Improving the powers and penalties provisions of the *Environmental Protection Act 1994*

Consultation paper

Introduction

The Queensland Government is committed to protecting and restoring our environment and the health of our communities. It delivers this in many ways, including work to protect biodiversity, growing our protected area estate, investing to transform our energy system and cut emissions and regulating industries that have the potential for environmental harm or pollution.

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 increased risks associated with co-existence of industrial and residential land uses.

A key tool for responding to these issues is the *Environmental Protection Act 1994.* An independent review of the powers and penalties under the Act was initiated in 2022 to consider whether they are sufficient for responding to these challenges.

The review was, in part, initiated in response to odour nuisance issues in the Swanbank industrial area and surrounding areas, where over 4,600 complaints received from residents indicated that there were serious consequences impacting on a community's health and wellbeing.

The review findings resulted in 18 recommendations – supported by the Government, with one supported in principle – on how Queensland's environmental laws can better protect the community and the environment. This paper sets out proposed amendments to give effect to the recommendations.

The proposed amendments are firstly aimed at facilitating a more proactive approach to environmental risk management to prevent the community being exposed to harm. Secondly, the responses seek to remove barriers to the timely regulatory response to manage and correct harm that has occurred.

Key objectives to be delivered by the proposed amendments include:

- Promoting proactive action to prevent environmental harm by supporting the existing General Environmental Duty that applies to all Queenslanders with an offence provision.
- Correcting environmental harm that has occurred by making it clear that if a person's actions cause environmental harm or contamination, there is a general duty to restore the environment or clean up the contamination without the need for a notice to be issued.
- Streamlining the number of statutory notices to reduce regulatory complexity and improve response timeliness, particularly with reference to Environmental Protection Orders, Direction Notices and Clean-up Notices.

The Queensland Government is committed to protecting the environment for the benefit of all Queenslanders and will make the necessary changes to ensure that it can take timely and effective action where the community is negatively impacted by operations.

These changes will help ensure our environmental laws are fit for purpose to deal with the current and future needs of the Queensland community.

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Glossary of abbreviations

AIA	*Acts Interpretation Act 1954* (Qld)
CN	Clean-up Notice
DES	Department of Environment and Science
DN	Direction Notice
EA	Environmental Authority
EEO	Environmental Enforcement Order
EP Act	*Environmental Protection Act 1994* (Qld)
EP Regulation	Environmental Protection Regulation 2019 (Qld)
EPO	Environmental Protection Order
EPOLA Act 2023	*Environmental Protection and Other Legislation Amendment Act 2023* (Qld)
EPP	Environmental Protection Policy
GED	General Environmental Duty
IGAE	Intergovernmental Agreement on the Environment
TEP	Transitional Environmental Program

Summary of the review of powers and penalties under the *Environmental Protection Act 1994*

In 2022, an independent review into the adequacy of powers and penalties available under the *Environmental Protection Act 1994* (the EP Act) was completed.

The review was conducted by retired Judge Richard Jones and former Senior Crown Prosecutor 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 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.

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

The review considered the 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.

Findings

The review findings are set out in the *Independent Review of the Environmental Protection Act 1994 (Qld) Report* (the Report), available online at:
https://environment.des.qld.gov.au/management/policy-regulation/independent-review

The review found that the EP 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 where the EP Act could be improved. Generally, the EP Act benchmarks well against other legislation in Queensland and environmental legislation from other jurisdictions, particularly in relation to penalties. 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, and there is 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 recommended a new offence for a breach of the general environmental duty. This would be similar to work health and safety and biosecurity legislation, and contemporary approaches adopted in interstate environmental legislation and promote the proactive management of environmental risks. The review also noted the importance of environmental authority (EA) 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.

Review recommendations and Government response

The review made 18 recommendations aimed at better preventing environmental harm from occurring, providing appropriate tools for nuisance matters to take effective action against polluters and better protect community health and wellbeing.

The Government response was released on 26 May 2023. The Government supports all of the recommendations other than Recommendation 12, which is supported in principle.

Some recommendations have already been addressed through the *Environmental Protection and Other Legislation Amendment Act 2023* (EPOLA Act 2023), which progressed independently of and in parallel to the development of the Report.

The EPOLA Act 2023 included amendments which address Recommendations 4 and 13. 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 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).

Having regard to the nature of Recommendation 12 to expand the power to amend the conditions of an EA, the review recognised that to amend an EA holder's existing conditions has the potential to have significant adverse impacts on the economic viability of an activity. However, the Government recognises the importance of keeping conditions fit for purpose to address contemporary environmental concerns and account for the development of new technologies that support pollution and emissions reduction. Accordingly, this recommendation is supported in principle.

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.

Table 1: Government response to recommendations

#	Recommendation	Government response (incl. comments)	
Principles			
1.	The principles underpinning the Environmental Protection Act 1994 (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.
3.	Section 15 or sections 16 and 17 of the EPA (Qld) should be amended to make	**Support**	Sections 15 to 17 relate to the definitions of environmental nuisance

#	Recommendation	Government response (incl. comments)	
	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.		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 2023**	
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 Act 2023
7.	The Environmental Protection Order 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	**Support**	

#	Recommendation	Government response (incl. comments)	
	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.		
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 2023.
Restraint orders			
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 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.
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 2023**	

#	Recommendation	Government response (incl. comments)	
Registers suitable operators			
14.	Schedule 4 of the EPA (Qld) be amended to include a contravention of sections 357I 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 357I 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**	The section referred to in the recommendation has been consequentially renumbered as section 490(8) due to amendments under the EPOLA Act 2023.

Have your say - how to provide responses

This paper sets out the proposed approach to delivering on the Government's commitment to implement the Report's recommendations and provides an opportunity for stakeholders and interested people to provide input.

The scope of this consultation is to seek comments in response to the proposed legislative amendments described in this paper. It is requested that feedback refers to the relevant recommendation number.

For each recommendation the following questions are suggested as a basis for the response:

- Is the proposal supported as the most effective way to implement the recommendation?
- What further improvements could be made?
- Are there regulatory impacts on activities which comply with the EP Act that should be identified?
- Are there benefits to the environment, community or industry that should be further highlighted?

You are invited to make a submission to these proposed legislation changes. Written submissions should be emailed to EPAct.Policy@des.qld.gov.au by 5:00pm 10 November 2023.

Feedback from submissions will be used to assist finalising amendments that respond to the recommendations. In addition, meetings with key stakeholder groups may be held.

Responses may be set out in table format as follows:

Recommendation number for proposal	Response

Principles

Recommendation 1

The principles underpinning the Environmental Protection Act 1994 (Qld) should be amended to include:

(a) The principle of polluter pays;
(b) The proportionality principle;
(c) The principle of primacy of prevention;
(d) The precautionary principle.

The Report recommended giving these principles increased prominence in the EP Act to reinforce proactive approaches to harm prevention, in preference to reactive responses to harm that are the focus of the current framework.

Presently, some of the recommended principles are embedded in the EP Act or through existing regulatory practice. For example:

- the polluter pays principle and the precautionary principle are principles of environmental policy that Queensland committed to in the Intergovernmental Agreement on the Environment (IGAE) which is included as a schedule to the *National Environment Protection Council (Qld) Act 1994*;
- the polluter pays principle underpins the payment of annual fees by holders of EAs which varies based on the impact of the environmentally relevant activity they perform;
- the precautionary principle is an existing consideration in the standard criteria in the EP Act for making a range of decisions including for EAs;
- the principle of primacy of prevention – that prevention of harm to human health and the environment is preferred to remedial or mitigation measures – is the basis of the existing general environmental duty, which requires a person to take all reasonable and practicable measures to prevent or minimise environmental harm. However, its effectiveness as a duty is limited by the lack of a penalty for non-compliance (see Recommendation 15). Further, it is not explicitly identified as a consideration in making instruments such as Environmental Protection Policies (EPPs);
- the principle of proportionality – that a decision, action, or thing directed towards minimising harm or a risk of harm to human health or the environment should be proportionate to the harm or risk of harm that is being addressed – is consistent with best practice regulation and DES's Regulatory Strategy.

Stating environmental policy principles up-front in the EP Act will provide clarity and direction – to government, industry and communities – on the values underpinning the EP Act and the principles under which it should be administered.

Proposal:

A new section will be introduced to Chapter 1, Part 2 of the EP Act identifying the principles which should be had regard to in administering the EP Act. As the identified environmental policy principles are to be applied to the general administration of the EP Act, this will flow through to the making of regulations, Environmental Protection Policies, guidelines and codes of practice.

It is proposed to amend the EP Act such that the four principles, as recommended in the Report, are prominently featured in the EP Act, that is:

- the polluter pays principle;
- the precautionary principle;
- the principle of primacy of prevention; and
- the principle of proportionality.

For completeness, it is proposed to also include all of the principles of environmental policy under the IGAE, that is:

- the precautionary principle (which was also recommended by the Report);
- intergenerational equity;
- conservation of biological diversity and ecological integrity; and
- improved valuation, pricing and incentive mechanisms.

The first three of these IGAE principles are already a part of the standard criteria of the EP Act (Schedule 4), which must be considered as part of various administrative processes in provisions across the EP Act (e.g. decision-making provisions relating to environmental impact statements and applications for EAs). The last provision is relevant to policy decisions rather than the assessment of specific applications and as a consequence is not included in the standard criteria.

It is not intended that affirming the principles as part of the objects and achievement of objects under the EP Act would override or limit specific provisions of the EP Act that contain a requirement for a decision-maker to have regard to environmental policy principles.

<u>Duty to Restore</u>

In response to Recommendation 1, the Government Response also stated that 'The government may also consider the need for a duty to restore environmental harm to complement the polluter pays principle'. This matter is considered under the 'Statutory Notices' chapter of this consultation paper.

Definitions

Recommendation 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.

The Report observed that the relevance and importance of human health is dealt with in an indirect way within the EP Act, noting there were only four direct references to human health throughout the EP Act. It concluded it would be desirable to incorporate the concepts of human health and wellbeing more directly into the definitional sections of the EP Act.

The matters of human health, wellbeing and safety are to some extent currently present in the definitions of 'environment' (section 8) and 'environmental value' (section 9) in the EP Act. For example, section 9 currently defines an environmental value as 'a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety'. Also, in section 8(a), people are specified as being part of ecosystems, and therefore ecological health applies to people as they are part of an ecosystem.

Further, due to section 9(b) providing for declaration of environmental values under an EPP or regulation, there are other instances of human health, wellbeing and safety sitting within the scope of environmental protection concepts under the EP Act. For example, section 6 of the Environmental Protection (Air) Policy 2019 defines environmental values to include 'the qualities of the air environment that are conducive to human health and wellbeing'.

However, increasing the prominence of human health, safety and wellbeing in the definitions of 'environment' and 'environmental value' more strongly signals to the administering authority, industry and communities that activities and decisions affecting the environment have the potential to adversely affect people's health and wellbeing. The recommendation to amend the definition of 'environmental value' will also flow through to see adverse effects on human health, safety and wellbeing being incorporated into concepts of environmental harm (section 14), environmental nuisance (section 15), material environmental harm (section 16) and serious environmental harm (section 17).

<u>Proposal:</u>

Sections 8 and 9 will be amended to more clearly state that human health, wellbeing and safety are included in 'environment' and 'environmental value'.

The definition of 'environment' in section 8 will be amended to include, and make clear that, physical factors of the surroundings of human beings – including land, waters, atmosphere, climate, sound, odours and tastes – are part of the environment. This would reinforce aspects of the environment conducive to human health, wellbeing and safety that are already prescribed as environmental values through EPPs, while limiting the amendment such that human health is only protected by the EP Act to the extent it is affected by the environment. This approach to the amendments is important for maintaining clarity and avoiding duplication or overlap across Queensland statutes, with particular regard to the *Public Health Act 2005* (Qld) given its object to protect and promote the health of the Queensland public.

Section 9 will be amended to more clearly incorporate human health, by stating an environmental value is 'a quality or physical characteristic of the environment that is conducive to public health, public amenity or public safety'.

It is also proposed that the reference in section 8(c) to qualities and characteristics of the environment contributing to biological diversity and integrity, intrinsic or attributed scientific value or interest, or amenity, harmony and sense of community, be relocated to the definition of 'environmental value' in section 9. It is considered that section 9 is the more proper placement as it already functions to describe qualities and characteristics that meet some beneficial end or purpose.

Recommendation 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.

Environmental nuisance (defined in section 15) is included in the definition of 'environmental harm' in section 14 of the EP Act, but expressly excluded from the meaning of what constitutes material and serious environmental harm in sections 16 and 17. The Report outlined that this presented difficulties with dealing with environmental nuisance causing serious impacts, particularly nuisance arising from odour, dust or fumes. The Report concluded the amendment should be made to ensure the definitions of environmental nuisance, and material and serious environmental harm do not prevent action being taken for material or serious environmental harm merely because it has characteristics listed in section 15.

Adopting the recommendation would not alter the overall scope of what constitutes environmental harm, but would clarify the available remedies (statutory notices, orders), duties (e.g. the duty to notify environmental harm) and criminal offences (e.g. for serious or material environmental harm) proportionate to the harm's impact. This ensures the administering authority has the appropriate tools to minimise the impacts of extreme cases of environmental nuisance, and in turn, improves public confidence in the governments' ability to manage these cases effectively.

Complementary to Recommendation 3, the body of the Report (at paragraph 248) also recommended allowing a finding of environmental nuisance to be made as an alternative when deciding a charge of material or serious environmental harm where the court is not satisfied a person is guilty of material or serious environmental harm (section 439). This would broaden conviction options for the courts, ensuring that proportionate penalties can be imposed on persons when the court finds the environmental harm constituted environmental nuisance.

<u>Proposal:</u>

Sections 15, 16 and 17 will be amended to ensure that despite contaminants having the prescribed characteristics of environmental nuisance stated in section 15 – for example, the release of aerosols, fumes, light, noise, odour, particles or smoke – the release may constitute material and serious environmental harm.

Section 15 will specify that an unreasonable interference or likely interference with an environmental value caused by a matter listed in the section (e.g. fumes, noise, odour) is not environmental nuisance if it is serious or material environmental harm. That is, the interference is no longer to be regarded as nuisance once it meets the definitions for either material or serious environmental harm set out in sections 16 and 17.

Sections 16 and 17 will be amended to remove the exclusionary words 'other than environmental nuisance'.

Examples of relevant considerations for establishing material or serious environmental harm from nuisance matters may be included in DES's compliance and enforcement guidance to provide further guidance.

Local governments are, in some circumstances, responsible for the administration and enforcement of environmental nuisance offences under sections 440 and 443A of the EP Act as devolved matters under section 130 of the Environmental Protection Regulation 2019 (EP Regulation). The intention is not to interfere generally with the operation of section 130 of the EP Regulation. However, it may be necessary to make amendments to provide certainty and clarity on which entity is the administering authority in relation to an environmental harm event. This could involve specifying in the EP Act or the EP Regulation that environmental harm that meets the characteristics of nuisance under section 15 continues to be a devolved matter for the purposes of sections 440 and 443A unless the Chief Executive makes a determination that the environmental harm event constitutes material or serious harm.

Section 439 will also be amended, or a new provision inserted, to provide that in a proceeding for an offence against section 437 or 438, if the court is not satisfied the defendant is guilty of the offence charged but is satisfied the defendant is guilty of an offence under section 440, then the court may make finding of guilt of the offence under section 440.

Recommendation 4

The threshold amounts for material and serious environmental harm should be reviewed and increased.

THIS RECOMMENDATION HAS BEEN IMPLEMENTED.

Changes to the threshold amounts for material and serious environmental harm in the EP Act were made through the EPOLA Act 2023 (sections 4 and 5).

No further proposals for this recommendation are being considered.

Further information regarding EPOLA Act 2023 can be found on the Queensland Legislation webpage: https://www.legislation.qld.gov.au/view/html/bill.first/bill-2022-002/lh.

Information on thresholds for material and serious environment harm can be found at: https://environment.des.qld.gov.au/management/compliance-enforcement/obligations-duties

Recommendation 5

Section 319 of the EP Act be amended by omitting the words "reasonable and practicable" and inserting in lieu thereof "reasonably practicable".

The Report considered the current wording of the GED under section 319, to take 'reasonable *and* practicable' (emphasis added) measures to prevent or minimise harm implies a two-stage test first, that a measure must be reasonable and second, that the measure must also be practicable. It concluded such a test is unnecessary as, in the context of what section 319 is trying to achieve, the words are largely synonymous.

Implementing the recommendation to introduce the words 'reasonably practicable' to section 319 would be beneficial because it:

- eliminates the apparent unnecessary two-stage test;
- provides a single and more widely recognised test of deciding what is reasonably practicable;
- introduces a level of consistency with the legislative approach adopted to address similar issues both in Queensland and interstate (for example, in the *Work Health and Safety Act 2011* (Qld) and under the GED in the *Environmental Protection Act 2017* (Vic); and
- is likely to be more familiar to the courts and others who must interpret the legislation.

Proposal:

Section 319(1) of the EP Act be amended by omitting the words 'reasonable and practicable' and replacing them with 'reasonably practicable'.

In addition, other existing instances in the EP Act of 'reasonable and practicable' will be similarly amended consistent with the rationale for amending section 319 under Recommendation 5, and to avoid creating further inconsistencies of terms in the legislation. This affects only two sections: section 4(6) and section 478.

Statutory notices

Rationalising notices

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 Report raised (at paragraphs 165-170) that it might be possible and beneficial for some of the existing notices to be combined into one notice, namely Environmental Protection Orders (EPOs), Direction Notices (DNs) and Clean-up Notices (CNs).

The current purposes of these notices are:

- EPOs can require a person to not start, or stop, an activity, or limit when and under what conditions they can carry out an activity, or require a person to take an action within a stated time period (section 358);
- DNs can be used if contravention of a prescribed provision (e.g. unlicensed environmentally relevant activities, environmental nuisance, noise standards) has occurred, or is likely to occur, and requires the recipient to remedy the contravention (section 363A); and
- CNs can be issued to a prescribed person in relation to a contamination incident and require the recipient to prevent or minimise contamination, rehabilitate or restore the environment, assess the nature and extent of the environmental harm or risk of environmental harm and keep the administering authority informed (section 363H).

One of the reasons behind the Report's suggestion is that it found in many of the case studies reviewed, multiple notices were issued by the administering authority. It was suggested that a 'combined' notice would permit flexibility and the opportunity to issue one notice covering a number of issues. The Report also observed that in many instances considerable time is spent on deciding which notice type is the most appropriate and that a combined notice could streamline the process and take this uncertainty out of the decision-making process.

A number of the Report's recommendations were about how to streamline and expand the application of EPOs, DNs and CNs. However, given the Report also noted efficiencies to be gained by rationalising notices there is opportunity to address the recommendations relating to specific types of notices (Recommendations 6-9) in the process of replacing EPOs, DNs and CNs with a single compliance notice.

Environmental Evaluations (EEs) were suggested by the Report for inclusion in a combined notice. EEs are different in nature to EPOs, DNs and CNs because while the latter are notices to ensure compliance with the requirements of the EP Act, EEs are required where information about the impact on the condition of the environment or the status of compliance with environmental requirements is needed to inform further decision making. EEs at times provide the information or grounds for an EPO to be issued, however in these cases it is at a different step in the process, and hence the advantage of combining EEs into the combined notice is not apparent and is not proposed to progress at this time.

Proposal:

Sections 358 – 363, ss 363A – 363E and ss 363F - 363L of the EP Act will be repealed, or alternatively the existing EPO provisions will be amended, to establish a new tool known as an Environmental Enforcement Order (EEO). Creating a new tool will, in effect, combine the existing powers and scope

available under EPOs, DNs and CNs. It is proposed that new sections providing for the EEO will have the features set out in Table 2.

Table 2: Features of the proposed EEO

Feature	Proposal
Grounds on which the EEO may be issued	An EEO will be able to be issued for the grounds that an EPO, DN and/or CN can currently be issued for. For example, to secure compliance with the GED or EA conditions, and for contraventions of specific provisions relating to environmental harm (e.g. section 440). To facilitate the amalgamation of CNs, the ground to issue will also be expanded to include securing compliance with the proposed duty to restore.
Who the EEO may be issued to	The administering authority will be able to issue the EEO to all persons who can currently be issued an EPO, DN and/or CN: a person, a related person of a company and a prescribed person for a contamination incident. It is intended that existing definitions for these types of persons will be retained.
Particulars of form and content	New provisions for EEOs will prescribe matters of form and content for a validly issued order. These matters will streamline the existing requirements for EPOs, DNs and CNs and include: • the requirement to state the grounds on which the EEO is being issued and, where the grounds is a contravention, how the relevant section of the EP Act has been contravened; • the ability to impose a reasonable requirement for a person to take steps such as stop an activity, carry out an activity subject to certain conditions, undertake assessment of environmental harm, undertake restoration of the environment, and report to the administering authority about steps taken to comply with the EEO; • the requirement to specify a date for the recipient to comply with matters set out in the EEO; • the requirement to state the review and appeal rights of the recipient; • the ability to issue the EEO verbally where it is not practicable in the circumstances to issue a written notice, and then confirm in writing as soon as practicable afterwards; and • the requirement for the administering authority to issue a separate EEO to each recipient where the EEO is for more than one person.
Cost recovery	Provision will be made for: • the administering authority to recover costs from the person who was issued the notice, or a related person, where the administering authority has undertaken remedial work to give effect to the notice; and • a recipient that complies with the EEO but did not cause or permit a contamination incident that is the subject of the EEO to recover costs from the person who did cause or permit the incident to happen.

Offences and penalties	Offences for non-compliance with a requirement of an EEO, without reasonable excuse, will be separated into categories to ensure the applicable penalties are proportionate not only to the offence of non-compliance, but also with regard to the contravention, or apprehended contravention, for which the notice is issued to remedy. For example, lower range penalties are more suitable where the EEO was issued in relation to an environmental nuisance contravention or noise standard contravention. Consistent with other offences in the EP Act, the distinction between a wilful contravention and a contravention will also apply. As with EPOs, DNs and CNs, it will be possible to issue penalty infringement notices under the State Penalties and Enforcement Regulation 2014 for the offence of contravening a requirement of an EEO. It will also be an offence to obstruct a recipient of an EEO in taking action to comply with the EEO, unless the person has a reasonable excuse.
Notification obligations of EEO recipients	Recipients of EEOs will have obligations to: • notify a buyer or transferee of the existence of an EEO when selling or disposing of the place or business to which the order relates; and • notify the administering authority if they cease to carry out the activity to which the EEO relates.
Provisions affecting undertaking of and/or compliance with the EEO	To facilitate fulfilment of an EEO, provisions will be made to: • provide for a procedure where the recipient of the notice is not the owner of the land on which action is required; and • give the administering authority a discretionary power to undertake the action required by the EEO itself where the recipient has failed to comply with the order.
Devolution to local government	Consequential amendments will be required to ensure existing powers pertaining to issuing notices continue to be devolved to local governments. Given the EEO will generally establish a broader notice power, the consequential amendments will seek to maintain the power for local governments in line their existing powers in relation to EPOs and DNs. For example, the amendments will continue to exclude their ability to issue to related persons of a company in line with current devolution authority under section 137 of the EP Regulation.

The proposed amendment will simultaneously implement the Report's recommendations for changes to the existing provisions for EPOs, DNs and CNs, however these changes will be implemented through provision for the EEO.

Rationalising EPOs, DNs and CNs is expected to result in a simpler process for notice recipients, as well as the administering authority. It will support better environmental outcomes by enabling a more responsive compliance approach.

Duty to restore

While not a recommendation set out in the Report, the Government's response to Recommendation 1 from the independent review stated it would consider the 'need for a duty to restore environmental harm to complement the polluter pays principle'.

To facilitate the response to the recommendations regarding improving and rationalising statutory notices and advancement of the polluter pays principle, a general duty to restore and rehabilitate following environmental harm is proposed to complement the existing GED.

The EP Act imposes a GED (section 319) under which a person must take measures to prevent or minimise environmental harm. However, while a reasonable person may think this would include restoring the environment if harm does occur, the GED is silent on the duties in relation restoration or clean-up. The Report identified the value in clearly spelling out the responsibilities of those who unlawfully contaminate the environment.

Under existing provisions, a person's lawful obligation to restore or rehabilitate harm they have caused is dependent on the receipt of a notice or order issued by the administering authority requiring them to do so. This includes through CNs that are presently available under the EP Act to require restoration of environmental harm. However, the Report recommended a rationalisation of notices to allow a more general notice to replace the existing three. In considering the rationalisation of notices, as well as the elevation of environmental policy principles such as polluter pays and primacy of prevention, there is an opportunity to address a regulatory gap by introducing a duty to restore environmental harm. A precedent exists under Victoria's *Environment Protection Act 2017* (section 31) for a duty to take restorative action to incidents causing environmental harm.

Existing obligations to rehabilitate or restore which arise through the issue of a statutory notice by the administering authority would be replaced with a continuous and proactive obligation through a general duty. This makes clear that a person must not wait for the administering authority to issue a notice to require clean-up or remediation. Notices would then be used only where necessary to ensure compliance with the duty to restore.

A duty to restore encourages quicker responses to contamination incidents such that they may be remedied before they cause greater harm. In this way, the duty would reinforce and complement the GED through a shared objective of harm prevention and/or mitigation.

Businesses can ultimately benefit from reduction in complexity, scale and cost of remediation measures by complying with the GED and duty to restore. Communities are also likely to benefit from more expedient restoration of environmental harm where a proactive approach driven by the duty to restore reduces duration and severity of impact of environmental harm.

<u>Proposal:</u>

A duty to restore environmental harm will be introduced. This duty would require 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 incident occurred.

The duty to restore will stand on its own; it will apply regardless of whether a person has breached their GED or not, or whether they have breached another provision under the EP Act (e.g. offence provisions for causing environmental harm).

The duty to restore will not apply to persons who have caused environmental harm authorised by an environmental requirement as defined in Schedule 4 of the EP Act (e.g. harm authorised by an EA)

which is already subject to a rehabilitation requirement in an EA or a progressive rehabilitation and closure plan or a prescribed condition for a small scale mining activity. As such, the duty will apply to any harm caused that was not authorised by an environmental requirement.

The proposed amendment will include a non-exhaustive list of factors a person must have regard to in deciding the measures that are 'reasonably practicable' to fulfil their duty to restore. This will largely be modelled on the factors under section 319(2) for the GED.

Failure to comply with the duty to restore environmental harm will be an offence where the environmental harm that occurred was material or serious. Creating an offence will result in better environmental outcomes by deterring persons from walking away from environmental harm they caused.

Consistent with other offences in the EP Act, there will be a distinction between a contravention and a wilful contravention. A penalty within the existing penalty range in the EP Act should attach, having regard to penalties prescribed for other offences involving actual or potential environmental harm (i.e. ss 437, 438, 440, 443 and 443A).

The offence can be complemented by existing regulatory tools, particularly statutory notices, to ensure that enforcement of the duty to restore can be dealt with proportionate to the environmental harm. This may necessitate other amendments, for example, to the State Penalties Enforcement Regulation 2014 for the purposes of allowing for infringement notices to be issued.

Recommendation 6(a)

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

THIS RECOMMENDATION HAS BEEN DELIVERED.

Clarification that a notice may require a person to clean up, fix or rectify environmental harm in remedying a matter relating to a contravention was delivered through the EPOLA Act 2023 (sections 82 and 83).

No further proposals for this recommendation are being made.

Further information regarding EPOLA Act 2023 can be found on the Queensland Legislation webpage here: https://www.legislation.qld.gov.au/view/html/bill.first/bill-2022-002/lh

Recommendation 6(b)

Direction notice provisions should be amended as follows:

(b) provide powers for the administering authority to undertake remedial works and recover the costs thereof

While it is an offence not to comply with a DN, and therefore the administering authority could take action for this, the Report concluded the administering authority should have the power to enter a site to undertake remedial works to address environmental concerns and subsequently recover costs.

Currently, where the recipient of certain notices under the EP Act fails to undertake the required work stated in the notice, there are provisions that enable the administering authority to step in and have those works done and recover the costs thereof. For example, this can be done for a CN (sections 363K-363N) or an EPO issued to a related person of a company (due to sections 363AG and 363AI). Better consistency would be achieved across the statutory notice powers if the power were similarly available for DNs.

Proposal:

The recommendation will be given effect through the proposal to replace EPOs, DNs and CNs with a single statutory notice, the EEO. Provisions enabling the administering authority to recover costs from the notice recipient for remedial works it undertakes will be a feature of the EEO.

Recommendation 6(c)

Direction notice provisions should be amended as follows:

(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.

The Report observed there are inefficiencies for the administering authority in having to determine the most appropriate type of notice to issue in the circumstances, and in the case of doubt, deciding to issue multiple notices.

Currently, the offences for which DNs can be issued are limited to contraventions of section 426 (carrying out environmentally relevant activity without an EA), section 440 (environmental nuisance), section 440Q (contravening noise standard), section 440ZG (depositing prescribed water contaminants in waters) or contravening an agricultural ERA standard. This creates inefficiencies for the administering authority and notice recipients in remedying contraventions.

For example, in a case where a person conducts an environmentally relevant activity without an EA which causes environmental harm, it is likely that two notices would be required. The most appropriate action is to require the person to obtain an EA, or to stop the activity, and clean up the harm. Since an EPO cannot be issued for a breach of section 426 and a DN cannot be issued to clean up harm, the only potential option is for a DN to be issued for the section 426 contravention and an EPO to secure compliance with the GED.

Proposal:

The recommendation will be given effect through the proposal to replace EPOs, DNs and CNs with a single statutory notice, the EEO. The proposed EEO will feature the securing of compliance with the

GED and contraventions that cause or risk environmental harm as grounds on which a notice can be issued.

Recommendation 7(a)

The Environmental Protection Order 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)

The Report recommended that EPO provisions be amended to remove the need to consider the standard criteria in deciding whether to issue an EPO under section 358(a)-(c) and (e) of the Act as this would make the issuing of an EPO more straight forward, and because the consideration of standard criteria is not required for CNs. The standard criteria are defined in the Schedule 4 of the EP Act (Dictionary).

Permitted grounds for issuing an EPO are currently set out in s 358(a)-(f). The grounds under paragraphs (a), (b), (c) and (e) are premised on non-compliance with requirements, contravention of certain sections of the EP Act, and an environmental evaluation satisfying the administering authority that unlawful environmental harm is occurring or likely. The grounds contemplate circumstances where an investigation has shown that obligations under the EP Act have not been complied with, and given that the standard criteria or regulatory impact has been considered in establishing those obligations, further consideration of standard criteria does not provide an additional benefit.

Removing the need to consider the standard criteria in these circumstances will support a more timely and certain response and minimise ongoing impacts on the environment and the community.

Proposal:

The recommendation will be given effect through the proposal to replace EPOs, DNs and CNs with a single statutory notice, the EEO. The new provisions for the EEO will reflect the recommendation such that consideration of the standard criteria will not be required in certain circumstances.

Recommendation 7(b)

The Environmental Protection Order provisions should be amended to:

(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

The Report found that the listed offence provisions that may trigger an EPO pursuant to section 358(e) are restrictive and may be expanded to include other offences which relate to acts that have caused or might cause environmental harm (for example, sections 437, 438 and 440). By contrast, the offences specifically listed under section 358(e), which include not complying with a DN (section 363E) and contravening a noise standard (section 440Q), are relatively low-level.

However, an EPO issued in accordance with section 358 may already be issued to secure compliance with duties and regulatory requirements such the GED, an EA condition, or an EPP, and this may cover circumstances where environmental harm has been caused or threatened.

Proposal:

The recommendation will be given effect through the proposal to replace EPOs, DNs and CNs with a single statutory notice, the EEO. While it may be unnecessary to identify specific offence provisions relating to environmental harm as grounds for issuing the EEO, the new provisions establishing the combined notice will ensure that environmental harm is a basis for which the administering authority can issue the notice.

Recommendation 7(c)

The Environmental Protection Order provisions should be amended to:

(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)

The Report concluded that there is an inconsistency in the powers of the administering authority to step in and take action to give effect to an EPO in the event of non-compliance, where the EPO is issued to a ‘person’ rather than a ‘related person’ of a company.

Presently, if a recipient of an EPO fails to comply with an EPO, the administering authority may only step in and take the actions required to give effect to the EPO, and recover the associated costs, if the EPO was issued to a related person. This power to take the actions and recover costs is included in Chapter 7, Part 5, Division 2 of the EP Act. Division 2 was inserted into the EP Act through amendments under the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld) which targeted related entities of companies and high-risk companies. There is no equivalent power to allow the administering authority to conduct the works required (and recover costs) where an EPO is issued to a person.

As an alternative, presently the administering authority may issue a CN and if the recipient fails to comply, take the action required and recover costs. However, there are different grounds for issuing a CN than for issuing an EPO, which may not be applicable in all circumstances.

Another alternative is that an authorised person may apply to a magistrate for an order to enter land to carry out work to prevent or minimise environmental harm or rehabilitate or restore the land because of an activity carried out under an EA (s 458(1)(a)(i)). These powers are not available if there is an unlicensed activity. There is also no provision to allow the recovery of costs associated with the administering authority taking the action pursuant to a warrant unless a notice to conduct or commission an investigation or remediate the land is issued (s 489).

It would be advantageous, and achieve consistency, for both the power to step in and carry out works and the power to recover the costs thereof to apply to EPOs issued pursuant to section 358 to a person, as is applied to EPOs issued to a related person described above.

Proposal:

The recommendation will be given effect through the proposal to replace EPOs, DNs and CNs with a single statutory notice, the EEO. The EEO will make provision for the administering authority to recover costs from any person the notice was issued on where it has stepped in to undertake remedial works to give effect to the notice.

Recommendation 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.

The Report noted an EPO can be issued to two classes of recipients:

- a 'person' for the purposes of section 358; or
- a 'related person' for the purposes of sections 363AC and 363AD,

and that there is considerable discrepancy in respect of consequences that flow for each class in the event of non-compliance with the notice.

As outlined at Recommendation 7(c) above, the EP Act permits an authorised person to step in and take action to give effect to the EPO, and allow administering authority to seek recovery of associated costs, for EPOs issued to a 'related person' and not EPOs issued to a 'person' pursuant to section 358.

Under s 361, it is an offence to contravene or not comply with an EPO. However, there are additional enforcement and offence provisions under ss 363AG, 363AH and 363AI which only apply to EPOs issued to a 'related person'. Under these provisions:

- a person must not obstruct the recipient of an EPO in the taking of action to comply with an environmental protection order unless the person has a reasonable excuse;
- an authorised person, or person acting under the direction of an authorised person, may take any of the actions stated in the environmental protection order; and
- the administering authority may issue a cost recovery notice to the recipient in particular circumstances.

It would be advantageous, and achieve consistency, for enforcement and offence provisions that apply to EPOs issued to a related person, including the offence for obstruction of compliance, to also apply to EPOs issued to a person pursuant to section 358.Proposal:

The recommendation will be given effect through the proposal to replace EPOs, DNs and CNs with a single statutory notice, the EEO. The EEO provision will align offences between a person and a related person.

Recommendation 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).

The Report concluded that the provisions concerning CNs do not expressly provide for the power to stop or restrict an activity that is the cause of a contamination incident.

Section 360(2), concerning Environmental Protection Orders (EPOs) provides:

> "*(2) Without limiting subsection (1)(c), an environmental protection order may—*
>
> > *(a) require the recipient to not start, or stop, a stated activity indefinitely, for a stated period or until further notice from the administering authority; or*

> *(b) require the recipient to carry out a stated activity only during stated times or subject to stated conditions; or*
>
> *(c) require the recipient to take stated action within a stated period."*

The Report recommended that, pursuant to section 363F, where a contamination incident might involve a situation where an activity is still being carried out, the powers provided for in section 360(2) (e.g. to stop the activity) should be included in the raft of requirements that might be contained in a CN.

Proposal:

The recommendation will be given effect through the proposal to replace EPOs, DNs and CNs with a single statutory notice, the EEO. Amendments for the EEO will include provision for the notice to stipulate requirements that are aligned with the existing section 360(2) to enable improved environmental outcomes following contamination incidents, such as an express power to stop or restrict any activity that is the cause of a contamination incident.

Recommendation 10(a)

The power to amend a Transitional Environmental Program be expanded to:

(a) allow the administering authority to amend without consent of the operator

The Report observed that while the administering authority currently has the discretion to approve an amendment to a Transitional Environmental Program (TEP), it has no express power to *cause* an amendment to it. That right resides solely in the hands of the holder of the TEP approval. The Report 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.

Section 24AA of the *Acts Interpretation Act 1954* (AIA) states 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.

For this reason, the AIA could be sufficient to authorise amendment of a TEP by the administering authority, in the same way as the original decision about the TEP was made. However, the Report noted that section 344 in its current form may complicate the application of section 24AA of the AIA, and suggests that a power to amend a TEP be expressly provided for in the EP Act to avoid the possibility of any argument about the scope of the sections. The Report 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. The Report highlighted that amendments should also be made to DES's enforcement guidance to ensure the effective use of TEPs.

Implementing the recommendation would provide greater certainty for the administering authority and holders of TEPs in the TEP provisions of the EP Act without expanding or establishing a new power for the administering authority.

Proposal:

It is proposed that an amendment be made to insert new provisions into Chapter 7, Part 3, and amend existing provisions as necessary, to provide for the power of the administering authority to initiate and decide amendments to TEPs having regard to any submission by the existing holder.

This approach would ensure any use of the power by the administering authority to make amendments to TEPs is exercised in the same way as the power to make the instrument. For example, the administering authority must have regard to the decision-making criteria in s 338, and the decision to amend the TEP is reviewable and subject to appeal.

Recommendation 10(b)

The power to amend a Transitional Environmental Program be expanded to:

(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

THIS RECOMMENDATION HAS BEEN DELIVERED.

This recommendation was delivered through the EPOLA Act 2023 (section 68).

No further proposals for this recommendation are being made.

Further information regarding EPOLA Act 2023 can be found on the Queensland Legislation webpage here: https://www.legislation.qld.gov.au/view/html/bill.first/bill-2022-002/lh

A guideline on transitional environmental programs is available online and reflects the recent EPOLA Act 2023 changes: https://environment.des.qld.gov.au/__data/assets/pdf_file/0034/88945/cm-gl-trans-env-program-ext.pdf

Restraint orders

Recommendation 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 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).

A GED offence, proposed under Recommendation 15 in the Report, was the Government's preferred option for enhancing enforcement actions in the event a person contravenes the GED. Therefore, there is no proposal made to give effect to Recommendation 11, to include the GED under section 505 of the EP Act.

Environmental authority conditions

Recommendation 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.

What the Report found

The Report identified that in some instances, the existing 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.

However, the Report considered the administering authority's powers to amend EA conditions without agreement from the EA holder under section 215(2) are generally prescriptive and reactive in nature. It found that there is no provision which allows an amendment to be swiftly proposed because of a lack of appropriate mitigation or avoidance of environmental harm.

The Report made the recommendation to expand the power to amend the conditions of an EA to address such circumstances. It did though recognise that amending an EA holder's existing conditions has the potential to have significant adverse impacts on the viability of an activity. The Report therefore also stated that the expanded amendment power should place caveats on the exercise of the power (paragraph 223) such as:

- the power sits solely with the Minister or the Chief Executive, and cannot be delegated;
- the power should be limited to those situations where there is clear scientific evidence which supports the decision of the Minister or Chief Executive;
- there should be a pre-emptory step in the form of a show cause notice, clearly identifying the reasons that ground the decision and giving the operator the right to be heard by way of submissions on the matter (e.g. as with EA cancellations or suspensions per sections 279-284)
- such decisions, save perhaps situations involving grave risks to human health and safety and emergency situations, ought be subject to existing rights of appeal and the granting of stays, but internal review would be inappropriate for decision made by Minister or Chief Executive.

Government response

The Government supports this recommendation in principle and the proposed response is outlined below.

When the EP Act was passed by Parliament, it sought to balance the need for certainty for business with the need for EAs to adapt to changing circumstances. The legislative framework recognised that the understanding of environmental impacts would change over time and that technology and management systems would improve. Accordingly, the legislative framework provided for circumstances and a process for amending licences and provisions found in section 215.

The provisions in section 215(2) that enable the administering authority to make a 'necessary or desirable' amendment to an EA include the following circumstances:

- the issue, amendment or withdrawal of an environmental protection order;

- an environmental audit, investigation or report under Chapter 7, Part 2 (environmental evaluations);
- a recognised entity report;
- a contravention of the Act or an environmental offence committed by the holder; and
- a significant change in the way in which, or the extent to which, the activity is being carried out.

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

Having regard to the Report's concern that swift action is needed due to environmental harm that has not been avoided or mitigated, this should not be prevented because of conditions of an EA. It is therefore proposed to make it clear that a condition of an EA is not a barrier to issuing an environmental protection order (Proposal 1). Where further information is needed to determine the appropriate remedy required, the same absence of barrier should apply to the requirement for an environmental evaluation.

The use of an environmental protection order or environmental evaluation supports a swift response to address environmental harm. Then, should it be necessary or desirable to amend EA conditions to avoid reoccurrence of unacceptable environmental harm, there will be sufficient time and information to ensure that any proposed amendments to the EA conditions are properly constructed.

It is also proposed (Proposal 2), as part of the process under sections 216-220, to clarify that any proposed amendment to the EA conditions presented to the EA holder can be modified, in response to any concerns raised by the EA holder, before a final decision on amending the EA.

<u>Proposal 1:</u>

Amend the provisions relating to issuing an environmental protection order or an environmental evaluation requirement to clarify that a notice may be issued to address concerns of environmental harm even if there is a condition of an EA appearing to authorise the relevant harm. However, a relevant ground or grounds under the EPO or environmental evaluation provisions for issuing the notice would still have to be otherwise satisfied (e.g. to secure compliance with the general environmental duty).

Note: the EPO will be replaced under the proposal to rationalise notices and therefore section 215(2)(j) will be consequentially amended to refer to the Environmental Enforcement Order.

This proposal will allow for swift action to be taken in relation to an environmental harm that is occurring. Then, if necessary, the existing provisions under section 215(2)(i) and (j) provide the grounds for amending an EA to address the potential for any future reoccurrence of the harm. This process allows time to ensure the conditions are adequately and appropriately drafted, whilst also ensuring a timely response to community concerns. As such, the proposal does not change the existing grounds for issuing EPOs, requiring environmental evaluations, or for amending EA conditions.

For example, if the release of water from a site was causing fish to die in a stream, the administering authority should not be prevented from taking action to stop this just because there was an EA condition allowing the releases that are causing the problem. The death of the fish could have resulted from a change to the quality of the water due to a change in the process or materials processed that had not been expected when the approval was given. The community would expect the Government to act in relation to the environmental impact. The proposed amendment provides certainty for the administering authority to take swift action by using an EPO. The administering authority could then decide whether an amendment to the EA conditions should be proposed.

By enlivening existing provisions for proposing an amendment to the EA conditions, the provisions would also enliven existing procedures for amending EA conditions under Chapter 5 Division 2 of the EP Act. This will ensure the EA holder is afforded an appropriate process, including natural justice considerations. This will also maintain current approach with the decision to propose an amendment being with the administering authority and not extended to the Minister.

This approach will mean that there will be limited impact on holders of EAs that are acting responsibly and are not causing environmental harm. The amendments will however counter the use of legal proceedings to delay or avoid action being taken to address environmental harm solely on the basis of an existing condition of an EA. This is intended to allay fears that the community may hold about continued exposure to harm while legal proceedings play out.

Proposal 2:

Amend section 219, or insert further provisions into Division 2 of Chapter 5A, Part 6 to allow the administering authority to, upon considering written submissions from the EA holder pursuant to section 218, make revisions to the proposed amendment in response to the EA holder's submissions.

Presently, 'the proposed amendment' is a defined term which refers to the amendment the administering authority has given notice to the EA holder that they propose to make. This includes specifying how the amendment would be drafted in a marked-up copy of the EA. Section 218 requires the administering authority to consider submissions on the proposal made by the EA holder. Section 219 holds that if the administering authority still believes a ground exists to make *the proposed amendment*, it may make the amendment.

It is arguable that the administering authority can only decide to either make the amendment in line with its original proposal or abandon the process, despite a willingness to modify the original proposal in response to the EA holder's submission. This may result in a need for the administering authority to start the notice of proposed amendment process from the beginning.

Clarifying that there is flexibility in the process to make limited modifications to the amendment proposal in response to the EA holder's submissions prior to making a final decision on whether to proceed with the amendment, would provide for a swifter process for making an amendment to an EA that continues to be necessary and desirable. This will create efficiencies for both the administering authority and the EA holder.

Recommendation 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.

THIS RECOMMENDATION HAS BEEN DELIVERED.

Amendments regarding continuing obligations under cancelled or suspended EAs were addressed via the EPOLA Act 2023 (section 36).

No further proposals for this recommendation are being made.

Further information regarding EPOLA Act 2023 can be found on the Queensland Legislation webpage here: https://www.legislation.qld.gov.au/view/html/bill.first/bill-2022-002/lh

Further information on cancellation and suspension of environmental authorities can be found here: https://www.business.qld.gov.au/running-business/environment/licences-permits/complying/cancellation

Registered Suitable Operators

Recommendation 14

Schedule 4 of the EPA (Qld) be amended to include a contravention of sections 357I and 363E as disqualifying events for the purposes of section 318K of the EPA (Qld).

The Report noted that contraventions of a temporary emissions licence condition under section 357I and a DN under section 363E are not included in the definition of 'environmental offences' in Schedule 4. A conviction for an environmental offence is prescribed as a 'disqualifying event', which is also defined in Schedule 4, and disqualifying events are grounds under section 318K for suspending or cancelling a person's registration as a suitable operator for carrying out an environmentally relevant activity.

The Report concluded there was no reason for the exclusion of these particular offences, and recommended amending the definition of an 'environmental offence' in Schedule 4 to include a failure to comply with conditions of a temporary emissions licence under section 357I and an offence not to comply with a DN under section 363E.

Continued exclusion of these offences from the definition does not appear necessary or justified having regard to the scope and nature of the other offences already included. That is, the definition covers the range of general environmental offences under Chapter 8, which includes failure to comply with EA conditions, as well as offences for failing to comply with various types of notices.

Giving effect to the recommendation will improve consistency in the legislation and provide a slightly broadened power for future use. Amending the definition in Schedule 4 avoids increasing complexity in the legislation by including all relevant offences in one definitional provision and is preferable to prescribing additional offences by regulation.

<u>Proposal:</u>

The definition of 'environmental offence' in Schedule 4 is proposed to be amended to include the contraventions under sections 357I and 363E so they may be regarded as disqualifying events.

However, given the proposal to rationalise certain statutory notices the amendment will be made to include contravention of the new notice provision as a relevant environmental offence, rather than section 363E as that section is proposed to be repealed.

The proposed amendment to the definition of 'environmental offence' is not proposed to be limited such that the additional offences can only be considered for the purposes of disqualifying events under section 318K. This is because the sections which use the term 'environmental offence' throughout the EP Act are few – it is otherwise used in sections 215(2)(a), 278(2)(d), 318R and 318V only – and there is relatively limited effect in broadening the definition for these sections. For example, section 215(2)(a) states a trigger for amending EA conditions as 'a contravention of this Act or an environmental offence committed by the holder'. As such, even without amending the definition of environmental offence to include additional offences, any offence under the EP Act would still be available for the purposes of section 215(2)(a) as a contravention. Further, where the offences are included in the definition for the purposes of section 318K, a consistent definition would need to apply to sections 318R and 318V for the provisions to be workable as the provisions relate to the same matters under Chapter 5A, Part 4.

Offences

Recommendation 15

Consideration should be given to creating an offence for breaching the general environmental duty.

The Report concluded that making it an offence not to comply with the general environmental duty (GED) would offer support for more proactive management in the prevention or minimisation of environmental harm. It was considered particularly so when coupled with the duty to notify under section 320A of an event that causes or threatens to cause serious or material environmental harm.

The recommendation proposes the introduction of an offence for the contravention of the GED to emphasise the principle of primacy of prevention, and focus on proactive steps that can be taken to prevent or minimise environmental harm. A precedent exists in other jurisdictions, for example under Victoria's *Environment Protection Act 2017* (section 25) for such an offence to be introduced.

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.

A general duty needs to be enforceable to be effective in proactively managing environmental risks. Making it an offence to breach the GED sends a strong message about the importance of taking steps to prevent and minimise environmental harm. Offences attached to general duties to take measures to prevent or minimise risk are not novel, for example, in Queensland such offences exist in the *Biosecurity Act 2014* (section 24), and the *Work Health & Safety Act 2011* (section 31-33).

The amendment is expected to provide benefits for business, regulators and community. For example, an offence will place an emphasis on prevention by duty-holders, with prevention measures likely to be more cost-effective rather than waiting for harm to occur and facing expensive clean-up and remediation operations. Further, this can reduce extent to which communities continue to be adversely affected for the duration of a remediation period. An offence also provides an additional tool for the administering authority to take proactive action in relation to sites at risk, which is likely to lead to efficiencies for both government and business where frequency and scale of environmental harm events are reduced due to the deterrent effect of the offence and enhanced ability for the administering authority to intervene early.

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.

Proposal:

Provisions will be inserted, likely in Chapter 8, Part 3, to specify that failure to comply with the GED is an offence. However, the offence will not apply to an aspect of minimising environmental harm that is currently addressed through an environmental requirement, for example, an EA. A provision

will also make clear that where the person has complied with a Code of Practice, the person is taken to have complied with the GED.

Unlike the duty itself under section 319(1), the GED offence should apply only to persons doing an activity in the course of conducting business or an undertaking. A definition of 'business or undertaking' should cover persons conducting private businesses for profit or gain, persons conducting not-for-profit activities, and government or public activities. But is not intended to extend to person conducting activities in the domestic sphere.

Consistent with other offences in the EP Act, there will be a distinction between a contravention and a wilful contravention for the purposes of penalties. Penalty ranges comparable with those for contraventions of sections 443 and 443A are considered appropriate for the GED offence as those provisions similarly deal with conduct that exposes the environment to risk of harm.

The GED offence will be complemented by the existing range of regulatory tools and penalties to ensure that enforcement of the GED can be dealt with proportionate to the environmental harm being managed and/or the risk of harm. This may necessitate other amendments, for example, to the State Penalties Enforcement Regulation 2014 for the purposes of allowing for infringement notices to be issued.

Existing offences applicable to actual, and unlawful, environmental harm (e.g. causing serious environmental under section 437) will remain available and separate to the GED offence in the event of environmental harm actualising. This reflects that the GED offence is a tool for reducing the probability of material or serious environmental harm, but that harm will not always be eliminated, and proportionate penalties should flow from the conduct in question.

Whether harm actually occurs is not an element of the GED offence; the relevant act is the failure to take all reasonably practicable measures to prevent or minimise harm that will or is likely to occur. In this way, the GED offence relates to the act or omission of failing to manage an activity by providing equipment and systems to prevent or minimise material or serious harm.

It is recognised that, in some instances, the same or similar conduct failure potentially could result in a breach of both the GED offence and an environmental harm offence. In such cases, it is not intended for both charges to be brought against an alleged offender. Rather, in accordance with DES's existing enforcement guidance, the most appropriate charge reflecting the person's culpability should be chosen to prosecute. This approach also intends to avoid a conflict with section 493A whereby a person can defend against a charge of material or serious environmental harm if they prove they complied with their GED.

The GED offence provisions will signify types of actions, where, if a person conducting a business or undertaking were to fail to do one or more of them, would be taken to have failed in their duty such that it amounts to an offence. The list of actions should include the following:

- install and maintain plant, equipment, processes and systems in a manner that minimises risks of environmental harm;
- maintain systems for identification, assessment and control of risks of environmental harm that may arise in connection with the activity, and for the evaluation of the effectiveness of controls;
- maintain processes for the handling, storage, use and transport of substances that minimises risks of harm;

- have systems in place to ensure information, instruction, supervision and training to any person engaging in the activity that minimises risks of environmental harm.

However, such a provision is not intended to set requirements for a person to comply with their GED or limit the duty; only stipulate when it will be taken that there is a failure of the duty.

DES may provide further guidance on how to meet the GED. Guidance may be provided through existing statutory instruments such as EPPs, codes of practice or statutory and nonstatutory guidance.

Recommendation 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).

The Report recommended expanding 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.

Currently section 320A 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.

An enhanced duty to notify also supports industry and others conducting activities potentially affecting the environment to monitor for contamination incidents more readily and respond to them more proactively. Introducing the element of reasonableness may also facilitate more consistent monitoring and notifying practices across the regulation population.

Proposal:

Section 320A is proposed to be amended such that the duty of a person to notify of actual or threatened serious or material environmental harm includes circumstances where the person ‘reasonably believes’ or ‘should in the circumstances reasonably believe’ that a notifiable event under section 320A has occurred.

Civil matters

Recommendations 17 and 18

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.

The words "by the prosecutor" be deleted from section 490(7).

Note: The section referred to in the recommendation was consequentially renumbered as section 490(8) due to amendments under the *EPOLA Act 2023*.

The Report noted that special evidentiary aids under sections 491 and 491A, relating to environmental nuisance and contravention of noise standard offences are presently limited to criminal prosecutions where guilt must be proved beyond reasonable doubt. These sections provide that opinion evidence about emissions may be given by authorised persons (i.e. persons acting for the administering authority), which is based on their own senses, without the need to call further opinion evidence.

Given these provisions are available for criminal proceedings where the burden of proof is higher than in civil proceedings and the consequences potentially more serious than in civil proceedings, the Report concluded there is no reason why the same evidentiary aid provisions should not also be available in civil proceedings. Such civil proceedings might include, by way of examples, seeking restraint orders pursuant to section 505, appeals concerned about the issuing of a statutory notice and proceedings about the granting of a stay.

Similarly, section 490(8), which relates to production of analysis certificates in a proceeding under the EP Act, currently only applies to prosecutorial proceedings. This is because it contemplates the production of the certificate in a proceeding is 'by the prosecutor'. The Report concluded those words should be removed to allow for the provision to apply to civil proceedings.

Making amendments as recommended in the Report is expected to reduce time and costs associated with the court process for civil proceedings.

Proposal:

Sections 491(1) and 491A(1) will be amended to specify the sections also apply to 'a proceeding in relation to' the relevant offences to which the provisions apply (sections 430, 440 and 440Q). This will make clear those evidentiary provisions are available in civil proceedings.

Section 490(8) will be amended to remove the words 'by the prosecutor' to make the provision available in civil proceedings.

Conclusion

The Queensland Government is committed to protecting and restoring our environment and the health of our communities. The proposed amendments in this consultation paper specifically respond to recommendations by an independent review into the adequacy of powers and penalties available under the EP Act. The Government supports the recommendations as necessary to improve the strength of environmental regulation in Queensland, and in turn, improved environmental outcomes.

Comments from all interested persons are invited on the amendment proposals in this consultation paper. Refer to page 11 of this document for details on how to have your say. Submissions will be important in assisting the Government to finalise the legislative amendment package.