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Quote in reply: Planning and Environment Law Committee

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Ms Julie Copley
The Research Director
Scrutiny of Legislation Committee
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Dear Ms Copley

Environmental Protection and Other Legislation Amendment Bill 2010 (Qld) – Part 4 – Amendments to the Environmental Protection Act 1994 (Qld)

This submission has been prepared by the Queensland Law Society's Planning and Environmental Law Committee.

The Queensland Law Society (QLS) would like to raise some concerns about several of the provisions of the *Environmental Protection and Other Legislation Amendment Bill 2010 (Qld)*, which we have previously raised directly with the Department of Environment and Resource Management.

The principal concerns of the QLS relate to breaches of fundamental legislative principles in relation to offences, penalties and court orders, so those issues are addressed first in this submission. We also have some drafting concerns, particularly in relation to ambiguity, which are subsequently addressed.

Clauses 87 and 88 of the Bill (Sections 480 and 480A Environmental Protection Act 1994) – False, misleading or incomplete documents

Essentially, the amendments split the offence of providing incomplete documents from the existing offence of providing false or misleading documents, and then for each of these offences inserts a new element 'or ought reasonably to know'.

As a matter of legal drafting, the QLS would **support** the splitting of Section 480 into Sections 480 and 480A, as this makes the provisions easier to read.

However, the creation of a power to prosecute people for inaccurate documents which they do not even know are inaccurate, is a different matter, particularly with a maximum penalty of 2 years' imprisonment. The explanatory notes state: *'The new offence retains the maximum penalty of 1665 penalty units.'* In fact, the Bill retains the maximum penalty of *'1665 penalty units or 2 years imprisonment'* for both Sections 480 and 480A.

The explanatory notes then go on to acknowledge:

'Being a new offence, it raises the fundamental legislative principle in relation to whether the legislation has sufficient regard to the rights and liberties of individuals, however the offence is necessary to improve the operation of the Environmental Protection Act 1994 and the penalty is appropriate for the nature and severity of the breach. in comparison to other equivalent offences. [sic]'

The QLS would agree that the provision breaches the fundamental legislative principle cited, but does not agree that this is justified having regard to a maximum penalty of 2 years' imprisonment for an unintentional paperwork oversight (which is one of the highest available penalties under the Act and is equivalent to penalties under the Criminal Code for offences such as threatening violence, forcible entry, discharging firearms with intent to intimidate etc). The amendment would obviously reduce the cost and effort involved for the prosecuting authority in establishing evidence that the defendant was aware of the inaccuracy, but it would be an overstatement to describe this breach of an FLP as 'necessary'.

The explanatory notes also argue, apparently in support of this proposed breach of the FLP, that:

'This places a greater onus on individuals to check information before it is passed onto the administering authority or authorised person. A penalty may apply in cases where due diligence has not been carried and false or misleading information is consequently provided to the administering authority or authorised person. The prosecution however would still be required to prove that the person knew or ought reasonably to have known the information was false or misleading.'

The QLS has concerns that these arguments do not justify the new offence, particularly taking into account the extremely short timeframes within which documents are frequently required to be submitted under this Act combined with the complexity and ambiguity of the contents required. For example, Section 320 of the Act (as recently amended by the *Natural Resources and Other Legislation Amendment Act (No. 2) 2010*) requires numerous notices to be given to various parties including the administering authority within 24 hours and there are even more extreme examples in conditions under the Act (such as a 6 hours' notice requirement following lawful water releases under the 'Fitzroy model water conditions'). In such short periods, it is not unusual to be impracticable to ascertain accurately and fully describe content requirements, such as the impacts of an event. Possibly, various individual impacts may be known within that period to individual employees or agents of a company, giving rise to allegations of imputed knowledge of the person preparing the notice (ie, 'ought reasonably to have known'), but not necessarily actually known by the individual preparing the notice, who may often be the same person responsible for practical steps to prevent or mitigate harm.

QLS has previously suggested to the Department of Environment and Resource Management that it would be appropriate to consider a more structured approach to these types of offences, for example, a series of offences with different levels of penalties, depending on factors such as wilfulness.

Clause 89 - Section 502 – new types of court orders for offences

The QLS is not opposed to the new 'monetary benefit orders', 'notification orders' or 'rehabilitation orders', but is opposed to 'education orders' and has concerns about 'public benefit orders'.

An 'education order' is defined as '*an order requiring the person against whom it is made to conduct a stated advertising or education campaign to promote compliance with this Act.*'

The explanatory notes state:

'The new orders are equivalent to the contemporary tools provided in other environmental jurisdictions.'

In fact, these proposed education orders are not currently available in other Australian States. It is not clear what the explanatory notes mean by 'other environmental jurisdictions', and we have not searched legislation beyond Australia.

The QLS would have no difficulty with the administering agency using funds collected from penalties for educational purposes. However, we have a concern that innocent citizens have done nothing to justify being inflicted with advertising or 'educational campaigns' by environmental offenders and that the proposed type of order does not have sufficient regard to the rights and liberties of the general public.

It is noted that 'public benefit orders' are already available under environmental legislation in other States, but it does not necessarily follow that Queensland should simply copy from other States without due scrutiny. While the QLS would support rehabilitation and restoration orders, which relate to the environment which was adversely affected by the offence, it is not clear why 'public benefit' orders should be available in addition to, or as an alternative to, rehabilitation and restoration orders. These 'public benefit' orders would be for the purpose of restoring or enhancing public places (or other places for the public benefit), which are unrelated to the offence. This type of order seems to be getting too far away from the damage caused by the offence. In other words, if an offence caused damage to a place, it makes sense for that place to be restored, not some other place where the administering authority has a shortfall of funds to carry out 'enhancements'. If the offence did not cause damage (for example, a record-keeping offence), then the appropriate sentence would presumably be a fine, rather than a 'public benefit order'. Apart from this, it is unclear whether the administering authority has thought through the legal difficulties of ordering people to carry out works on land they do not own, such as the need to obtain consents and approvals which are not under the control of the offender.

In noting that the proposed new orders raise a question of fundamental legislative principles, the explanatory notes seek to justify this by arguing that: '*The legislation does not require the imposition of these orders but leaves it up to the Court's discretion to determine whether the order is proportionate and relevant to the actions which the consequences are applied.*' Logically, this is not a sufficient justification for creating the discretion in the first place to impose orders, where there is a concern that these may either be in breach of fundamental legislative principles or otherwise the implications have not been fully worked through.

Clause 71 – Section 331 - Transitional environmental programs (TEP)– Content of programs

In principle, the QLS supports clarification of the content requirements and assessment of TEPs.

However, we have some concerns about drafting issues, in particular, in relation to the fundamental legislative principle set out in Section 4(3)(k) of the *Legislative Standards Act 1992*, requiring that legislation '*is unambiguous and drafted in a sufficiently clear and precise way*'. We have previously raised these concerns directly with the Department of Environment and Resource Management.

In particular, we refer to proposed section 331(c) '*state how any environmental harm that may be caused by the activity will be prevented or minimised, including any interim measures that are to be implemented.*'

The term 'activity', in the context of the *Environmental Protection Act 1994*, normally refers to the 'environmentally relevant activity', for example, dredging, mining or chemical manufacturing; it does not refer to the condition or other standard which is proposed to be temporarily overridden by a TEP. The term 'environmental harm' includes all types of environmental impacts from the project, including lawful impacts and trivial impacts. Accordingly, the question of 'any environmental harm that may be caused by the activity' is not sufficiently specific as a content requirement. For example, if the 'activity' is dredging, the environmental harm caused by the activity would include literally all of the impacts from the activity of dredging including lawful impacts authorised under conditions, rather than focussing on interim impacts from the particular standard that is proposed to be overridden by the TEP.

Although not referenced in the explanatory notes, it is hoped that the Department of Environment and Resource Management at least took some account of the recommendations in relation to TEPs raised in the *Report to the Queensland Premier – Review of the Fitzroy River Water Quality Issues* by Professor Barry Hart dated November 2008 (the Hart report). Professor Hart noted a number of deficiencies in the former Environmental Protection Agency's process for determining the Ensham TEP, which are explained on pp11-12. (While Professor Hart's suggested solution was a guideline, this would not legally overcome the deficiencies in the TEP legislative contents list or in the assessment process which he identified. The correct solution would be legislative amendment.) Specifically, Professor Hart was concerned to ensure that there was an assessment of which downstream users and which environmental values were likely to be affected by interim measures and to what extent. However, the proposed drafting is inadequate to address this concern. Instead, if any regard was intended to be given to the Hart report, we think what would have been intended is that the TEP should state:

- What interim standard or series of standards is proposed to be met during the period of the TEP;
- What environmental values are likely to be impacted by those interim standards, including impacts on persons or property beyond the boundaries of the premises; and
- What interim measures are proposed to be taken to meet the interim standards.

Section 339 – Decision about draft program

Another concern raised by Professor Hart was that the former EPA's assessment of the Ensham TEP was considered inadequate and lacking in transparency. Again, the process concern could be addressed in part by statutory amendment:

- Assessment criteria should be stated, specifically with regard to satisfying the content requirements of TEPs, rather than just the 'standard criteria' under the Act.
- The power to impose '*any other conditions the administering authority considers appropriate*' has always been too broad and ambiguous, in terms of fundamental legislative principles. It is

suggested that these should be reasonable or relevant requirements, similar to the *Sustainable Planning Act 2009*.

- The power to state any period at all for the TEP under s339(3) is too broad, and could potentially create absurdities in the TEP if the period is different from that proposed.

Yours faithfully

Bruce Doyle
President