



## REVIEW OF THE *ENVIRONMENTAL PROTECTION ACT 1986* (WA) KEY PRIORITIES FOR PUBLIC INTEREST REFORM

### BACKGROUND

The [Environmental Protection Act 1986 \(WA\)](#) (EP Act) came into force over 30 years ago and is in urgent need of reform to adequately respond to modern environmental issues.

The State Government is seeking public comments on reform of the EP Act. As part of this consultation, a [Discussion Paper](#) and a [draft Bill](#) with proposed amendments to the EP Act have been released.

The deadline for comments is **28 January 2020**. We encourage members of the public to provide comments on the EP Act review, to ensure that our key piece of environmental legislation reflects the public interest in the protection of the WA environment.

### *Using this document*

The EDO will be making a comprehensive submission to the consultation based on our experience and expertise in public interest environmental law in WA and across Australia. We recognise, however, that our clients and the broader WA community are not necessarily specialist legal practitioners but have unique perspectives, innovative ideas and years of experience which the consultation process would benefit from immensely, and we encourage you to share these perspectives by making a submission.

In this document, we outline some key community priorities for reform identified through our work providing legal assistance in relation to the environmental legal framework in WA. Our recommendations are formulated with a view to ensuring best practice government decision-making and administration, achievement of the objects and principles of the EP Act, and access to environmental justice for the WA community.

While this document does not cover all potential areas for reform, we hope that it is useful in providing information on current issues and suggestions for public interest reform to support your submissions.

## **KEY COMMUNITY PRIORITIES FOR REFORM**

As a community legal centre, the EDO advocates for access to environmental justice for the WA public. Unfortunately, there are several major aspects of the EP Act which do not deliver on community expectations. Our clients and indeed the entire WA community would benefit from modernisation of these key areas to ensure that the public interest is upheld and the EP Act can achieve its fundamental object of protecting the environment of the State.

Below we provide an overview of the following key areas for reform:

1. **CLIMATE CHANGE** – introducing specific climate change legislation and ensuring the EP Act adequately addresses and regulates greenhouse gas emissions and climate change;
2. **IMPROVED DECISION-MAKING**
  - 2.1. **PRINCIPLES** – clarifying that the object and principles of the EP Act, as well as the published policies of the EPA, are limits on discretionary decision-making and that statutory powers should be exercised in the public interest; and
  - 2.2. **RIGHT TO REASONS** – creating an express right to obtain the reasons for decisions made under the EP Act.
3. **PUBLIC PARTICIPATION**
  - 3.1. **ENFORCEMENT** – improving public access to the courts in relation to enforcement of the legislation and environmental offences; and
  - 3.2. **APPEALS** – broadening public merits review rights and directing these appeals to an expert independent tribunal.

## 1. CLIMATE CHANGE

Western Australia's legal and policy settings relating to climate change have been shifting significantly with the recent consultations relating to the EPA's greenhouse gas [assessment guidelines](#) and the State Government's [climate change policy](#), as well as the announcement of a State target for net zero emissions by 2050 within a new [emissions policy for major projects](#).

As a community legal centre, our office is often approached by members of the public concerned about the impacts of climate change on the WA environment. The current legal framework, including the EP Act, does not provide clear avenues for the community to seek climate justice nor an administrative framework for decision-making in the context of climate change. Failing to address climate change fundamentally undermines the entire purpose and object of the EP Act in protecting the environment of WA, making it a key area for reform.

Many Australian states and territories including Victoria, New South Wales, South Australia and the Australian Capital Territory have introduced legislation that specifically deals with climate change and greenhouse gas emissions. The EDO strongly supports the [introduction of specific climate change legislation, such as a Zero Carbon Act for Western Australia as recently proposed by a group of distinguished scientists and academics](#).

Without this legislation, the EP Act is in need of urgent reform to modernise the existing statutory assessment and offence frameworks in order to address and regulate greenhouse gas emissions and respond to climate change. This should include:

- [amending the definition of “pollution”, “environmental harm” and “emission” to clarify that these include greenhouse gases;](#)
- [including provisions addressing climate change mitigation and adaptation;](#) and
- [including climate change as an express requirement for consideration for decisions under the EP Act.](#)

## 2. IMPROVED DECISION-MAKING

Reform of the EP Act should support good decision-making by the Environmental Protection Authority, the Minister for Environment, the CEO of the Department of Water and Environmental Regulation and others tasked with decisions under the EP Act. “Good” decision-making is consistent and transparent and supports the object and principles of the legislation. It is also proactive, evidence-based, guided by the best available scientific information, and subject to clear and robust environmental controls.

Reform of the following key areas would support public confidence in and proper functioning of the decision-making powers under the EP Act.

### 2.1. PRINCIPLES FOR DECISION-MAKING

Section 4A of the EP Act contains the object and principles of the EP Act. This provision should be amended to clarify that these principles are express requirements for consideration in decision making under the Act.

The environment and natural resources of WA are public assets and should be managed for the benefit of the community. To ensure this is properly considered in the administration of the EP Act, the public interest should be added to the other principles in section 4A.

The public also expects that the policies published by the EPA will be applied in assessments under the EP Act. After the [Save Beeliar Wetlands cases](#) the status of these policies does not meet this fundamental expectation. In addition to the section 4A principles, consideration of these policies should be an express requirement for EP Act decision-making.

### 2.2. RIGHT TO REASONS

As outlined above, the environment and natural resources of WA are public assets. Decisions under the EP Act which affect these matters must be subject to public scrutiny and accountability. The fundamental starting point for this is a right to request and be provided with reasons from decision-makers.

While the EPA and the Minister for Environment may at times publish records of decisions, there is no recourse for the community, or indeed a proponent, to formally seek a written statement of reasons for exercises of power under the EP Act. A right to reasons should be included in the EP Act as an express provision similar to that in [section 13 of the Administrative Decisions \(Judicial Review\) Act 1975 \(Cth\)](#).

### 3. PUBLIC PARTICIPATION

Communities expect to participate in decision-making which affects the environment of Western Australia. The EP Act provides several of these opportunities – however, many inadequacies exist that can be addressed through the current reform process. Of particular significance are the processes and availability of third party enforcement and appeals under the EP Act.

#### 3.1. ENFORCEMENT

The current system of enforcement under the EP Act precludes third parties from initiating proceedings for environmental offences, despite these offences concerning injury to the environment and natural resources of WA which are public assets. Not only does this limit access to environmental justice, it prevents the community from sharing the regulatory burden with the bureaucracy.

In our experience as a community legal centre, we have seen conservation groups and members of the public with evidence to establish an arguable case who are prepared to undertake enforcement proceedings (including bearing the costs risks of litigation) in the public interest. While frivolous and vexatious proceedings should not be permitted, standard court processes for striking out such claims, as well as the inherent expenses and costs risks of litigation, are effective to ensure any proceedings are orderly and appropriate.

To allow for the efficient administration of the EP Act and the expression of the public interest in the courts, the community should be given the right to bring third party enforcement proceedings for environmental offences.

#### 3.2. APPEALS

WA does not have an independent merits review system for environmental appeals like other Australian jurisdictions, instead providing the power to decide merits appeals to the Minister for Environment. This compromises public confidence in the system, lacks transparency and without clear bases for review or a system of precedent can be unpredictable and confusing for both ordinary members of the public and practitioners. A new Part VII should create an independent, specialist tribunal to conduct merits review of environmental decision-making, or at a minimum direct appeals to the State Administrative Tribunal.

Further, public merits review under the current Part VII is available for very few decisions. This limits the opportunities for the community to hold decision-makers to account in the public interest. A new Part VII should expand public appeal rights to ensure access to environmental justice, including merits review of decisions not to assess referred proposals and schemes and decisions on whether to grant approvals under Parts IV and V.

## HOW TO MAKE A SUBMISSION

As set out on the [consultation website](#), you can:

- email submissions to [EPActamendments@dwer.wa.gov.au](mailto:EPActamendments@dwer.wa.gov.au); or
- mail a hard copy to:

Strategy Policy - Environmental Protection Act 1986 amendments  
Department of Water Environmental Regulation  
Locked Bag 10  
JOONDALUP DC WA 6919



## Environmental Defenders Office

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

***Successful environmental outcomes using the law.*** With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

***Broad environmental expertise.*** EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

***Independent and accessible services.*** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

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