

Government response: Independent review of environmental regulator's powers and penalties

Background

An independent review into the adequacy of powers and penalties available under the *Environmental Protection Act 1994* has been completed and the final report provided to the Minister for Environment and the Great Barrier Reef and Minister for Science and Youth Affairs. The review was initiated in part due to the significant odour nuisance issues in the Swanbank industrial area and surrounds but has relevance to all of Queensland.

The review was conducted by retired Judge Richard Jones and Barrister Susan Hedge. Mr Jones served as a judge of Queensland's District Court and Planning and Environment Court for more than 10 years before retiring from the bench in October 2021. He also served as a member of the Land Court of Queensland from 2005 to 2010 and has very significant experience in environmental law. Ms Hedge was a Crown Prosecutor and Senior Crown Prosecutor at the Office of the Director of Public Prosecutions for eight years, prosecuting serious and complex criminal offences. She joined the private Bar in 2013 where she practices in the areas of planning and environment, public, administrative, regulatory and criminal law and commissions and inquests.

The review aimed to identify whether the tools available to the regulator, particularly in relation to nuisance, are sufficiently contemporary to deal with the challenges of the future and make any recommendations for improvement for the regulation of Queensland's environment.

In recent years, the environmental impacts from a number of industries have presented increasingly complex regulatory challenges. These are often linked to growing communities with changing land uses over time, resulting in co-existence of urban and industrial areas with increased risks associated with dust, odour and noise.

The review considered environmental legislation of other jurisdictions as well as other Queensland regulatory legislation. As part of the review, submissions were received from the Queensland Law Society, the Bar Association of Queensland, the Queensland Environmental Law Association and the Local Government Association of Queensland. The review did not include broader stakeholder consultation. However, stakeholder consultation is expected to occur on any legislative changes proposed that would arise from the review.

Findings

The review found that the Environmental Protection Act generally has an adequate range of powers and penalties to enforce environmental obligations and reduce the risk of environmental harm, however circumstances were identified (e.g. for nuisance matters), where the powers could be improved. Generally, the Environmental Protection Act benchmarks well against other legislation in Queensland and in other jurisdictions, particularly in relation to penalties. While fundamental changes are not required, recommendations were made to improve the legislation and enhance the effectiveness of tools available, with a particular focus on addressing nuisance issues and protecting health and wellbeing.

The review found that the focus of existing powers and penalties tends to be reactive rather than proactive. The review also identified a need to incorporate better consideration of health and wellbeing in the legislation and introduce clearer principles such as the precautionary principle, polluter pays, primacy of prevention and proportionality.

The review reinforced the need to prevent harm occurring and has recommended a new offence for breach of the general environmental duty. This would emulate similar provisions in work health and safety and biosecurity legislation, and recent changes adopted in interstate environmental legislation. The review also noted the importance of environmental authority conditions being clear, consistent, and enforceable, with the ability to update conditions over time, and for conditions to remain in force when authorities are cancelled or suspended.



Recommendations

The review made a number of recommendations aimed at better preventing pollution occurring, providing appropriate tools for nuisance matters to take stronger action against polluters and better protect community health and wellbeing.

Key recommendations included:

- greater emphasis be placed on the concepts of human health, wellbeing 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
- This would allow other 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
- creating a new offence for contravening the general environmental duty 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 environmental authority conditions to ensure they remain contemporary and effective
- clarifying that certain obligations contained in environmental authority conditions, such as site management and rehabilitation, continue under suspended or cancelled authorities
- specific recommendations in relation to the use of Transitional Environmental Programs and Environmental Protection Orders to improve their effectiveness.

The full list of 18 recommendations is available in the final review report and below in Table 1.

Government response

The Palaszczuk Government welcomes the findings and recommendations of the review.

The recommended changes are designed to ensure that the environmental regulator has the appropriate tools in place to prevent and appropriately manage environmental impacts, including ongoing nuisance, and deter environmental offending.

The Palaszczuk Government supports all of the recommendations. Several recommendations are already being progressed through the *Environmental Protection and Other Legislation Amendment Act 2023* (EPOLA Act), whilst the remainder will be subject to development of detailed proposals, further stakeholder consultation and regulatory impact assessment.

Building on the review recommendations, government may also consider a duty to restore environmental harm to align with recommendation 1 (regarding the polluter pays principle), and amendments to Environmental Protection Policies (subordinate legislation to the Environmental Protection Act) to assist in maintaining appropriate environmental authority conditions.

Detailed government response on recommendation

Table 1: Government response to recommendations

#	Recommendation	Government response	Comments
Principles			
1.	The principles underpinning the <i>Environmental Protection Act 1994</i> (EPA (Qld)) 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.	Support	The government may also consider the need for a duty to restore environmental harm to complement the polluter pays principle.
Definitions			
2.	Sections 8 and 9 of the EPA (Qld) should be amended to include the concept of "human health, safety and wellbeing" in the definitions of environment and environmental value.	Support	The inclusion of human health, safety and wellbeing will be in relation to qualities or physical characteristics of the environment

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3.	Section 15 or sections 16 and 17 of the EPA (Qld) 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.	Support	Sections 15 to 17 relate to the definitions of environmental nuisance and material and serious environmental harm. The body of the review also contained the following recommendation, which is related and also supported in principle: 'amending the Act to provide that in respect of offences under section 437 or 438, environmental nuisance is a further alternative.'
4.	The threshold amounts for material and serious environmental harm should be reviewed and increased.	Delivered by EPOLA Act	
5.	Section 319 of the EPA (Qld) be amended by omitting the words "reasonable and practicable" and inserting in lieu thereof "reasonably practicable".	Support	
Statutory notices			
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.	Support	Partially addressed in the EPOLA Bill
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 EPA (Qld); (b) extend the power to issue an EPO for contravention of an offence under section 358(e) to all offences under the EPA (Qld) 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 EPA (Qld)	Support	
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 EPA (Qld) or an offence provision that captures both related persons and persons issued an EPO pursuant to section 358.	Support	
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).	Support	
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.	Support	Partially addressed in the EPOLA Act
Restraint orders			
11.	In the event that a general environmental duty (GED) offence was not preferred, consideration might be given to including the general environmental duty within the scope of operation of section 505 of the EPA (Qld), 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).	Delivered by recommendation 15	Recommendation 15 is the preferred option for providing enforcement actions to DES in the event a person contravenes the GED.

#	Recommendation	Government response	Comments
Environmental authority conditions			
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.	Support in principle	The intent of keeping conditions fit for purpose is supported. This recommendation is supported in principle subject to the outcome of consultation and regulatory impact assessment. Consideration of the caveats mentioned in paragraph 223 of the report is also supported.
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.	Delivered by EPOLA Act	
Registers suitable operators			
14	Schedule 4 of the EPA (Qld) be amended to include a contravention of sections 3571 and 363E as disqualifying events for the purposes of section 318K of the EPA (Qld).	Support	The recommendation is to amend the definition of an 'environmental offence' for a disqualifying event to include a failure to comply with conditions of a licence under section 3571 and an offence not to comply with a direction notice under section 363E.
Offences			
15	Consideration should be given to creating an offence for breaching the general environmental duty.	Support	
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).	Support	
Civil matters			
17	Chapter 10, Part 1 of the EPA (Qld) be amended to expand the evidentiary aids limited to criminal proceedings to be available in civil proceedings.	Support	
18	The words "by the prosecutor" be deleted from section 490(7).	Support	

Next Steps

The Palaszczuk Government is committed to open and transparent government and to consulting with the wider community prior to considering the implementation of any of the recommendations.

Several of the recommendations have already been delivered through the *Environmental Protection and Other Legislation Amendment Act 2023* which was passed by the Queensland Parliament in March 2023. The remainder of the recommendations will be subject to development of detailed proposals, further stakeholder consultation and consideration of regulatory impact assessment.

It is intended to prepare a detailed public consultation paper and/or Regulatory Impact Statement for release in the second half of 2023 followed by the development of the necessary amendments to legislation.