforcement and elevation of the proactive approach to the prevention of environmental harm which is the core objective of the department.[39]

The department also noted that the polluter pays principle is already defined in the IGAE which is a schedule to the *National Environment Protection Council (Queensland) Act 1994*.[40]

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34 Australian Government, *Intergovernmental Agreement on the Environment*, 1 May 1992, https://faolex.fao.org/docs/pdf/aus13006.pdf.

35 Submissions 3, 6 and 14.

36 Australian Government, *Intergovernmental Agreement on the Environment*, 1 May 1992, https://faolex.fao.org/docs/pdf/aus13006.pdf.

37 Submission 14, p 3.

38 Submission 14, p 3.

39 Department of Environment, Science and Innovation, correspondence, 13 March 2024, pp 4-6; Department of Environment, Science and Innovation, correspondence, 15 March 2024, p 2.

40 Department of Environment, Science and Innovation, correspondence, 13 March 2024, p 8.

In respect of the precautionary principle, the Australian Council of Recycling (ACR) raised concerns about the principle's diverse international definition and application, potential for subjectivity, and risk of perverse outcomes as it could potentially permit 'no recycled waste products to be recovered and reused in case unknown pollution risks to environment and human health manifest in the future. However, this would disincentivise industrial and economic innovation and work against the objectives of a circular economy'.[41] ACR submitted this contradicts the objectives of the *Waste Reduction and Recycling and Other Legislation Amendment Act 2023* (WR Act). ACR further submitted that installation of the precautionary principle as a general environmental principle unreasonably shifts the burden of proof.

The department's response stated that the Bill does not change the burden of proof in relation to any offences under the EP Act and that as a part of the Act's existing standard criteria, the precautionary principle is already required to be considered in the making of several decisions under the EP Act.[42] Regarding any incompatibility with the WR Act the department responded that Act:

> …defines the circular economy principle as the principle that, to promote waste avoidance and minimise the impact of waste on the environment and human health, all products and materials should be kept in the economy for as long as they have value or remain useful.
>
> As the circular economy principle embodies the need to minimise the impact of waste on the environment, the department is of the view there is no conflict between the precautionary principle and the circular economy principle.[43]

Committee comment

We acknowledge submitter suggestions for further clarity in the Bill about who is or is not a polluter, for the purposes of the polluter pays principle. However, we also perceive this to be an intractable definitional issue from our brief review of environmental legislation from other Australian jurisdictions that reveals no definition of 'polluter' that could provide a comparative reference, or act as a benchmark against qldwater's proposal. Tasmania's environmental legislation states 'polluter, in relation to an area of land in respect of which a notice has been issued, means a person on whom the Director has served, or is or was entitled to serve, a notice in respect of that area of land under [the *Environmental Management and Pollution Control Act 1994*]'.[44] This definition is highly contextual and not a suitable precedent. We will leave it to finer legal minds than ours to settle this definitional issue. In the meantime, to allay submitter concerns we urge the department to ensure sufficient guidance exists for how the polluter pays and other environmental principles will continue to be applied in the general administration of the EP Act.

2.3 Environmental definitions

Clauses 7 and 8 of the Bill amend ss 8 and 9 of the EP Act to ensure that human health, well-being, and safety are included within the definitions of 'environment' and 'environmental value'. The explanatory notes state that the proposed amendment to the definition of environment 'reinforces the aspects of the environment conducive to human health, well-being and safety that are already prescribed as environmental values through environmental protection policies'.[45] The amendment to the definition of 'environmental value' will more clearly require human health, safety and well-being to be considered regarding environmental nuisance and material and serious environmental harm. The intention is to limit the amendment such that human health is only protected by the EP Act to the

41 Submission 19.

42 Department of Environment, Science and Innovation, correspondence, 15 March 2024, p 3.

43 Department of Environment, Science and Innovation, correspondence, 15 March 2024, p 3.

44 *Environmental Management and Pollution Control Act 1994*, s 74W

45 Explanatory notes, p 12.

extent it is affected by the environment to avoid duplication or overlap across Queensland statutes, particularly the *Public Health Act 2005.*

Local government submitters were concerned with potential overlap and regulatory duplication with legislation other than the *Public Health Act 2005*, such as the *Human Rights Act 2019* and *Work Health and Safety Act 2011*.[46] However the department responded that the Bill does not change how matters are devolved to local government or the responsibilities of other regulators.[47] In addition, submitters were concerned that additional definitional components being inserted by the Bill, including odour, taste, harmony, well-being and safety were subjective, would be difficult to measure and would require guidance materials.[48]

Ms Andersen from DESI responded at the public briefing:

> These amendments seek to clarify that the role of the act is only to the extent that human health and safety is affected by the quality or characteristic of the environment, such as the impact of excessive noise or odour and the impact that that can have on the health and wellbeing of the community by affecting, for example, the ability of someone to be able to go to sleep. The intent is definitely not to duplicate or overlap other Queensland statutes such as health or workplace health and safety legislation.[49]

2.4 Environmental nuisance

Clauses 9 and 10 of the Bill implement recommendation 3 of the Review which proposed clarifying that environmental harm which may constitute a nuisance at low levels, may also constitute material and serious environmental harm if it meets the definitions of those terms. Currently, 'environmental nuisance' is included in the definition of 'environmental harm' in s 14 of the EP Act, but expressly excluded from the meaning of what constitutes 'material' and 'serious' environmental harm in ss 16 and 17. The Review found that the enforcement difficulties arising because of these current definitions was clearly revealed in recent events in the Swanbank and Collingwood Park areas. [50]

The objective of these proposed amendments is to ensure that where instances of environmental nuisance are of a magnitude or severity that they meet the definition of material or serious environmental harm, sufficient tools are available to address this harm. The amendments do not alter the scope of what constitutes environmental nuisance, only that instances are not precluded from constituting either material or serious environmental harm. There is no change to the existing arrangements of devolved responsibility for environmental nuisance to local government under the Environmental Protection Regulation 2019 (EP Regulation); local government will continue to be the administering authority for an environmental harm event unless the chief executive determines that the environmental harm event constitutes material or serious harm in which case the department will assume responsibility.[51]

Local government submitters expressed concern that the proposal will increase the volume of devolved responsibilities to councils for environmental nuisance, leading to increased investigations costs to councils and longer decision timeframes which may result in continuing significant environment harm.[52] The department's response stated:

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46 Submissions 6 and 14.

47 Department of Environment, Science and Innovation, correspondence, 15 March 2024, p 10.

48 Submissions 12, 13, 14 and 16.

49 Public briefing transcript, Brisbane, 22 March 2024, p 2.

50 R Jones and S Hedge, *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties,* p 25.

51 Queensland Government, *Consultation report: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, p 9.

52 Submission 6; Dr Jemma Purandare, City of Gold Coast, public hearing transcript, Brisbane, 18 March 2024, p 6.

> …the elevation of nuisance issues to the department will involve close collaboration with local councils. Development of processes will occur and will take a form which ensures any identified issues can be addressed in a manner which is timely, efficient and definitive…
>
> The proposed amendments are expected to have a negligible impact on local government as a co-regulator, and instead deliver a reduction in regulatory burden where environmental nuisance constitutes material or serious environmental harm. In these instances, the department will have the grounds to assume responsibility. [53]

QCAR repeated concerns expressed by agriculture and aquaculture stakeholders during the consultation process that the proposal could restrict the use of sound deterrent measures enforced by Biosecurity Queensland to manage depredation by birds at aquaculture facilities, and that the proposal would be difficult to apply in the context of agriculture operating in areas with increasing urban encroachment.[54] The department responded that in the event of conflict between the requirements of the EP Act and the *Biosecurity Act 2014* (Biosecurity Act), the Biosecurity Act would prevail to the extent of any conflict. Additionally, the department noted 'regarding concerns about urban encroachment and an increase in nuisance complaints, it is important to note that any nuisance must still be qualified as unreasonable before an offence of causing environmental nuisance can be enforced by an administering authority'.[55]

Qldwater opposed this proposal on the basis that it is difficult to quantify material or serious environmental harm using the existing monetary thresholds specified in the EP Act. Qldwater recommended that the proposal should include amendments to articulate:

- a formula for determining when the release of aerosols, fumes, light, noise, odour or smoke amounts to a material or serious environmental harm (other than the current definitional elements)
- who the administering authority will be
- continuing exemption from environmental nuisance provisions from water and sewerage public infrastructure providers.[56]

In response the department stated, 'through the normal implementation of amendments to legislation, the department will update existing guidance materials, including the enforcement guidelines, and where appropriate develop new guidance material'.[57]

Logan City Council submitted that cl 55 of the Bill, which amends the EP Regulation to provide that the administration and enforcement of environmental nuisance is no longer devolved to a local government if it relates to a particular matter that the chief executive has decided involves serious or material environmental harm, may cause delays in practice:

> The mechanism appears to by default, to make local government responsible for any matter that meets the definition of a nuisance. If local government investigates a nuisance that the local government considers material or environmental harm, waiting for approval (in writing) from the chief executive to hand the matter over to DESI will cause delay. The delay could result in significant environmental harm occurring. It is recommended that alternate mechanisms are considered.[58]

In response the department stated the amendment in cl 55 is necessary to ensure certainty as to which regulator – a local government or the state government – is responsible for a particular matter.

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53 Department of Environment, Science and Innovation, correspondence, 13 March 2024, p 12.

54 Queensland Government, *Consultation report: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, p 8; submission 13.

55 Department of Environment, Science and Innovation, correspondence, 13 March 2024, p 14.

56 Submission 14.

57 Department of Environment, Science and Innovation, correspondence, 13 March 2024, p 15.

58 Submission 6.

Matters with the characteristics of environmental nuisance remain with local government unless the chief executive decides the matter is one of serious or material environmental harm.[59] Furthermore, the chief executive cannot delegate this decision-making power. 'This limitation on the ability for the power to be delegated recognises the potential significance of such decisions for both local and State government, for example, impacts on resources or costs where the State government does or does not assume responsibility for a matter'.[60]

2.5 Environmental enforcement orders (EEOs)

Currently the EP Act contains powers for the administering authority to issue a range of statutory notices that require a person to take certain actions, and to seek penalties for non-compliance with the notice. The Review found that it might be possible and beneficial for some of the existing notices namely environmental protection orders (EPOs), direction notices (DNs) and clean-up notices (CNs), to be combined into one notice. The Review found that in many of the case studies it reviewed, multiple notices were issued by the administering authority which increased the administrative burden. It was suggested that a 'combined' notice would permit flexibility and the opportunity to issue one notice covering several issues. The Review also observed that in many instances considerable time was spent on deciding which notice type was the most appropriate and that a combined notice could streamline the process and take this uncertainty out of the decision-making process.[61]

Clause 28 of the Bill implements Review recommendations 6-9 to streamline and expand the application of EPOs, DNs and CNs by establishing a new tool to be known as an environmental enforcement order (EEO). Rationalising EPOs, DNs and CNs is expected to result in a simpler process for notice recipients, as well as the administering authority, and support better environmental outcomes by enabling a more responsive compliance approach.[62] Given an EEO will establish a broader notice power, consequential amendments ensure the existing powers pertaining to issuing some notices continue to be devolved to local governments.[63]

The proposed EEO will be able to be used to secure compliance with the GED, and contraventions that cause or risk environmental harm will also be a ground on which the EEO can be issued, even where there is an EA which appears to authorise the environmental harm. An EEO can be issued in relation to instances of environmental harm regardless of whether the harm can also be characterised as environmental nuisance, material or serious environmental harm. A new ground to issue an EEO will also be introduced to secure compliance with the duty to restore environmental harm, but it will also still be possible to issue an EEO to address a contamination incident and this is important to cover circumstances and persons to which the duty may not apply.[64]

New offence provisions for non-compliance with various aspects of the EEO process without reasonable excuse are also proposed, including wilful contravention of an EEO, failure to properly notify purchasers and administering authorities and obstructing a recipient of an EEO from taking required actions.[65]

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59 Department of Environment, Science and Innovation, correspondence, 13 March 2024, p 50.

60 Department of Environment, Science and Innovation, correspondence, 13 March 2024, p 50.

61 Queensland Government, *Consultation paper: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, p 18.

62 Explanatory notes, p 23.

63 Queensland Government, *Consultation paper: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, p 20.

64 Queensland Government, *Consultation report: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, pp 14-17.

65 Explanatory notes, pp 28-31.

The proposal also permits the holder of an EEO, or another authorised person if the EEO holder fails to act, to enter land they do not own in order to take actions as directed.[66]

2.5.1 Local government powers

Local government submitted that it should be able to issue EEOs for clean-up directions and reparations, and to issue cost-recovery notices where immediate action is required to prevent or control the extent of environmental harm where the polluter cannot or will not complete the necessary work, such as in instances of illegal dumping.[67] Environmental Health Australia Queensland (EHAQ) submitted:

> Local governments are often the first responders to pollution events and need to take immediate action or give immediate instructions to prevent further environmental harm and achieve the best possible environmental outcome. The extent of the clean-up and recovery costs are often realised after the clean-up has commenced, to be beyond the threshold amounts.

Local government witnesses at the public hearing spoke of the significant costs involved in clean-up operations after contamination incidents, and their concern that these amendments continue the regulatory 'cost creep' being experienced by local government around environmental harm events. In response to a question on notice, Gold Coast City Council provided an estimate of the costs borne by local government due to the restricted powers available to them under the EP Act:

> From the perspective of the City's infrastructure assets (sewer, stormwater, etc.), we deal with numerous cases of illegal dumping or spills from private entities (some EA holders, and some not) where we are required to investigate the source of the pollution and clean up the downstream impacts. The cost of this varies dependent on the magnitude and extent of the pollution. A recent incident resulted in approximately $5,000 of quantifiable work by the City to investigate (using CCTV), clean, and respond to the unlawful release of contaminated liquid waste into a stormwater drain. The City responds to numerous incidents such as these each year, and an estimated cost to the City is approximately $100,000 in such incidents annually alone.
>
> Sewer strikes by private contractors is also a regular occurrence, although not necessarily related to an EA licence holder, it impacts the GED of both the City and the contractor responsible. A recent sewer strike by a construction contractor resulted in over $300,000 worth of quantifiable costs to the City, which included isolating the main, disruptions to normal operations, clean up of sewage in a sensitive environment, and sewer repairs (including the associated labour costs).
>
> From the perspective of the City's public health responsibilities, again it can be difficult to fully quantify the true cost to the City in responding to incidents caused by the private sector (both licence holders and those without, but with GED). Within the past 12 months, the City has had two significant clean up cases related to public health where the combined costs were approximately $120,000.[68]

In response to the request by local government for additional regulatory powers, the department stated:

> The Bill does not change the existing powers granted to local governments in the pre-amended EP Act and therefore does not expand on the existing grounds on which local government can issue notices.
>
> The department notes that for other circumstances, for example in relation to damage to a stormwater drain from a prohibited substance, the cost recovery provisions are contained in the Local Government Act 2009.

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66 Explanatory notes, pp 29-30.

67 City of Gold Coast, submission 5; Logan City Council, submission 6; Local Government Association of Queensland, submission 11; Environmental Health Australia (Queensland), submission 9.

68 City of Gold Coast, correspondence, 22 March 2024, p 1.

> The purpose of the Bill is to implement the recommendations of the Independent Review of the Powers and Penalties under the EP Act. Increasing the tools available to local governments was out of scope of the Independent Review.[69]

Committee comment

The costs reported by local government of responding to and cleaning up pollution incidents, particularly where immediate action is needed to reduce harm to the environment and the polluter cannot or will not do the necessary work, are significant.

While we note the department's advice that increasing the tools available to local governments was out of scope of the Review and that the Bill does not change the existing powers granted to local governments, the committee urges future work with co-regulators on the issue of cost recovery and consideration of whether to legislate expanded grounds for local government to issue notices is worthwhile.

2.5.2 Power to issue EEO to holders of EA

QRC and CCAA witnesses at the public hearing shared the view that this proposal to allow EEOs to be issued to the holders of an EA (and a similar proposal to issue investigation notices to EA holders contained in cl 23 of the Bill) creates sovereign risk.[70]

CCAA stated:

> Clause 28 of the Bill outlines the new EEO provisions. The new Section 359 sets out the 'enforcement grounds' that can trigger the Administering Authority to issue an EEO, including (among other examples) where it is deemed necessary to secure compliance with an environmental protection policy or achieve General Environmental Duty (GED). Compliance with the conditions of an EA does not protect an operator from this - new Section 362(3) confirms that an EEO can be issued even where an EA authorises the activity….
>
> This arrangement could mean that an Environmentally Relevant Activity (e.g. quarry or cement facility) licensed under an EA and operating in compliance with its EA conditions, could be issued an EEO where the Administering Authority deems those conditions insufficient in relation to a new environmental protection policy and GED. For example, a quarry may operate under an older EA, the conditions of which may not be equivalent to the regulator's expectations under current environmental protection policies. If the Bill is adopted, the Administering Authority could issue an EEO to compel an operator to undertake actions over and above their EA conditions - e.g. change water management systems to meet more stringent water release limits than those in the EA. This can result in the need for significant expenditure to change onsite stormwater management infrastructure or install costly monitoring equipment. An EEO can also require an operator to cease an activity indefinitely or until further notice and / or change operating hours (new Section 367).[71]

In response to this submission, the department stated:

> Where an operator is carrying out their activity lawfully and in compliance with an EA which clearly provides for the management of the levels and type of environmental harm occurring, the administering authority would not issue an EEO in response to such harm.
>
> There may be circumstances where an EA does not include or specify appropriate measures or limits in relation to an activity or contaminant because the environmental impacts were not known or fully understood at the time the authority was issued. The operator should consider their GED under the current legislation in these circumstances…
>
> Where an operator was failing to take reasonably practicable measures to prevent or minimise environmental harm as a result of activity that cannot be said to be authorised or regulated by the

69 Department of Environment, Science and Innovation, correspondence, 13 March 2024, p 16.

70 Public hearing transcript, Brisbane, 18 March 2024, p 21; submissions 1 and 8.

71 Submission 1, p 2.

> EA, the administering authority could issue the EEO on the grounds of securing compliance with the general environmental duty.
>
> The Bill provides that an environmental enforcement order may only be issued if a ground set out in section 359 of the EP Act exists. There is no ground to issue an EEO merely because an EA contains older conditions.[72]

Mr Michael Connor, Chair of the Queensland Law Society (QLS) Planning and Environment Law Committee also registered concerns about this proposal during the public hearing:

> The bill gives the minister or the chief executive the power to change the conditions. There are just a couple of things to think about.
>
> If I have organised myself because of the particular conditions of my environmental authority— I am law-abiding, I have a small business that creates dust, noise and blast overpressure—a change to these conditions could be quite traumatic and impact on my ability to operate my business….If the condition is changed and I did not have a power to appeal it to the Planning and Environment Court, I am stuck with it. There are possibilities of review, but it may well be that the impacts on my business and the way I have performed in the past cannot be taken into account.
>
> I think that is an important aspect of the bill that needs to be carefully considered, remembering that most regulatory legislation assumes there is a wrongdoer and they need to be punished. The vast majority of Queenslanders who have environmental authorities will be doing the right thing. They have a business, they set themselves up in terms of where plant and equipment is placed and where other thing are put in place to ensure they comply with their environmental duty, and imagine that now this can be changed.[73]

Ms Leanne Bowie from QRC submitted at the public hearing that this proposal is a 'backdoor approach' to implementing recommendation 12 of the Review:

> The way the bill achieves this is by a two-step process rather than one step as in the previous version. The first step is that at three points in the bill—clauses 23, 24 and 28—the department can impose an order or investigation notice even if the person is the holder of an environmental authority that authorises or purportedly authorises the activity. The second step is that, once the notice or order has been issued, there are already existing powers available under section 215(2)(i) of the act for the department to change conditions, just because of the fact that there has been an investigation notice. If the department wants to change the wording of a condition because it is thought it is not modern enough then, even if the company is complying with conditions and is not causing unacceptable environmental harm, all the department has to do is issue an environmental investigation notice…
>
> In the department's response to submissions, which we received last week, they have repeated the same line throughout the document that where an operator is carrying out their activity lawfully and in compliance with an EA which clearly provides for the management of the levels and type of environmental harm occurring, the administering authority would not issue a notice in response to such harm, but what they say there they would do is roughly the opposite of what the bill itself says, for example at clause 23.[74]

Qldwater also submitted that this proposal is a stealthy mechanism for enabling amendments to existing EAs, without the proposal going through the complete regulatory impact assessment process that the government noted would be required for the Review's recommendation 12.[75] Mr David Wiskar, Program Director for Qldwater submitted during the public hearing:

> The current arrangement exists that environmental authorities stay consistent unless there is a major upgrade at a wastewater treatment plant. The proposals in this bill offer powers to the department to alter those environmental authorities. That is likely to trigger, if it was to be enacted, significant investments on behalf of communities and lead to costs.

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72 Department of Environment, Science and Innovation, correspondence, 13 March 2024, pp 39-41.

73 Public hearing transcript, Brisbane, 18 March 2024, p 2.

74 Public hearing transcript, Brisbane, 18 March 2024, p 20.

75 Submission 14, p 2.

> I note a number of the submissions you have received indicate that if that is the intent then this bill should have been the subject of a regulatory impact statement and it has not. That power offers to either the chief executive of the department or the minister the opportunity to alter environmental approvals. If that was to happen then our members would have to upgrade their treatment plants.
>
> That leads to a significant cost. It also seems to be counter to work that is going on in government which is assessing at the moment through Minister Butcher's department the risks that exist in our sector and what is likely to be a significant underinvestment already in infrastructure. Harsher regulation will trigger even more investment requirements, and this bill offers the potential for that to be the case.

Ms Andersen for DESI submitted in response:

> The power to amend environmental authority conditions has been present in the act since commencement and the bill does not amend these existing powers. What the bill does do is provide clarity on those existing powers under the act to make it clear that an environmental authority is not a barrier to issuing an order or notice when responding to an environmental harm incident. By providing clarity, the intention is to prevent any delays to responding to environmental harm due only to legal processes, only on the basis of the existence of an environmental authority.
>
> The act currently does not include any limitation on issuing relevant orders or notice. In practice, securing compliance with the GED is already used as a ground for issuing enforcement notices and can be issued to environmental authority holders despite conditions of their authority. The bill provides clarifications and confirms this existing approach.
>
> Prior to issuing an order on notice, there is still a requirement under the act for specific grounds to be met. To be clear, we cannot issue a notice simply because we want to change the conditions. The conditions that are proposed to be changed must be related to the enforcement matter, not a broad-scale review of all of the conditions on an authority. I want to assure the committee that if the regulator does propose changes to a condition of an authority following an enforcement action, the act provides for a full process that must be followed to ensure the holder has a right to make a submission on the proposed changes and has review and appeal rights…
>
> We are not proposing to be able to open up licences broadly or introduce a new review mechanism to contemporise licence conditions. That is not the proposal. I think there was quite a bit of confusion from stakeholders, both in the hearing and in the submissions that we received. We are certainly not going down that track of opening up every licence.[76]

2.5.3 Consistency with FLPs and human rights

The explanatory notes state that proposals contained in cl 28 to introduce EEOs as a new compliance tool and allow EEOs to be issued to an EA holder potentially depart from FLPs in the following ways:

- a procedure for the recipient of an EEO to enter land they do not own in order to take actions as directed may breach the rights and liberties of individuals, as might the right for an authorised person to take any action stated in an EEO if the recipient of that EEO fails to act
- a requirement that new or increased maximum penalties must be proportionate to the offence for:
  - not complying with an EEO
  - EEO recipients failing to (1) give any prospective buyer written notice of the existence of the EEO, and (2) give notice to the administering authority that they have ceased the activity the subject of the EEO
  - obstructing the recipient of an EEO from taking action as directed
- an administrative decision to impose an EEO can only be exercised if the power is sufficiently defined and subject to appropriate review

[76] Public briefing transcript, Brisbane, 22 March 2024, p 2.

- a EEO issued by local governments may only occur where the delegation of administrative power is in appropriate cases and to appropriate people.[77]

In its submission, QRC stated that the proposal to issue EEOs to holders of existing EAs is inconsistent with the following FLPs under the LSA:

- Section 3(a) – Making rights and liberties dependent on an administrative power, where the administrative power has not been sufficiently defined. It is noted that the administrative power is subject to review, but that is only part of the FLP in question.
- Arguably, there is a retrospective element of this power – Section 3(g), given that it makes existing lawful operations unlawful after the owners have already relied on the existing approvals.
- Section 3(k) – Sufficiently unambiguous and drafted in a sufficiently clear and precise way.[78]

The statement of compatibility tabled with the Bill also notes that the amendments in cl 28 potentially affect rights protected under the HRA in the following ways:

- a procedure for the recipient of an EEO to enter land they do not own to take actions directed of them in an EEO, or for an authorised person to take any action stated in an EEO if the recipient of that EEO fails to act, engages property rights under s 27 of the HRA
- amendments requiring that when an EEO is being issued to 2 or more recipients that a copy of the notice is given to each recipient, engages the right to privacy under s 25 of the HRA.

2.5.3.1 Entry to land requirement – FLPs

Clause 28 amends the EP Act to provide for a procedure for the recipient of an EEO to enter land they do not own to take actions directed of them. This power retains and marginally extends existing powers for CNs and EPOs issued to related persons of companies.[79] As the explanatory notes state:

> The recipient or person acting on their behalf may only enter the land to act with the consent of the owner and occupier of the land, or if 2 business days written notice, which includes the purpose, date and times of entry, has been given to the owner and occupier of the land. The 2-business day timeframe may be considered to provide only short notice. However, it is consistent with the former section 363AF, and this short notice period is necessary to ensure that any urgent action required to prevent environmental harm can be taken in a timely fashion, even if the owner or occupier has not provided consent. Further provisions ensure that the recipient or person acting on their behalf must cause as little damage and inconvenience as possible and is not authorised to enter a residential building. While the FLP is raised by this provision, the checks and balances in place mean that it is not objectionable.[80]

QLS submitted its concerns that third-party property rights may be impacted by this proposal to allow an EEO recipient to enter land they do not own to address requirements of the EEO. At the public hearing, Ms Wendy Devine, QLS Principal Policy Solicitor, stated:

> We recognise that the Environmental Protection Act already includes similar powers which authorise a person to enter onto a third party's private property to undertake work to comply with an order; however, given the content of the bill, QLS considers it is timely to reconsider these existing powers and the amendments proposed in the bill to ensure the appropriate balance is struck between responding to environmental damage and protecting private property rights.[81]

Ms Devine further submitted that the proposal to only allow 2 business days' notice period is very short:

> It may well be that in urgent circumstances two business days is what is needed in order to catch the damage and repair it as quickly as possible. However, not every situation will be like that. What we are

77 Explanatory notes, pp 3-6.

78 Submission 8.

79 Explanatory notes, p 3.

80 Explanatory notes, p 4.

81 Public hearing transcript, Brisbane, 18 March 2024, p 1.

> looking at with these provisions is a statutory authority authorising a private entity to enter onto another third party's property. We are not speaking about a police officer executing a warrant and we are not speaking about a government official exercising a statutory power.
>
> The issuing of the authority actually permits the person carrying out an activity that has caused harm to enter onto a third party's property to fix that harm…
>
> If it is not an urgent situation, two business days is incredibly short and we would suggest up to 10 business days being the period and the period of notice that should be given if consent cannot be obtained. We have also recommended that these powers should be exercised by a government agency and not by the individual authority holder. If that authority holder is being asked to repair damage that their activity has caused, that authority holder should be working with a government agency or officer to negotiate that access and that authority to enter should not rest with the private sector.[82]

In response to these concerns, Ms Andersen from DESI stated at the public briefing:

> I would expect that most landholders who have had a contamination event on their property would want to ensure it is cleaned up as soon as possible by those responsible. The current time frame for a clean-up notice is five business days, and for an environmental protection order two business days. These time frames are a minimum and obviously subject to discussion with the landholder.[83]

QLS submitted that while it may be the intent to draft guidelines or other informative material to support these powers of entry, at present, the risks to third-party property rights appear significant and should not be left to non-statutory documents which are not enforceable. QLS recommended amendments to the proposal to address the following matters:

- If there is a need to enter onto third party property, the EEO recipient must contact the administering authority for assistance. The administering authority should then be responsible for contacting the third party to negotiate access. If consent cannot be obtained, a period of at least 10 business days' notice should be given for non-urgent work.
- If the remediation work is urgent, the authority to enter onto third party property must be authorised by the administering authority and on appropriate conditions. QLS would be comfortable if 2 business days' notice was allowed for urgent matters, provided the administering authority is responsible for issuing the entry notice.
- The administering authority must establish a process to address any workplace health and safety consequences where entry is to a workplace without the consent of the owner or occupier.
- Further consideration must be given to compensation rights for the owner or occupier of an affected third-party property if damage occurs. Proposed section 369G contemplates reasonable compensation will be available for certain damage, but there also needs to be a clear compensation pathway if the EEO recipient is financially unable to satisfy any subsequent compensation determination. This is not presently addressed in the Bill…
- QLS also notes the EP Act presently includes a framework to authorise entry to land to comply with an environmental requirement. This requires an application to the Magistrates Court for an entry order and the application must be served on the owner or occupier of the affected land (section 575 of the EP Act). The order is also subject to a clear compensation framework (section 579 of the EP Act). QLS suggests this mechanism should generally be used for non-urgent entry requirements.[84]

The department's written response to QLS's submissions stated:

> The amendments in the Bill consolidate the existing environmental protection order, clean-up notice, and direction notice provisions into a single environmental enforcement notice. The powers of entry are based on those that currently exist for those provisions.
>
> The Bill inserts new section 369E in to the EP Act which will provide for a procedure for the recipient of an EEO to enter land they do not own to take actions directed of them in an EEO. This power retains and

82 Public hearing transcript, Brisbane, 18 March 2024, p 4.

83 Public briefing transcript, Brisbane, 22 March 2024, p 3.

84 Submission 20, p 6.

> marginally extends the powers provided under former section 363J for clean-up notices as well as under former section 363AF for environmental protection orders issued to related persons of companies.
>
> The recipient or person acting on their behalf may only enter the land to act with the consent of the owner and occupier of the land, or if two business days written notice has been given, which includes the purpose, date and times of entry, has been given to the owner and occupier of the land. The two business day timeframe is consistent with the former section 363AF of the EP Act, and this short notice period is necessary to ensure that any urgent action required to prevent environmental harm can be taken in a timely fashion, even if the owner or occupier has not provided consent. Further provisions ensure that the recipient or person acting on their behalf must cause as little damage and inconvenience as possible and is not authorised to enter a residential building.
>
> The two business day timeframe is consistent with the former section 363AF of the EP Act, and this short notice period is necessary to ensure that any urgent action required to prevent environmental harm can be taken in a timely fashion, even if the owner or occupier has not provided consent….
>
> The land may be entered only with the consent of the owner and occupier of the land, or if the recipient or person acting on their behalf has given at least two business days written notice to the owner and occupier. The written notice must state the intention to enter the land and purpose of entry, and specify the days and times when the land will be entered. It is specified that this section does not authorise the recipient or contractor to enter a building used for residential purposes…
>
> New section 369G will provide protections for owners and occupiers of the land being entered to undertake actions stated in the EEO pursuant to new sections 369E and 369F. In taking the action on the land, the recipient, an authorised person or person acting on their behalf must take all reasonable steps to ensure they cause as little inconvenience and damage as is practicable.
>
> If the owner or occupier of the land incurs loss or damage because of the actions taken by the recipient, authorised person or the person acting on their behalf, they are entitled to reasonable compensation which can be agreed upon. If agreement is not reached between the parties on compensation, the court may order the recipient, the administering authority, or the person acting on their behalf to pay suitable compensation…
>
> The department is currently drafting new and updated guidance and web content to ensure that information about key reforms is available, and that people and businesses understand their obligations under the EP Act.[85]

2.5.3.2 Entry to land requirement - human rights

The statement of compatibility notes that cl 28 marginally extends existing powers under the EP Act relating to CNs and EPOs. The provision will apply to an EEO issued on any ground, which means it can now be relied upon in circumstances for which an EPO could have been issued to a person or a DN could have been issued, whereas previously the course of action under new 369E and 369F would not have been available.[86] According to the statement of compatibility, while there is marginal expansion of entry powers:

> …this is a necessary consequence of making the amendments to establish the EEO so there can be a simpler process or notice recipients, as well as a more responsive compliance approach from the administering authority. Powers to enable the fulfilment of requirements of an environmental protection order, direction notice or clean-up notice ought to have been consistent to avoid irregularity of outcomes simply because of the type of notice a person may have been issued. Sections 369E and 369F rectify this potential for inconsistent outcomes as part of combining existing powers into EEO provisions.[87]

The statement of compatibility additionally states:

> There are no less restrictive and reasonably available alternatives to the amendments having regard to the nature of the amendments as relatively minor changes to refine and enhance existing powers in the EP Act. To the extent that introduction of new sections 369E and 369F involve an expansion of powers,

[85] Department of Environment, Science and Innovation, correspondence, 15 March 2024, pp 9-13.

[86] Statement of compatibility, p 3.

[87] Statement of compatibility, p 5.

existing protections afforded by former sections 363J, 363K, 363AF and 363AG are retained in the new EEO, which means any provisions that ensure limitations on property rights are fair and balanced will also apply to the expanded use of these powers.

Sections 369E and 369F both provide a procedure to be followed whereby the EEO recipient or the authorised person seeks consent of the owner and occupier to enter the land, or gives at least 2 business days written notice before entering the land. This timeframe is consistent with the former section 363AG, and is necessary to ensure that any urgent action required to prevent environmental harm can be taken in a timely fashion, even if the owner or occupier has not provided consent. Sections 369E and 369F also expressly state they do not permit the EEO recipient, an authorised person or contractor to enter to enter a building used for residential purposes.[88]

Committee comment

The department and submitters clearly disagree as to the impact of proposals in the Bill to allow EEOs (and investigation notices) to be issued to the holders of an EA. Noting submitter concerns about the quality of the consultation process which preceded this Bill, it is possible that the department did not spend enough time explaining the rationale, intent and impact of these proposed amendments. While we note that the IAS produced for the Bill indicated this proposal should be regarded as having some, but not significant, impacts, evidence from legal representatives indicates the potential for this proposal to unfairly impact EA holders. If that is the case, such a proposal might have more significant impacts than has been contemplated. If this Bill is passed, we urge the department to continue consultations with relevant stakeholders to attempt to resolve the continuing disagreement about the effect of this proposal.

Regarding the procedure proposed to allow access to land for the purpose of complying with an EEO, again there are concerns from legal representatives that the process is potentially unfair. We note the procedure involves either seeking consent of the owner and occupier before entering the land, or giving at least 2 business days written notice before entering the land. We note submissions from the Queensland Law Society that 2 days is a short timeframe. We also note the current EP Act timeframe for a clean-up notice is 5 business days, and for an environmental protection order 2 business days. While the notice period applicable for entry onto land without consent under new sections 369E and 369F could be expanded to, for example, 5 or 10 days, there remains the need to facilitate urgent access to respond to environmental harm incidents of the most serious nature. While noting the concern from the Queensland Law Society about private sector agents being given the right to access land they do not own under this proposal, that right is already present in the EP Act in respect of existing notices such as clean up notices.

In regard to the FLPs and potential limitation on property rights arising from the expansion of entry powers proposed by clause 28 of the Bill, we consider the purpose of the limitation is important – to permit an authorised person to be able to enter land to take urgent action. We note the potential limitation does not involve requisition of land or loss of rights and entry onto land can only be for a permitted purpose, protecting against unreasonable or arbitrary exercise of the proposed powers of entry. The proposed provisions include appropriate safeguards, such as excluding permission to enter a residential property, to reduce the potential for this interference to the right to property to be arbitrary. The committee therefore considers that any potential limitation on property rights in this instance is reasonable and justified and proportionate to the need to effectively prevent environmental harm.

88 Statement of compatibility, pp 5-6.

2.5.3.3 Penalties for offences arising from EEOs – FLPs

To have sufficient regard for the rights and liberties of individuals, the consequences of legislation should be relevant and proportionate. In line with this, a penalty should be proportionate to the offence, and penalties within legislation should be consistent with each other.[89]

The Bill provides that it would be an offence to contravene a requirement of an EEO, with the penalties depending on whether the contravention was wilful and the ground the EEO was issued on.[90]

A wilful contravention of an EEO issued on a prescribed ground[91] carries a maximum penalty of 6,250 penalty units[92] ($967,500) or 5 years imprisonment, and a non-wilful contravention carries a maximum penalty of 4,500 penalty units ($696,600). Examples of prescribed grounds include where an EEO was issued to secure compliance with the GED where serious or material environmental harm is involved or to secure compliance with an EA condition.[93]

For all other grounds for which the EEO was issued (for example, the causing of environmental nuisance or for securing a person's compliance with an audit notice or surrender notice),[94] a wilful contravention carries a maximum penalty of 1,655 penalty units ($256,194), and a non-wilful contravention a maximum penalty of 600 penalty units ($92,880).

According to the explanatory notes, separating the offence into 2 penalty tiers ensures the penalty amounts are proportionate to the relevant conduct.[95] Generally the maximum penalty for not complying with an EEO does not exceed the penalty for the offences which the order relates to.[96] The penalties are consistent with those that were available under the previous offences relating to EPOs, DNs and CNs.[97]

The Bill also introduces other offences relating to the administration and enforcement of EEOs, however these attract significantly lower penalties and are more administrative in nature.[98] These relate to:

- failing to provide a buyer or administering authority with written notice of the existence of an EEO in certain circumstances (maximum penalty – 50 penalty units ($7,740))
- failure to give administering authority notice of ceasing to carry out activity (maximum penalty – 50 penalty units ($7,740))
- obstructing a person taking action to comply with an EEO (maximum penalty – 165 penalty units ($25,542)).

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89 Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental legislative principles: the OQPC notebook* (Notebook), p 120. See also LSA, s 4(2)(a).

90 See Bill, cl 28.

91 'Prescribed ground' is defined under cl 28 of the Bill as an enforcement ground mentioned in s 359(c) or (d) involving serious or material environmental harm; or an enforcement ground mentioned in ss 359(e)(ii), (iii), (iv), (v), (vi), (xii) or (xiii); or 359(f)(i).

92 The value of a penalty unit is $154.80: Penalties and Sentences Regulation 2015, s 3; *Penalties and Sentences Act 1992*, ss 5, 5A.

93 See Bill, cl 28 (EP Act, new ss 359, 369A(4)) for more examples. See also explanatory notes, p 28.

94 Explanatory notes, p 28. See also Bill, cl 28.

95 Explanatory notes, p 5.

96 Explanatory notes, p 5.

97 Explanatory notes, p 5.

98 See Bill, cl 28.

The explanatory notes advise the penalties for these offences largely reflect those in the current EP Act as they relate to EPOs, DNs and CNs.[99]

Committee comment

Whilst the penalties for the new provisions are significantly high, they are consistent with the approach taken in the current EP Act and are scaled to reflect the seriousness of the relevant conduct. This includes the penalty of imprisonment, the most serious of penalties, which obviously has a significant impact on individual rights and liberties. The committee to considers the new offence provisions, and the corresponding penalties, are justified and as such the provisions have sufficient regard to the rights and liberties of individuals.

2.5.3.4 Administrative power for the use of an EEO as a compliance tool – FLPs

Legislation should make rights and liberties dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.[100] The Bill raises this issue because an EEO, issued by an administering authority, may require a person to take action on their land or property in a particular way, which could impact their rights and liberties.

However, the Bill sets out specific criteria that must be taken into account by the administering authority before an EEO is issued and specific matters to consider in regard to particular emissions. The Bill also provides for the form and content of an EEO and sets out examples of what might be the type of action to be taken under an EEO. The time stated for the recipient to take the action must also be reasonable.

Importantly, the issue of an EEO is an original decision under schedule 2 of the EP Act[101] which means, in most cases, the decision will be subject to internal and external review. According to the explanatory notes, the review components are consistent with those that currently exist under the EP Act in relation to EPOs, DNs and CNs.[102]

Separately, legislation should allow the delegation of administrative power only in appropriate cases and to appropriate persons.[103] The explanatory notes state:

> Environmental protection orders and direction notices are statutory notices available to local governments in the administration and enforcement of their devolved (not delegated) responsibilities for particular prescribed Environmentally Relevant Activities, environmental nuisance, noise standards and water contamination set out in the Environmental Protection Regulation 2019 (EP Regulation). The environmental enforcement order will continue to be available for local governments to use for devolved matters in the same manner the power to issue environmental protection orders and direction notices was previously available. While combining the existing power to issue environmental protection orders, direction notices and clean-up notices into the environmental enforcement order will place all grounds to issue notices under one instrument, the grounds local governments can utilise to issue notices will continue to be limited to their devolved responsibilities.[104]

99 Explanatory notes, pp 5-6.

100 LSA, s 4(3)(a).

101 Bill, cl 52.

102 Explanatory notes, p 7.

103 LSA, s 4(3)(c).

104 Explanatory notes, p 7.

2.5.3.5 EEO Notice requirements – human rights

Clause 28 of the Bill specifies that if an EEO or cost recovery notice is issued to 2 or more recipients, a copy of the notice must be given to each of the recipients.[105] This provision engages the right to privacy under s 25 of the HRA, as it would allow disclosure of personal information such as names and addresses and the alleged conduct of persons.

As noted in the statement of compatibility, the purpose of this provision is to ensure that action can be taken to rectify environmental issues identified in a notice, and that it is important that when there are multiple people responsible for environmental harm, each person knows who is responsible for the matter and understands their individual responsibilities.[106]

Committee comment

The right to privacy is highly contextual, and whether an interference with privacy is permissible depends on whether there is a reasonable expectation of privacy in the circumstances. This is relevant because the information which is likely to be disclosed is personal information, but would be disclosed as part of a public administrative decision-making process (and does not relate to sensitive personal data such as health information etc).

The committee considers that any limitations on the right to privacy arising are reasonable, justified, and proportionate, as the importance of ensuring communication of information to facilitate the enforcement of the environmental protection provisions in an efficient and effective way, outweighs any limitation on the right to privacy in this instance.

2.6 General environmental duty (GED) offence

Clause 13 implements Review recommendation 15 to create an offence for breaching the GED. Clause 13 specifies that a failure to comply with the GED is an offence where the failure of the duty is likely to cause serious or material environmental harm. The Review found that making it an offence not to comply with the GED would offer support for more proactive management in the prevention or minimisation of environmental harm. This proposal emphasises the principle of primacy of prevention and focus on proactive steps that can be taken to prevent or minimise environmental harm.[107]

The department's consultation paper stated:

> The GED is an existing obligation under section 319 of the EP Act and has been a core part of the EP Act since assent in 1994. It requires all persons carrying out an activity that causes, or is likely to cause, environmental harm to take all reasonable and practicable measures to prevent or minimise the harm. The GED is particularly relevant to activities that are not prescribed as environmentally relevant activities and where an EA does not state what measures must be taken to manage the risk of environmental harm. In the absence of EA conditions, the GED sets the standard for risk management for an activity. However, there is presently no offence if a person does not comply with the GED. Offences and many enforcement tools are only applicable after the failure to comply leads to environmental harm. [108]

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105 New s 369(1) provides that: 'If an environmental enforcement order is issued to 2 or more recipients, a copy must be given to each recipient'. New s 369L specifies that: 'If a cost recovery notice is issued to 2 or more recipients (a) a copy of the notice must be given to each recipient'.

106 Statement of compatibility, p 8.

107 Queensland Government, *Consultation paper: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, p 35.

108 Queensland Government, *Consultation paper: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, p 35.

The IAS completed for the Bill indicated that cl 13 was regarded as having some, but not significant impacts.[109] The department's consultation paper noted 'as the GED is an existing duty in legislation, the amendment to attach an offence for non-compliance will not impose any new obligation or regulatory requirements on those that are currently complying with the duty'.[110]

The explanatory notes state:

> The offence only applies where serious or material environmental harm is caused, or likely to be caused, by the failure of duty so that the applicability of an offence and associated penalties are proportionate to the conduct. Wilful contravention of the general environmental duty carries a maximum penalty of 4,500 penalty units or 2 years imprisonment, and a contravention otherwise carries a maximum penalty of 1,655 penalty units. The penalty for the offence is of an appropriate level and considered necessary to ensure persons meet their environmental obligations. The penalty is comparable to other penalties for environmental offences under the EP Act and other Queensland legislation.
>
> Exemptions from the offence provision exist in certain circumstances based on whether environmental harm, which may arise from a particular act or omission in carrying out the activity, can be said to have been appropriately managed. A person will not have committed the offence where the act from which the contravention arises was authorised under an instrument identified in section 493A(2) (for example, an environmental authority), and that instrument provides for the reasonably practicable measures to be taken in relation to the act. Alternatively, a person will not have committed the offence if, in doing the act that gives rise to the contravention, they complied with a code of practice that applied to the relevant act…
>
> The introduction of the offence for contravention of the general environmental duty does not limit the ability of the administering authority to issue a statutory notice, that is, an environmental enforcement order, to secure compliance with the duty. This ground to issue an environmental enforcement order will remain in place under the new section 359 and is intended to be available regardless of whether the relevant contravention of the general environmental duty has caused or is likely to cause serious or material environmental harm.[111]

Waste and wastewater receivers and recyclers raised concerns with this proposal. Qldwater submitted that those conducting an undertaking that constitutes critical public infrastructure or water and sewerage services should not be liable for non-compliance with the GED, because complying with the duty is not always obvious, particularly when dealing with emerging contaminants.[112] Qldwater urged the department to produce greater documentary guidance on what would be considered compliance with the GED in particular circumstances.[113]

WRIAQ submitted that this proposal unreasonably places environmental damage liability on waste receivers for issues which are outside their control, instead of entities further up in the supply chain, where the most severe contamination risks are generated.[114] In response Ms Andersen for DESI stated at the public hearing:

> I acknowledge the concerns from the waste industry and local governments in relation to challenges dealing with upstream wastes that are difficult to control such as PFAS in sewage treatment plants. The general environmental duty defence that already exists still applies, and the department would consider what steps are reasonably practicable for an operator to be able to do in relation to managing those sources. I also note that there are other mechanisms available to deal with these types of issues—for example, through end-of-waste codes for things like biosolids which provide for a low level of PFAS in

109 Queensland Treasury, *Impact Analysis Statement - Environmental Protection (Powers and Penalties) Bill 2024–Improving the powers and penalties of the Environmental Protection Act 1994*, p 3.

110 Queensland Government, *Consultation paper: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, p 35.

111 Explanatory notes, p 15.

112 Submission 14, p 18.

113 Submission 14, p 18.

114 Submission 19, p 3.

biosolids whilst still protecting the community and agricultural producers who are using those final products.[115]

2.6.1 'Reasonably practicable'

Clauses 4, 13, 14, 40, and 58 of the Bill replaces the phrase 'all reasonable and practicable measures' under the GED and throughout the EP Act with 'all reasonably practicable measures' to:

- avoid an interpretational issue of the two-tier test for the defence to breach of the GED (see below)
- aid interpretation and reflect consistency with the statute book.

LGAQ and QCAR opposed this proposal because of the potential legal implications of differing interpretations of the 2 phrases.[116] In response the department stated:

> The change in wording to 'reasonably practicable' eliminates the apparent unnecessary two-tiered test and replace it with the single and more widely recognised test of deciding whether or not a measure is reasonably practicable. It also introduces a level of consistency with the legislative approach adopted to address similar issues both in Queensland and interstate.[117]

2.6.2 Defence provisions

The proposed amendment provides that a person does not commit an offence contravening the GED in relation to an activity if the activity is authorised by a relevant approval or authority and the approval or authority provides for reasonably practical measures to be taken in relation to the doing of the act. Submitters raised concerns about the potential retrospectivity of this proposal if EA holders are unable to satisfy both elements of the defence to a charge of breaching the GED.[118]

QREC submitted the proposal is a substantial change in government policy which the explanatory notes do not identify as such, as it applies to every person and business in Queensland, and because, since the introduction of the EP Act, the GED has been, in criminal law terms, a defence, not an offence.[119] While acknowledging that harm authorised under an EA will not be made unlawful, QREC expressed concern that for a defence to a breach of the GED to be available:

> …the authority needs to both exist and its contents provide for reasonably practicable measures. The second of these is problematic, as the content of an approval is the responsibility of the issuing authority, in the case of a development authority, one of many local or state government agencies. This is not a matter the applicant/holder ought to be required to pursue to ensure it is protected from an offence under separate legislation. Equally, there is a genuine legal query about whether a condition which satisfies proposed s319(3)(b) would be lawful where there is separate legislation for government development approvals.
>
> This consequential change is not recognised in the Notes and can be regarded as a retrospective consideration of a lawfully granted approval. Amendments which introduce an element of retrospectivity do not meet Queensland's Fundamental Legislative Principles. QREC suggests that this provision is carefully considered by the HEAC, and recommends it be removed from the Bill, and the defence instead reflect the existing section 493A(2) only.[120]

Ms Andersen from DESI responded to stakeholder concerns about the potential retrospectivity of this proposal during the public briefing:

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115 Public briefing transcript, Brisbane, 22 March 2024, p 2.

116 Submissions 11 and 13.

117 Department of Environment, Science and Innovation, correspondence, 13 March 2024, p 47.

118 Submissions 1, 8, 12 and 20.

119 Submission 12, p 3.

120 Submission 12, p 3.

> Concerns were also raised about the general environmental duty offence and whether the bill would apply retrospectively. The act has always contained a general environmental duty to take all reasonable and practicable measures to prevent or minimise environmental harm. It is a broad duty that is always applied to everyone, including environmental authority holders, and has been enforceable through statutory notices under the act. The bill does not propose to change this duty.
>
> To promote proactive action by operators to prevent environmental harm from occurring, the bill does seek to introduce an offence for not complying with the duty. The bill importantly, though, includes two exclusions from that offence to provide fairness to environmental authority holder and persons complying with the code of practice under the act. In particular, the exclusion applies when the environmental authority provides for reasonably practicable measures as stated in the duty.
>
> However, the mere existence of an instrument that is not related to the relevant duty would not be an appropriate exclusion to the offence. The offence provision of the bill does not apply retrospectively. It will only apply prospectively—that is, to a contravention of the duty that occurs on the date the amendment to the act comes into effect.[121]

QLS submitted that regarding the second limb of the proposed defence, namely an EA that provides for reasonably practicable measures the holder has complied with in managing environmental harm:

> For a person yet to be issued with a new authority or approval, the amendments will make it practically difficult, if not impossible, to establish the in-built defence mechanism as currently drafted in section 319(3)(a)(b)(ii), because the person has no control over the conditions or measures set out in the relevant approval.
>
> This amendment also blurs the line between separate legislative processes. Whilst the offence is proposed to be added to the EP Act, some of the approvals and authorities mentioned in section 493A(2) of the EP Act are issued under other legislation by other approving agencies, and it would be an excessive administrative burden if these other agencies were required to review their own separate approval and conditioning process to ensure those approvals can be lawfully acted upon in their own right.[122]

AMEC also notes concern that this proposal confuses regulatory processes under different Acts:

> The drafting of section 319 would create a clear duplication with other acts that are already in operation in Queensland and that are associated with the regulated resources community, namely:
> - Coal Mining Safety and Health Act 1999: Part 2, Division 1
> - Petroleum and Gas (Production and Safety) Act 2004: Division 3, Sections 699-701
> - Petroleum and Gas (Safety) Regulation 2018: Part 2, Division 1
> - Workplace Health and Safety Act 2011: Part 2, Subdivision 1, Section 17.[123]

The department's response to submissions did not respond directly to the concerns raised by QLS and AMEC regarding any conflict this proposal potentially has with other legislative processes. In response to AMEC, the department stated:

> Section 319 of the EP Act is amended to include relevant considerations to which regard may be had in determining whether a person has contravened the GED. For example, failing to install, use and maintain plant, equipment, processes and systems in a way that minimises risks of environmental harm, and failing to use and maintain systems that ensure all substances are handled, stored used or transported in a way that minimises the risks of environmental harm.
>
> Amendments in the Bill give effect to the Independent Report. The definition of an environmental value has included the concept of safety since 1994. Enhancements to workplace health and safety are outside the scope of the Bill.[124]

In its submission, QLS provided some examples of ways that the drafting of the defence provision could lead to an unfair outcome:

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121 Public briefing transcript, Brisbane, 22 March 2024, p 2.

122 Submission 20, p 2.

123 Submission 17, p 1.

124 Department of Environment, Science and Innovation, correspondence, 15 March 2024, p 5.

A person was granted a development approval (DA) 5 years ago under the Planning Act 2016. The DA permits the person to undertake certain acts but the DA does not set out specific 'measures' to be taken in relation to the act.

- Development conditions are set by an approving authority and not by the applicant.
- This Bill could have the effect that a person undertakes an act in compliance with the development approval, but if the act gives rise to a contravention of the general environment duty, the person cannot rely on the defence provision because the person cannot point to any "reasonably practicable measures" in the approval which would enliven the defence in this proposed section.[125]

To mitigate this, QLS recommended removing the words '*and provides for reasonable practicable measures to be taken in relation to the doing of the act'* in cl 13(3) of the Bill.[126] In response to QLS, the department stated in respect of the new s 319B which provides legal protections for particular persons who are charged with an offence involving a relevant act mentioned under s 493A(1) of the EP Act:

Section 493A(3) of the EP Act provides a defence to a charge of doing a relevant act mentioned under section 493A(1) of the EP Act where the defendant proves they complied with the GED. Where a person is intending to rely on the defence under section 493A(3) of the EP Act in a proceeding for a relevant offence, the person may not be charged in the alternative with an offence of contravening the GED in relation to the same, or substantially the same, conduct as was engaged in when causing a relevant act. Additionally, any information obtained in relation to the defence under section 493A(3) of the EP Act in a proceeding for a relevant offence cannot be used against the person in a proceeding for an offence of contravening the GED that is constituted by the same, or substantially the same, conduct as was engaged in when causing a relevant act.

These provisions are necessary to ensure that persons may still rely on the GED in a defence of causing a relevant act, without the risk of the failure of this defence then resulting in self-incrimination or a subsequent a charge of contravening the GED. These provisions remove the possibility of a person being charged with two separate offences for the same conduct.[127]

2.6.3 Frequency of GED breach enforcement

During the public briefing, we asked the department to clarify how it uses the GED to take enforcement action against EA holders which might lead to a change in EA conditions:

Ms Andersen: We will often use the existing general environmental duty as a grounds for taking enforcement action, even against environmental authority holders. Then that will allow us to amend specific conditions where we have a particular compliance issue with that site. There is a whole process around sending them a notice of proposed amendment. They have internal review and appeal rights around that. If they are dissatisfied or want to appeal the environmental protection order or one of the compliance notices, there are provisions around that as well. It is fair to say that we already have the ability to do that; the bill merely clarifies and confirms that approach. I do not think it creates any further investment uncertainty. If anything, it provides greater certainty by saying, 'You still have a GED that you need to comply with and we have existing provisions to amend your licence if you are not meeting those requirements,' so we can specifically call out what is reasonably practical steps that need to be taken to manage that risk of harm.[128]

In response to a further question on notice regarding how often an EA might have its original conditions amended, the department stated that s 215 of the EP Act enables an EA amendment:

- to correct a clerical or formal error;
- where the holder has agreed to an amendment, or

125 Submission 20, p 3.

126 Submission 20, p 3.

127 Department of Environment, Science and Innovation, correspondence, 15 March 2024, p 7.

128 Public briefing transcript, Brisbane, 22 March 2024, p 6.

- where the department considers the amendment is necessary or desirable because of a matter mentioned in section 215(2) of the EP Act. These matters are quite extensive and include the following compliance grounds:
  - that there has been a contravention of the EP Act or an environmental offence committed by the holder;
  - an environmental audit, investigation or report under chapter 7, part 2 of the EP Act;
  - the issue, amendment or withdrawal of an environmental protection order; or
  - the acceptance, withdrawal, variation, amendment or suspension of an enforceable undertaking under chapter 10, part 5 of the EP Act.

Where the department is proposing to amend an environmental authority for matters stated in section 215(2) of the EP Act, the department is required to follow a procedure that includes issuing a Notice of Proposed Amendment to the holder of the authority, and considering any written representations made by the holder of the authority.

These amendment decisions are subject to internal review and appeal processes.

Through analysis of data available for the last five years, the department identified five environmental authorities that have been amended following a compliance action through a Notice of Proposed Amendment process. Approximately a further 12 environmental authorities were amended by agreement following a compliance action.

The department regulates more than 9,000 environmental authority holders, so this represents a small proportion of authority holders where licence conditions have been amended following compliance action.

As the data indicates, most environmental authority amendments that follow a compliance action are facilitated through an agreement with the environmental authority holder.[129]

Committee comment

We note the concerns expressed by some stakeholders about the new two-limbed test for satisfying the defence to a charge of breaching the GED. Specifically, we note the Queensland Law Society submission that the second limb of the test - that there are 'reasonably practicable' measures contained in a relevant approval or authority which a holder can use to manage the environmental harm - might lead to an unfair outcome because the holder (of current EAs) or the applicant (for new EAs) has no power over the number or nature of management measures that an administering authority did or might include in an EA. This would in effect frustrate the EA holder's ability to rely on that defence, through no fault of their own. We note here the Queensland Law Society recommendation to remove the words *"and provides for reasonable practicable measures to be taken in relation to the doing of the act"* from this clause of the Bill. If this Bill is passed, we urge the department to provide further guidance to how this defence provision will fairly operate for existing and prospective EA holders.

Submitters expressed concern about the potential retrospective impact of this new offence on existing EAs. We suspect the department and stakeholders are engaging at cross purposes here. We acknowledge the advice from the department that the offence provision will only apply prospectively, but the submitter concerns focus more on historic (or 'retrospective') EA conditions not being sufficient to function as a defence once the new charge of breaching the GED commences. Despite this, given the evidence the department has provided about how infrequently an EA is amended following a compliance action, we find any risk to existing EA holders posed by this new provision is remote.

[129] Department of Environment, Science and Innovation, correspondence, 28 March 2024, p 1.

2.6.4 Consistency with FLPs and human rights

The explanatory notes state that this proposal potentially departs from FLPs in the following provisions:

- The creation of a GED offence requires that any new or increase to maximum penalties should be proportionate to the offence.
- The availability of a defence to a charge of contravening the GED should not reverse the onus of proof in criminal proceedings without adequate justification.
- A defence to a charge of contravening the GED where a person proves they complied with the duty, should provide appropriate protection against self-incrimination.[130]

The statement of compatibility notes that s 32 of the HRA which protects rights in criminal proceedings 'affirms the right of all individuals to procedural fairness when before a court and sets out a number of minimum guarantees for persons charged with criminal offences. This includes, pursuant to s 32(2)(k), the right not to be compelled to testify against themselves or to confess guilt, otherwise known as the right against self-incrimination'.[131] This proposal engages this right in circumstances where the EP Act also holds that compliance with the GED can operate as a defence, pursuant to s 493A, when a person is charged with other offences involving environmental harm.

2.6.4.1 Offence penalties – FLPs

The new GED offence carries a maximum penalty of 4,500 penalty units ($696,600) or 2 years imprisonment if the offence is committed wilfully or otherwise 1,655 penalty units ($256,194). The justification for this offence, according to the explanatory notes, is deterrence and the encouragement of stronger environmental management for the prevention and mitigation of environmental harm:[132]

> An offence will place an emphasis on prevention by operators rather than waiting for harm to occur and facing expensive clean-up and remediation operations, noting that communities can continue to be affected for the duration of a remediation period.[133]

The explanatory notes state that the penalties are 'considered necessary to ensure persons meet their environmental obligations and are comparable to other penalties for environmental offences under the EP Act'.[134] Whilst the penalty amounts (particularly for a wilful contravention) are high and include the possibility of imprisonment, there are other offences in the EP Act that attract similar substantial penalties. For example, if a person wilfully and unlawfully causes material environmental harm, the maximum penalty is 4,500 penalty units or 2 years imprisonment.[135] Further, a (wilful) failure to comply with a condition of a temporary emissions licence has a maximum penalty of 6,250 penalty units ($967,500) or 5 years imprisonment.[136]

At a public hearing, Mr Panikos Spyrou, Chief Executive Officer for QCAR submitted:

> With respect, we believe that the bill fails to address one of the primary goals of the independent review into the adequacy of existing powers and penalties under the EPA terms of reference, namely the

130 Explanatory notes, pp 6-9.

131 Statement of compatibility, p 9.

132 Explanatory notes, pp 6, 14-15.

133 Explanatory notes, pp 14-15.

134 Explanatory notes, p 6.

135 See EP Act, s 438. If a person unlawfully (but not wilfully) causes material environmental harm then the maximum penalty is 1,665 penalty units. See also EP Act, s 437 where if a person wilfully and unlawfully causes serious environmental harm, the maximum penalty is 6,250 penalty units or 5 years imprisonment. Unlawful (but not wilful) contravention of the offence attracts a maximum penalty of 4,500 penalty units.

136 See EP Act, s 357I.

> adequacy of existing … penalties for … prosecuting operators and deterring environmental offending … and with respect to … the adequacy of existing maximum penalties—
>
> From our point of view, I guess it appears that adequacy has been overlooked in place of efficacy and efficiency and that a full and proper assessment of the adequacy of penalties imposed under the EPA has not been undertaken.
>
> An adequate solution, for instance, is one that adequately addresses the problem at hand without exceeding the necessary measures. It is important to note that adequacy does not connote excellence or surpassing expectations; rather, it denotes a level of sufficiency that is satisfactory but may not necessarily be exceptional. Adequacy sets the baseline, ensuring the minimum requirements be met without exceeding them.
>
> From a sugarcane farming point of view in particular and reflecting on the environmental protection measures that were introduced in 2019 affecting the sugarcane industry, we had some maximum penalties: for example, section 82, the penalty for wilful breaches is 1,665 penalty units, or $257,000, and for other breaches it is $92,000; section 85, false and misleading advice about an ERA, 600 penalty units, or $92,000; section 316P, requirement to replace noncompliant EA, 4,500 penalty units, or $696,000; and section 357, failure to comply with a temporary emissions licence, 6,250 penalty units, or $967,500. Even in the proposed new section 319C(3), the duty to restore, the maximum penalty is 4,500 penalty units, or $696,000. We are concerned that, unless there is evidence that the maximum penalties are being imposed and such impositions are not having the desired deterrent effect, then a lower baseline maximum penalty should be set that is adequate to achieve the intent of the act. We believe that the issue of adequacy has not been properly addressed.[137]

2.6.4.2 Availability of defences – FLPs

The GED offence provision allows for an exemption from having committed the offence for persons who were authorised to perform the act, in accordance with reasonably practicable measures, that causes or is likely to cause environmental harm under an approval or authority or if they complied with a code of practice that applied to the relevant act. These amendments raise the FLP that legislation should not reverse the onus of proof in criminal proceedings without adequate justification.[138]

The explanatory notes state that reversing the onus is justified as the measures taken by the defendant to satisfy their duty or comply with their authorisation will be particularly within the knowledge of the defendant. While the onus to prove the defence is on the defendant, the onus will always be on the prosecution to prove all the elements of the offence.[139]

The EP Act has an existing defence provision to a charge of environmental harm where a person proves they complied with the GED. This reversed onus of proof will continue to operate for the new GED offence. The explanatory notes state:

> This raises the FLP that legislation should provide appropriate protection against self-incrimination. For example, if a circumstance arose where a person was prosecuted for the serious environmental harm offence under section 437, they could raise evidence of their compliance with the general environmental duty in accordance with section 493A(3). If the evidence raised tended to show they had actually failed to satisfy their duty, this could amount to self-incrimination of a breach of section 319.
>
> To provide protection against self-incrimination that may arise from the interaction of the general environmental duty offence and section 493A(3), the Bill inserts provisions that restrain prosecutions in certain circumstances. The new section 319B provides that a person being prosecuted for an offence involving environmental harm, the person cannot be charged in the alternative with an offence against the general environmental duty in relation to the same, or substantially the same, conduct that gave rise to the environmental harm offence charge. In addition, there is a limitation on raising a charge in a separate proceeding against the general environmental duty offence in relation to the same, or

[137] Public hearing transcript, Brisbane, 18 March 2024, pp 17-18.

[138] Explanatory notes, p 8.

[139] Explanatory notes, p 8.

substantially the same, conduct that gave rise to the environmental harm offence where the prosecution would be using information obtained in the proceeding for the environmental harm offence. These provisions ensure that a person is not unfairly disadvantaged by the operation of section 493A(3) and giving evidence in their defence.[140]

2.6.4.3 Criminal proceedings – human rights

The rights contained in s 32 of the HRA relate to people who are charged and/or convicted of a criminal offence. Rights in criminal proceedings can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Specifically, the Bill engages s 32 as it introduces an offence for contravening the GED in circumstances where the EP Act also holds that compliance with the GED can operate a defence when a person is charged with other offences involving environmental harm (under s 493A). This engages the right against self-incrimination.

The operation of the GED offence provision alongside s 493A(3) could impose a limitation on protection against self-incrimination. For example, a person could be charged with a stand-alone offence of serious or material environmental harm. GED compliance would then be available to the defendant as a defence under s 493A(3). This could put them in a position of producing evidence as to their compliance with the GED, and if the evidence did not prove the defence, then they are exposed to the potential for a charge of contravening the GED offence.[141]

However Clause 15 of the Bill inserts new s 319B which provides protections for someone who has been charged with an offence for which a defence that the defendant complied with their GED is available. Clause 15:

- provides two protections for a person who is charged with an offence identified under section 493A(1), which are offences involving environmental harm, and who is intending to rely on the defence that they complied with their GED:
- in a proceeding for an offence, the person may not be charged with an alternative offence against the GED in relation to the same, or substantially the same, conduct; and
- any information obtained from the person in a proceeding for an offence in relation to a defence of GED compliance cannot be used against the person in another proceeding for an offence against the GED that is constituted by the same, or substantially the same, conduct.

> The policy intent is to establish an offence for contravening the GED to promote better environmental outcomes through harm prevention and minimisation. The provisions inserted by new section 319B of the Bill are intended to enable the introduction of the offence without interfering with the right of privilege against self-incrimination…
>
> By including new section 319B, the Bill achieves the purpose of enabling enforcement of the GED through an offence provision without restricting the human rights of defendants in criminal proceedings.[142]

Committee comment

In respect of this proposal's engagement with FLPs and human rights, we note the concerns expressed by Queensland Cane Agriculture and Renewables about the adequacy of the EP Act's existing penalties and those proposed by this Bill. Whilst the penalties for the new offence are significantly high, and include imprisonment, the most serious of penalties, they are consistent with the approach taken in the current EP Act and are scaled to reflect the seriousness of the relevant conduct. We therefore find the new offence provisions, and the corresponding penalties, are justified, such that the provisions have sufficient regard to the rights and liberties of individuals.

140 Explanatory notes, p 9.

141 Statement of compatibility, p 10.

142 Statement of compatibility, p 10.

Regarding the protection of human rights in criminal proceedings, we find there are no less restrictive and reasonably available ways to achieve the purpose of promoting greater protection of the environment than by continuing the reversed onus of proof provisions in the EP Act for this new GED offence. The Bill contains a safeguard against self-incrimination via a new section 319B which provides that where a person has been charged with an environmental harm offence, they cannot also be charged with an offence against the GED for the same conduct, nor can a separate proceeding relating to a GED offence rely on information obtained in the proceeding for the environmental harm offence, such as evidence the person may give in their defence. We agree with the statement of compatibility that the Bill achieves the aim of enabling enforcement of the GED without restricting the human rights of defendants in criminal proceedings.

2.7 Duty to notify

Clause 17 of the Bill implements Review recommendation 16 to expand the duty to notify of environmental harm to capture situations where the person 'reasonably believes' or 'should in the circumstances reasonably believe' that the land is or is likely to be affected by a contaminant.

The department's consultation paper stated:

> Currently the EP Act limits the duty to notify to situations where a person 'becomes aware' of circumstances, including the presence of a hazardous contaminant. However, in its practical application it should not be necessary to prove that a person has become aware of a circumstance, and therefore possesses that knowledge if the person should reasonably know in the circumstances.
>
> Amending this provision to include that the person reasonably believes or should in the circumstances reasonably believe, for example, that contamination exists, or that a known contamination has worsened, will ensure that the administering authority is more effective in its ability to hold accountable someone who has failed to meet their duty to notify obligations. It will provide a more appropriate test for determining whether or not the duty was complied with.[143]

The explanatory notes state this proposal:

> …allows for the circumstances surrounding the event or contamination, or observable indicators of environmental harm, to be considered in determining when notification ought to have occurred. In practice, there will likely be significant overlap in when a person became aware, and when circumstances indicate they should reasonably believe harm or change or condition in contaminated land has occurred. However, the amendment to the duty is relevant where there is some doubt the person acted on the duty when they were supposed to, for example, if it appears they delayed notification on the basis they were not aware of the event even though it can be objectively determined there were indicators that the event had occurred before the time they claimed to have 'become aware'.[144]

Submitters raised concerns about this proposal in terms of its subjectivity, lack of definition or guidance materials, and potentially unfair application to third parties. Mr Spyrou for QCAR told a public hearing that:

> In terms of the bill and supporting documentation and in some instances inadequate information, we note the use of subjective, unclear and ambiguous words in the legislation: 'ought reasonably' to have known, 'reasonably believes or should in the circumstances reasonably believe', 'ought reasonably to have become aware' such as in section 320A, and 'reasonable and practicable measures', such as in section 4 et cetera. We are concerned that that unclear and subjective language, particularly as it relates to sugarcane farmers having to respond in some cases with positive obligations around proactive action, should be further defined or there should be explanatory notes included to ensure that any unintended or inadvertent consequences do not occur. Obviously, to some extent that concern is alleviated if the onus of proof falls on the government and not the persons or business expected to meet that requirement. The concern is, particularly where farmers are supposed to be acting proactively, that there may not be

[143] Queensland Government, *Consultation paper: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, p 37.

[144] Explanatory notes, p 19.

> sufficient clarity around that to make that determination. The department has provided a standard response on 32 occasions along the lines of-
>
> The department is currently drafting new and updated guidance and web content to ensure that information about key reforms is available, and that people and businesses understand their obligations under the EP Act.
>
> I believe it is critical for the preamble to the bill, explanatory notes or subsequent guidance to more clearly articulate the intent of the amendments and, more importantly, to state what is not intended. From our point of view, QCAR believes it is simply not good enough for inadequate or insufficient information to be contained in the proposed new legislative amendments and that further time taken to provide that information, clarification and further consultation to affected people and businesses could be taken.[145]

The lack of a clear definition or guidance regarding this provision was also noted by CCCA, QREC and QRC.[146] QRC noted that in the absence of clear explanatory notes, comprehensive consultation should be had on defining when a person 'ought reasonably to have become aware of the event'.[147] CCCA submitted that the clause 'ought reasonably to have become aware' should be deleted unless further clarification is provided to 'understand how this amendment would be implemented - i.e. how would the regulator determine when an operator 'ought reasonably to have become aware'?'.[148]

In its response to submissions the department, as noted above by the QCAR witness, has provided the same form answer in excess of 30 times:

> The department is currently drafting new and updated guidance and web content to ensure that information about key reforms is available, and that people and businesses understand their obligations under the EP Act.

Ms Andersen for DESI provided additional information about this issue at the public briefing:

> Several stakeholders spoke about the amendments to the duty to notify provisions, particularly the amendments to insert the wording 'ought reasonably to have become aware of the event'. This amendment delivers on the recommendation from the independent review which raised issue with the duty being based on the knowledge alone, rather than becoming aware of potential consequences. The amended wording includes the term 'reasonably' which is important when considering some of the concerns raised by stakeholders on what would be required in practice. The intent of the amendment is to ensure an early heads-up of any contamination or environmental harm.
>
> These changes are not intended to require additional monitoring or oversight by someone without any role in the activity.

QLS made written submissions on this proposal, including that persons other than EA holders might be caught by the proposal's extension of the duty and offence provisions to land owners, occupiers and local governments in relation to incidents or events caused by others, namely:

- 'Other persons' not carrying out the activity during employment (clause 19 of the Bill – amending section 320C of the EP Act);
- Owners and occupiers of land affected by an activity or an event involving harm even where the harm is occasioned by others (clause 21 – amending section 320DA of the EP Act); and
- Local governments purely by virtue of being an administering authority in the relevant locality (clause 22 – amending section 320DB of the EP Act).

> The expansion of this duty could have unfair consequences for these third parties, particularly when failing to comply with the duty is an offence and these third parties could be exposed to penalties of up to $77,400 for an individual and $387,000 for a body corporate, including a local government.
>
> The Explanatory Notes appear to suggest that 'other persons', owners, occupiers and local governments are now expected to actively monitor potentially affected land for "observable indicators of

[145] Public hearing transcript, Brisbane, 18 March 2024, p 18.

[146] Submissions 1 and 12.

[147] Submission 8, p 2.

[148] Submission 1, p 4.

> environmental harm", even though they do not hold the approval or are not otherwise undertaking the activities which might give rise to the harm.[149]

QRC is also concerned by the proposal to apply this objective element to other categories of persons who are affected by incidents or events caused by others but who were not responsible for the activity.[150]

In response the department stated that the proposal does not expand who the duty currently applies to. Further:

> The Bill amends section 320A of the EP Act to expand the duty to notify to situations where a person not only becomes aware, but where they 'ought reasonably to have become aware', of an event that requires notification. The Bill makes consequential amendments to sections 320B, 320C, 320D, 320DA, 320DB of the EP Act to reflect the changes to the duty to notify under amendments to section 320A of the EP Act.[151]

2.8 Duty to restore

Clause 16 of the Bill provides for a duty to restore the environment to complement other duties in the EP Act. In response to Review recommendation 1 regarding environmental principles to underpin the administration of the EP Act, the government response indicated it may consider the need for a duty to restore environmental harm to complement the polluter pays principle'.[152] Clause 16 introduces a standalone duty to restore the environment which requires that, if a person causes or permits unlawful environmental harm through contamination, the person must take appropriate action, as soon as reasonably practicable, to rehabilitate or restore the environment as far as reasonably practicable to its condition before the harm was caused. The duty complements the GED and is proactive - a person should not wait for the administering authority to issue a notice to commence clean-up or remediate - and is intended to encourage quicker responses to incidents involving contamination to ensure they are remedied before they cause greater harm.[153]

The duty will not apply to a person if the act causing environmental harm was authorised to be done under certain regulatory instruments where such instruments regulate a particular harm caused by an activity and set out requirements for how the impacts of that harm are to be managed or remedied. However, where such instruments do not, the administering authority is not precluded from issuing an EEO requiring clean-up of contamination.

Clause 16 also makes it an offence to contravene the duty to restore the environment where the contravention relates to environmental harm that is serious or material. The purpose of this offence is to sufficiently deter persons from walking away from serious or material environmental harm they have caused. The offence only applies where serious or material environmental harm was not restored so that the applicability of an offence and associated penalties are proportionate to the conduct.[154]

The majority of submitters who commented on the duty to restore were supportive. QCAR opposed the proposal on the basis that it was not a recommendation of the Review.[155] Gold Coast City Council expressed reservations about the duty as it relates to contamination where the source cannot be

149 Submission 20, pp 4-5.

150 Submission 8, annexure.

151 Department of Environment, Science and Innovation, correspondence, 15 March 2024, p 4.

152 Submissions 2, 5, 6, 8 and 11.

153 Explanatory notes, p 18.

154 Explanatory notes, p 18.

155 Submission 13, p 3.

easily ascertained.[156] LGAQ expressed concern that local governments will be liable for this duty where the original contaminator is hard to identify or as the result of cumulative spillages.[157]

In response the department stated:

> The duty to restore applies to the person causing or permitting, or who caused or permitted, the incident. 'Permit' includes 'to let (something) be done or occur' which implies inaction or an omission, for example inaction to maintain a containment structure for contamination. It is directed towards the persons responsible for the environmental harm (in line with the 'polluter pays' principle).
>
> The duty to restore is proactive, in that it does not require the issuing of a notice for restoration to be required under the EP Act. However, it is acknowledged there is likely to be continued need in practice to utilise statutory notices to ensure harm from contamination is restored if a circumstance arises where there are persons or circumstances not covered by the duty…
>
> The duty does not introduce a requirement for councils to become liable where they are not covered by the duty (i.e. where the council did not cause or permit the contamination).
>
> The department administers a reimbursement scheme for orphan incidents to support local government in the clean-up of incidents where material or serious environmental harm has occurred and the polluter cannot be pursued.[158]

QRC noted that the proposal does not include a form of notice procedure for entry onto land to fulfil this duty, unlike the provisions for EEOs. [159]

2.8.1 Consistency with FLPs and human rights

The explanatory notes state that this proposal potentially departs from FLPs in the following provisions:

- Maximum penalties for the new offence of contravening the duty to restore should be proportionate to the offence.
- A defence to a charge of contravening the duty to restore, if it can be proven the duty was breached while carrying out a lawful activity, should not reverse the onus of proof in criminal proceedings without adequate justification.

The statement of compatibility notes that the duty to restore engages property rights under s 24 of the HRA. The duty is to take appropriate action, as soon as reasonably practicable, to rehabilitate or restore environmental harm that has been caused or permitted as far as reasonably practicable to its condition before the harm was caused.[160]

We have noted earlier in the report that the duty to restore also engages s 32 of the HRA regarding rights against self-incrimination, because it raises the possibility that a person could be charged with 2 separate offences for the same conduct.

2.8.1.1 Offence penalties – FLPs

It would be an offence to contravene the duty to restore the environment where the contravention relates to environmental harm that is serious or material.[161] Wilful contravention of the duty to restore the environment carries a maximum penalty of 4,500 penalty units or 2 years imprisonment, and a contravention otherwise carries a maximum penalty of 1,655 penalty units.[162]

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156 Submission 5, p 1.

157 Submission 11, p 10.

158 Department of Environment, Science and Innovation, correspondence, 13 March 2024, pp 24-26.

159 Submission 8, annexure.

160 Statement of compatibility, p 3.

161 Explanatory notes, pp 17-18.

162 Explanatory notes, p 18.

Whilst the penalties are high, the explanatory notes state that they are proportionate to the conduct involved because the offence only captures conduct that involves 'serious or material environmental harm'.[163] Where environmental harm falls below the threshold of material environmental harm, compliance with the duty to restore can still be secured through other administrative means, such as the issuing an EEO.

2.8.1.2 Availability of defences – FLPs

Existing provisions in the EP Act will apply to an offence against this duty. Under s 493A(3), it is a defence to a charge if proven that the act was done while carrying out an activity that is lawful apart from the EP Act, and the defendant complied with the GED. Section 493A(2) provides a defence where the relevant act was authorised under an instrument such as an EA or TEP.

The explanatory notes state:

> The reversal of onus under section 493A(3) for the defendant to prove their compliance with the general environmental duty, or that their act causing environmental harm was authorised by an instrument mentioned in section 493A(2), or that they complied with a code of practice, is justified as the measures taken by the defendant to satisfy their duty or comply with their authorisation will be particularly within the knowledge of the defendant. While the onus to prove the defence is on the defendant, the onus will always be on the prosecution to prove all the elements of the offence.[164]

2.8.1.3 Effect on property – human rights

Section 24 of the HRA also provides that a person must not be arbitrarily deprived of their property. This right does not include a right to compensation if a person is deprived of their property. The statement of compatibility provides that this duty to restore proposal 'may create a limitation on property rights in that the impact of using these powers, imposing duties or enforcing duties may require a person to take action, that they might otherwise not choose to take, on and in relation to their property to prevent, minimise or rectify environmental harm'.[165]

If a person is required to comply with this duty to restore, the statement of compatibility notes this could also have the effect of supporting property rights where compliance with the duty leads to outcomes where environmental harm is rectified, or even prevented or minimised, where it is happening to a person's property or the property of others.[166]

Committee comment

Whilst the penalties for an offence against the duty to restore are significantly high, and include imprisonment, the most serious of penalties, they are consistent with the approach taken in the current EP Act and are scaled to reflect the seriousness of the relevant conduct. This offence has a high threshold, hence the higher penalties. There are comparable penalties in the EP Act for other offences that relate to serious or material environmental harm. We therefore find the new offence provisions, and the corresponding penalties, are justified, such that the provisions have sufficient regard to the rights and liberties of individuals.

2.9 Amending transitional environmental programs (TEPs)

Clause 26 implements Review recommendation 10 which proposed allowing the administering authority the power to amend a TEP without the consent of the operator. The Review observed that while the administering authority currently has the discretion to approve an amendment to a TEP, it has no express power to cause an amendment to it. That right resides solely in the hands of the holder

163 Explanatory notes, pp 6, 18.

164 Explanatory notes, p 8.

165 Statement of compatibility, p 2.

166 Statement of compatibility, p 5.

of the TEP approval. The Review stated this means that, notwithstanding how ineffective a TEP may turn out to be, unless the holder agrees to amendments proposed by the administering authority, it would have to cancel the approval, and even then the grounds for cancellation are restrictive.[167]

The Review also noted that case studies have revealed that in a number of significant circumstances TEPs have been allowed to remain in place regardless of their lack of impact on solving the problem at hand, including the more complex cases involving emerging contaminants and the more nebulous contaminants such as odour. The Review highlighted that amendments should also be made to DESI's enforcement guidance to ensure the effective use of TEPs.[168]

Clause 26 therefore provides that the administering authority may correct or amend a TEP if it considers the amendment is necessary or desirable for the purpose of the program achieving compliance with the EP Act for the activity to which the program relates, and the procedure for the notice of proposed amendment is followed.[169] The consent of the TEP holder is not required, but to ensure procedural fairness for TEP holders, there are checks and balances on the power including prescribing sufficient review and appeal rights.

LGAQ opposed this proposal on the basis that the power to amend without the approval of the TEP holder introduces further uncertainty and potential costs for holders of EAs in situations that already are out of the ordinary:[170]

> TEPs are intended as short-term measures to allow compliant operations during extreme situations outside of the control of the EA holder. In this already strained environment, it is essential that any EA holder operating under a TEP has the certainty that the conditions agreed on would not be changed without their approval. The changes proposed would eliminate this certainty and cannot be supported. The State Government should much rather increase communication and cooperation with TEP holders to ensure that ordinary compliance with the approved EA can be re-instated as soon as possible[171]

The department responded that the power to amend unilaterally 'is analogous to the processes for amending EAs'.[172] Furthermore, procedural fairness is afforded to TEP holders by the authority being required to have regard to any submissions the holder may make, and the TEP amendment being an original decision.

2.9.1 Consistency with FLPs and human rights

Section 4(3)(a) of the LSA provides that legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review. The explanatory notes state that the proposal to amend TEPs:

> …is intended to clarify the application of section 24AA of the Acts Interpretation Act 1954 (Qld) (AI Act) to decisions to make or amend a transitional environmental program. Section 24AA provides that if an Act authorises or requires the making of an instrument or decision, the power includes power to amend or repeal the instrument or decision, and the power to amend or repeal the instrument or decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision. The new provisions of the EP Act (sections 344AA to 344AH) specify how the decision to amend a transitional environmental program is to be made by the administering authority to remove any doubt that section 24AA of the AI Act applies.

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167 Queensland Government, *Consultation paper: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, p 27.

168 Queensland Government, *Consultation paper: Improving the powers and penalties provisions of the Environmental Protection Act 1994*, p 27.

169 Explanatory notes, p 21.

170 Submission 11, pp 3-5.

171 Submission 11, p 11.

172 Department of Environment, Science and Innovation, correspondence, 13 March 2024, p 45.

> The new provisions require the administering authority to have regard to any submission by the transitional environmental program holder. While submissions can be made from the holder of a transitional environmental program, the administering authority will maintain the power to decide amendments. To ensure this FLP is not breached, the Bill makes clear that decisions to amend a transitional environmental program are prescribed as original decisions under schedule 2 to provide for sufficient review and appeal rights.[173]

The statement of compatibility notes that s 24 property rights are engaged through this proposal to enable the administering authority to initiate and decide TEP amendments rather than require a TEP holder to apply for an amendment, by creating a limitation on property rights in that the impact of using these powers, imposing duties or enforcing duties may require a person to take action, that they might otherwise not choose to take, on and in relation to their property to prevent, minimise or rectify environmental harm.[174]

> To limit the impacts of new sections 344AA to 344AH on property rights, provision is made for the TEP holder to make a submission on the proposed TEP amendment before a decision is made, as well as access to review and appeal of a decision. This will give the TEP holder the opportunity to explain the limitations the proposed TEP amendments could have to their right to property and give the administering authority the opportunity to consider this information prior to making a decision on the amendments.[175]

2.10 Civil proceedings

Clauses 41-43 of the Bill implement Review recommendation 17. These clauses amend the EP Act to:

- allow the production of certificates, for example about the analysis of a sample, as evidence in a civil proceeding under or in relation to the Act (cl 41)
- provide that opinion evidence may be given in civil proceedings in relation to certain offences involving environmental nuisance (cl 42)
- provide that opinion evidence may be given in civil proceedings for an offence under the EP Act related to noise, if it is claimed audible noise was made (cl 43).

LGAQ recommended we reject the proposal to expand the evidentiary aids limited to criminal proceedings to be available in civil proceedings on the basis they might open up public service providers to a wave of vexatious legal proceedings, thereby increasing the financial burden on councils.[176] LGAQ submitted that the expansion of the evidentiary aids to civil proceedings has the potential to increase legal liability and insurance costs for councils due to the lack of control for inputs into council operated activities such as wastewater treatment plants or landfills.

In response the department stated:

> This amendment does not expand the circumstances in which civil or criminal action can be taken. The EP Act already allows for any person to prosecute a person for breach of the EP Act, and the existing section 24 specifies that the EP Act does not limit any civil right or remedy that exists apart from the EP Act, and that a breach of the general environmental duty (or the duty to restore under the new section 319C as inserted by clause 16 of this Bill) does not, of itself, give rise to a civil right or remedy.
>
> The amendment does not expand evidentiary provisions to the giving of opinion evidence by persons other than authorised persons in case involving environmental nuisance.[177]

2.10.1 Consistency with FLPs

The explanatory notes state that cl 41:

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173 Explanatory notes, p 7.

174 Statement of compatibility, p 2.

175 Statement of compatibility, p 6.

176 Submission 11, p 6.

177 Department of Environment, Science and Innovation, correspondence, 13 March 2024, p 44.

> …could potentially reverse the onus of proof by placing the onus on the defendant to prove a certificate about a sample analysis is proof of the evidence stated in the certificate about a sample analysis. However, the certificate is only to be treated as evidence and is not conclusive proof of the matters stated in the sample analysis. The party affected by the production of the certificate as evidence in a civil proceeding will continue to be provided an opportunity to challenge a fact sought to be proven by the certificate.[178]

2.11 Confidentiality of information

Clauses 49 and 50 of the Bill remedy a potential unintended consequence that was inserted in the EP Act by the EPOLA Act 2023 which may unduly limit the sharing of appropriate information with other Queensland Government agencies and law enforcement agencies in other jurisdictions.

Clause 49 clarifies that use or disclosure of confidential information can occur where it is necessary for the administration of the EP Act or to perform the person's functions or exercise the person's powers under the EP Act, or is otherwise required or permitted under the EP Act or another law.

Clause 50 permits the exchange of information with other relevant entities if there is an information-sharing arrangement in place. The explanatory notes state this section is discretionary rather than a prerequisite to sharing information as it is intended to facilitate information-sharing, for example, where having an arrangement in place will make the sharing and exchange of information more expeditious.[179]

2.11.1 Consistency with human rights

Section 25 of the HRA states that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and not to have the person's reputation unlawfully attacked. The Bill engages this right through cls 49-50. These amendments may create a limitation on privacy and reputation rights in that the use of these powers entails the disclosure of information about a person that may be personal information, as well as information about a person's interactions with a law enforcement agency.[180]

The statement of compatibility notes:

> The purpose of allowing for sharing confidential information in the circumstances set out in section 579D is to uphold the law and assist other law enforcement agencies to uphold the law. It protects the wider community by ensuring that the relevant Queensland Government agencies and law enforcement agencies in other jurisdictions can access information necessary to fulfil their regulatory mandates and act on breaches of the legislation which they administer. New section 579E does not create additional permissions for the administering authority to use or disclose of someone's confidential information but rather allows for appropriate mechanisms to be in place for the information to be shared…
>
> There are no less restrictive and reasonably available alternatives to the amendments having regard to the nature of the amendment as a relatively minor change as part of clarifying the scope and ensuring the intended operation of an existing power under the EP Act.[181]

[178] Explanatory notes, pp 8-9.

[179] Explanatory notes, p 39.

[180] Statement of compatibility, p 7.

[181] Statement of compatibility, pp 8-9.

Appendix A – Submitters

Sub #	Submitter
1	Cement Concrete & Aggregates Australia
2	Environment and Social Governance Research Group, School of Law, Queensland University of Technology
3	Waste Recycling Industry Association Queensland Inc
4	Sandy Bolton MP
5	City of Gold Coast
6	Logan City Council - Officer-level submission
7	Australian Pork Ltd
8	Queensland Resources Council
9	Environmental Health Australia (Queensland) Incorporated
10	Confidential
11	Local Government Association of Queensland
12	Queensland Renewable Energy Council
13	Queensland Cane Agriculture & Renewables
14	Queensland Water Directorate (qldwater)
15	Waste Management and Resource Recovery Association of Australia
16	Ipswich City Council - Officer-level submission
17	Association of Mining and Exploration Companies
18	Australian Lot Feeders' Association
19	Australian Council of Recycling
20	Queensland Law Society

Appendix B – Officials at public departmental briefings

Public briefing - 4 March 2024

Department of Environment, Science and Innovation

- Claire Andersen, Executive Director, Operational Support, Environmental Services and Regulation
- Louise Karle, Manager, Regional and Regulation Support, Operational Support, Environmental Services and Regulation
- Lawrie Wade, Director, Environmental Policy and Legislation, Environment and Conservation Policy and Legislation Branch, Environment and Heritage Policy and Programs
- Theo Verrills, Manager, Environmental Policy and Legislation, Environment and Conservation Policy and Legislation Branch, Environment and Heritage Policy and Programs
- Stephen Potts, A/Executive Director, Environmental Policy and Legislation, Environment and Conservation Policy and Legislation Branch, Environment and Heritage Policy and Programs

Public briefing - 22 March 2024

Department of Environment, Science and Innovation

- Claire Andersen, Acting Deputy Director-General, Environmental Services and Regulation
- Louise Karle, Manager, Regional and Regulation Support, Operational Support, Environmental Services and Regulation
- Lawrie Wade, Director, Environmental Policy and Legislation, Environment and Conservation Policy and Legislation Branch, Environment and Heritage Policy and Programs
- Theo Verrills, Manager, Environmental Policy and Legislation, Environment and Conservation Policy and Legislation Branch, Environment and Heritage Policy and Programs
- Stephen Potts, A/Executive Director, Environmental Policy and Legislation, Environment and Conservation Policy and Legislation Branch, Environment and Heritage Policy and Programs

Appendix C – Witnesses at public hearing

Public hearing - 18 March 2024

Queensland Law Society

- Michael Connor, Chair of the QLS Planning and Environment Law Committee
- Claire Meiklejohn, Member, of the QLS Planning and Environment Law Committee
- Wendy Devine, Principal Policy Solicitor of the QLS Planning and Environment Law Committee

City of Gold Coast

- Dr Jemma Purandare, Coordinator Environmental Assessments and Approvals

Logan City Council

- Brett Esbensen, Health, Climate and Conservation Manager
- Cherie Parkyn, Environmental and Immunisation Program Leader

Queensland Water Directorate (qldwater)

- David Wiskar, Program Director
- Dr Louise Reeves, Major Program Lead

Waste Recycling Industry Association Queensland

- Alison Price, Chief Executive Officer

Australian Council of Recycling

- Suzanne Toumbourou, Chief Executive Officer

Queensland Cane Agriculture and Renewables

- Panikos Spyrou, Chief Executive Officer
- Michael Kern, Chief Strategy Officer

Australian Pork Limited

- Margo Andrae, Chief Executive Officer
- Tanya Pittard, General Manager Policy and Industry Relations

Queensland Resources Council

- Leanne Bowie, Service Member and Legal Advisor
- Hannah Gardiner, Environment Policy Adviser

Cement Concrete & Aggregates Australia

- Roger Buckley, Interim State Director Queensland
- Victoria Musgrove, Queensland Planning Approvals Manager, Holcim Australia

Queensland Renewable Energy Council

- Katie-Anne Mulder, Chief Executive Officer
- Frances Hayter, Director, Sustainability and First Nations

Abbreviations

ACR	Australian Council of Recycling
AI Act	*Acts Interpretation Act 1954*
Bill	Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024
Biosecurity Act	*Biosecurity Act 2014*
CCAA	Cement Concrete & Aggregates Australia
CN	clean-up notice
committee	Health, Environment and Agriculture Committee
QREC	Queensland Renewable Energy Council
DA	development approval
DES	Department of Environment and Science
DESI	Department of Environment, Science and Innovation
DN	direction notice
EA	environmental authority
EEO	Environmental Enforcement Order
EHAQ	Environmental Health Australia Queensland
EP Act	*Environmental Protection Act 1994*
EP Regulation	Environmental Protection Regulation 2019
EPO	environmental protection order
EPOLA Act 2023	*Environmental Protection and Other Legislation Amendment Act 2023*
FLPs	Fundamental legislative principles
GED	general environmental duty
HRA	*Human Rights Act 2019*
IAS	impact analysis statement
IGAE	Intergovernmental Agreement on the Environment
LGAQ	Local Government Association of Queensland
LSA	*Legislative Standards Act 1992*
OQPC	Office of the Queensland Parliamentary Counsel
PFAS	per-and poly-fluoroalkyl substances
QCAR	Queensland Cane Agriculture and Renewables

qldwater	Queensland Water Directorate
QLS	Queensland Law Society
QRC	Queensland Resources Council
QREC	Queensland Renewable Energy Council
Review	R Jones and S Hedge, *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties*, 1 September 2022.
TEP	transitional environmental program
WR Act	*Waste Reduction and Recycling and Other Legislation Amendment Act 2023*
WRIAQ	Waste Recycling Industry Association Queensland

Dissenting report

Stephen Andrew MP

State Member for Mirani

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Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024

Dissenting Report

10 April 2024

I have a number of concerns around some of the potential, unintended consequences of this bill. These include:

1. Clause 13 - Offence for Contravening General Environmental Duty (GED)

Under Clause 13's changes, the holder of an Environmentally Relevant Activity (ERA), licensed under an EA and operating in compliance with its conditions, could be issued with an investigation order or an EEO, compelling the operator to undertake actions over and above the conditions of their EA.

This presents a significant risk for operators, particularly in terms of unforeseen expenditures, where major changes to infrastructure or the installation of costly new equipment may be required.

The new offence therefore introduces an element of retrospectivity, that is not in accordance with Queensland's Fundamental Legislative Principles.

It will also make investing in a site extraordinarily risky, particularly as it may be impossible for an operator to comply with any new conditions.

As the QRC pointed out, the bill's changes could effectively put people out of business, simply because they are unable to comply with reduced limits.

All this creates unacceptable levels of sovereign risk, uncertainty, and potentially costly impacts for businesses operating under EAs in Queensland.

2. Powers of entry - third party property rights

Proposed new section 369E of the Act authorises the recipient of an environmental enforcement order (EEO) to enter land they do not own, to take actions directed of them in an EEO, on only 2 days' notice.

This power is far too expansive and adversely affects third party property rights.

3. Duty to notify of environmental harm

Currently, the Act requires a person to report potential or actual environmental harm within 24 hours of when a person 'becomes aware' of that harm.

Clause 17 of the Bill amends Section 320A of the Act by changing the wording of the 24-hour notification period, to when the person *'becomes aware, **or ought reasonably to have become aware'*** of potential or actual environmental harm.

Clarification is needed on how the Administering Authority will quantify or measure, the exact moment that someone *'ought reasonably to have become aware*' of something.

Such highly subjective wording only serves to cause confusion and uncertainty for operators and third parties associated with them.

The whole clause, *'ought reasonably to have become aware*' needs to be deleted.

4. No Regulatory Impact Statement

The bill's strengthened powers for allowing the department to alter the conditions on EA's may trigger significant additional costs in some cases.

The bill should therefore have been the subject of a regulatory impact statement.

Despite this fact, the department did no more than a basic IAS.

No consultation RIS or decision RIS was undertaken at all.

Lack of Consultation

Adequate timeframes were not provided to stakeholders to respond to the amendments in the bill.

According to a number of submitters, no form of stakeholder engagement was undertaken by the Department of Environment, Science and Innovation (DESI) beyond that set out in its Consultation Paper.

They were also not consulted on any exposure drafts of the bill.

Doing so would have allowed stakeholders the opportunity to address concerns and unintended consequences, which makes it very unfortunate the step was omitted.

Use of ambiguous language

A number of submitters raised concerns over the inclusion of 'public health' and 'safety' in the definition of 'environmental value'.

None of these terms are objectively identifiable or measurable.

Their precise meaning should have been properly clarified and defined within the bill itself.

The bill's amended definitions of 'environmental nuisance', and 'material and serious environmental harm' are also highly subjective.

At the very least, guidelines should have been provided with the Bill, in order to create a clear and consistent application of all these terms.

Lack of Detail or Clarity Overall

The bill lacks specific details across a number of its changes, leaving open the question of its likely impacts.

It is simply not good enough for the government to keep producing these broadly drafted 'framework' bills, with no details on how the bill's ambiguously stated changes will work in practice, or how it will be administered.

It means that stakeholders and parliament are expected to support the passage of a bill, the specific details and parameters of which are unknown.

Stephen Andrew MP