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Social Policy Scrutiny Committee
Legislative Assembly of the Northern Territory
Parliament House
Darwin, NT 0800

By email: SPSC@nt.gov.au

Dear Chair and Committee members

Submission on Northern Territory Environment Protection Authority Amendment Bill 2018

The Environmental Defenders Office (NT) Inc (**EDONT**) welcomes the opportunity to make a submission to the Committee on the *Northern Territory Environment Protection Authority Amendment Bill 2018* (**the Bill**).

EDONT is a community legal centre specialising in public interest environmental law. We regularly advise and represent clients across the range of environmental legislation and regulation in the Northern Territory. We are widely respected for our expertise, and are frequently are invited to participate in policy and law reform processes as a key stakeholder.

In this submission, we make some general comments about the reform context of this Bill, and then provide specific feedback on certain provisions of the Bill.

1. General comments

Broadly, EDONT supports this Bill, subject to our specific suggestions below. We consider strengthening the governance of the Northern Territory Environment Protection Authority (**EPA**), a key objective of this Bill, is critical given the central role it plays in the assessment and regulation of environmental impacts associated with development in the Northern Territory.

However, this Bill must also be viewed within the broader context of environmental law in the Northern Territory, and in particular the environmental regulatory reform process that is underway and that will see a new Environment Protection Act delivered to replace both the *Environmental Assessment Act* and the *Waste Management and Pollution Control Act.*

While we assume the government has considered the amendments in the Bill in the context of this proposed new framework, it is very difficult for the community and stakeholders to analyse whether the changes to the EPA's governance, functions and administration put forward in this Bill are appropriate, without having clarity about the new legislative framework that it will operate within. In our view, this Bill should be introduced as part of a reform package, that is, when the new Environment Protection Bill is released. An incremental approach to reform undermines the ability to make genuine input into what we consider is an historic reform in the Northern Territory.

We also make the following key comments about the Act, which have not been addressed by this Bill. In our view, the Act:

- is replete with vague language and frequently unconstrained discretionary powers, which creates uncertainty and lack of accountability in decision-making on the part of the EPA; and

- does not sufficiently emphasise the importance of genuine public participation in EPA decision-making (particularly for Indigenous and remote communities in the Northern Territory), which in our view should be at the core of any environmental legislation.

We consider the fact that the Bill makes no improvements on either of these matters to be a lost opportunity for delivering accountable, transparent and participatory decision-making by the EPA.

In the context of these general concerns, and mindful of the terms of reference of the committee, we make the following detailed comments on the Bill, including proposing amendments where relevant.

2. Specific Bill provisions

Clause 5 – Amending NTEPA functions and powers

Although we generally support this proposed amendment, we consider:

- Better emphasis should be given to the importance of public participation in decision-making processes as a way to delivery accountability and transparency (i.e. section 8 (3)(a) should be strengthened to reflect this), and
- The proposed amendment to (3)(b) should not be restricted to the EPA's 'processes' (the meaning of which is uncertain) but should be generally applicable to all functions and activities of the EPA. The emphasis in this subsection should be on delivering transparent, accountable and consistent decision-making and administration for all.

Clauses 6 – Amending membership

EDONT understands that the purpose of this amendment is to enable the appointment of further members to the EPA to diversify its expertise, including so that it is able to advise the Environment Minister on petroleum decision-making (in light of the recommendations of the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* (**Fracking Inquiry**)).

However, in the broader environmental regulatory reform context, we submit that this amendment misses an opportunity for a more fundamental reconsideration of the EPA's membership provisions in the Act.

The EPA is an independent institution that the community expects to have the primary role of environmental protection. Requirements and criteria for membership in the Act should directly reflect this role.

While skills in economic analysis and business may support members' understanding of their operating context, they are not relevant skills to undertaking the EPA's core functions of assessing environmental impact statements and regulating pollution and waste (and now, hydraulic fracturing), which require clear technical expertise. We submit that there should be, at a minimum, a guarantee that all members have relevant environmental expertise. Clause 6 should propose further amendments to reflect this emphasis.

Clause 7 - Leave of absence

EDONT considers a 12-month limitation on a leave of absence, as proposed in clause 7 of the Bill, appears appropriate. However, we query whether the ability to approve this leave should instead rest with the Minister (rather than the EPA), which would be consistent with other roles and powers of the Minister in section 11 of the Act.

Clause 10 - Requirement to prepare a 'statement of intent'

We interpret the intent of the proposal in clause 10 is to establish a strategic planning process for the EPA. EDONT supports this amendment, as strategic plans are one of the cornerstones of good governance. However, we suggest that use of the term 'statement of intent' is potentially confusing (particularly given the use of the terminology, 'notice of intent,' under the current framework for environmental impact assessment). This section should simply use the term 'strategic plan' as it has an ordinary meaning that is well understood.

We also submit that the ability of the Minister to refuse a 'statement' on the basis that the activities are 'not consistent with the objectives of the NTEPA' should be supported by a transparency mechanism that requires the Minister to justify his or her reasons. While we support the intention behind this provision (i.e. maintaining the independence of the EPA, while retaining some Ministerial oversight to their direction is in line with objectives), we consider it would be appropriate to insert a further transparency mechanism to ensure that the Minister does not politically interfere in setting the priorities of the EPA. It may also be important to set a time frame within which the Minister must consider the statement.

Finally, we submit that the requirement for publication by the EPA of the 'statement' (proposed s24C) must be more specific. The amendment proposes an open-ended discretion that enables the EPA to determine publication 'as soon as practicable…. in the way it considers appropriate'. This provision gives unnecessary and excessive discretion to the EPA, undermining transparency and trust in decision-making. Access to information is fundamental in an accountable system of government. We therefore suggest a simple amendment to the Bill to require that 'within 7 days of approval by the Minister, the [statement of intent] must be published on an appropriate government website.'

Clause 11 – principles of ecologically sustainable development

EDONT supports the explicit inclusion of the principles of ecologically sustainable development (ESD) in the Act. We have consistently argued for ESD principles to be integrated within environmental legislation in the Northern Territory, given that ESD is the nationally-accepted framework[1] for balancing economic, social and environmental considerations in decision-making processes.

However, there are a number of important ways we consider this proposed section must be strengthened to deliver an appropriate legislative approach to integrating ESD principles in decision-making in the Northern Territory. We submit that:

- The requirement for the EPA to consider and apply ESD principles should not be limited to providing advice under 'this Division'. It should apply broadly to the EPA's decision-making powers, particularly considering an objective of the EPA is 'to promote ecologically sustainable development'. Moreover, the Bill should provide further clarity about how the ESD principles relate to the definition of ESD that already exists in section 3 of the Act. As currently drafted, the relationship between these two sections may be confusing.
- The phrase in proposed section 25AA(1) - 'the NTEPA considers relevant to the advice or report' - must be deleted. This phrase provides excessive discretion to the EPA to disregard the principles of ESD based on its own opinion, rather than on any objective criteria. This phrase significantly undermines transparent and consistent decision-making processes. Further, it is simply not required, given the test that is proposed is 'to have regard to'.

In our view, the best approach to integrating ESD principles into EPA decision-making would be to establish a new standalone section of the Act that defines ESD and its principles. Each specific section of the Act that requires the EPA to make a decision (including s25AA(1)) would then cross-reference this primary definitions clause. It would also enable the new definition (including principles) to be cross-referenced and applied by other legislation. We submit that amendments to the Bill should be made to reflect this approach.

Clause 12 – Matters for consideration

EDONT generally supports the minor amendment to section 26 to ensure the Act is clear that the EPA may consider *all* government policies and priorities rather than only economic ones. We submit that to achieve this objective, it would be more appropriate to simply delete the word

[1] All State and Territory governments have endorsed the 1992 *National Strategy for Ecologically Sustainable Development.*

'economic' from the current section, so as not to give continued precedence to economic policies over others (and would be more consistent with the 'triple bottom line' concept of ESD).

More broadly, we consider that this section needs to better emphasise the role and importance of genuine public participation and consultation with the community, particularly Indigenous and remote communities. The EPA's role is to protect the environment for all Territorians – it should not provide a greater focus on the needs of business and the economy (as in subsection (c) for example), without at least including an equivalent lo higher level of recognition of the individuals and communities who are impacted by environmental decisions.

In our experience, this is something that has not been well carried out by the EPA in the past. We strongly submit that a further subsection should be added to that explicitly obliges the EPA to consult with and consider the views of the community, and particularly to consult in ways that are appropriate to Indigenous and remote communities, when undertaking their functions under section 26.

Clauses 14 - 17 – environmental quality reports

EDONT is generally supportive of the proposal to provide a role for the EPA to undertake more strategic and holistic review of the Territory's 'system of environmental management or its outcomes' (proposed section 28A).

However we reiterate our earlier comments about vague language and excessive discretion given to the EPA, particularly in determining when it may restrict publication of information. We submit section 29A(2) should specify that the Minister's response must be made available within 7 days on an appropriate government website (consistent with previous comments).

Further, there is no guidance around what constitutes information that is 'of a commercially confidential nature,' (section 29A(3)) which could enable this section to be used excessively. We consider a more appropriate test for when the EPA may withhold information is when considers that it is the 'public interest' to do so.

Making consistent amendments of this nature throughout the Act would strengthen transparency, and by doing so, accountability of the EPA. This would build greater community confidence and trust in EPA decision-making.

Clause 17 – Advice on specific matters

Proposed new sections 29B and 29C, we understand, are to enable the provision of advice by the EPA to the Minister on new matters, including environmental approvals (environmental management plans) for fracking (as per recommendation 14.34 of the Fracking Inquiry).

Putting aside our concerns that about whether this is an appropriate model for implementing recommendation 14.34, we submit that proposed section 29C is too vague and discretionary. It provides very limited guidance on matters for consideration by the EPA.

While we understand that these provisions are 'enabling' in nature, at a very minimum it would seem clearly consistent with other parts of the Act that the EPA be required to consider its own objectives when providing advice under new section 29B.

Further, we strongly submit that there be a specific requirement to apply the principles of ESD in this section. It is not clear to us why this approach has not been included, even though it has been included in the Bill where the EPA will provide advice on 'general matters' (under section 25AA). This omission is particularly surprising given recommendation 14.11 of the Fracking Inquiry explicitly requires 'that the principles of ESD must be *taken into account and applied* by a decision-maker in respect of all decisions concerning any onshore shale gas industry' (emphasis added). We consider the Bill should directly reflect this requirement to take into account and apply ESD principles, in proposed section 29C. The government has committed to implementing the Fracking recommendations in full, and must deliver on the intent of the Inquiry by including this language.

Finally, we again reiterate our concerns about the limited requirement for transparency with regards to the advice it gives. We submit that the language in proposed section 29D must be tightened – i.e. that specific obligations be placed on the EPA to publish advice within 7 days, and that the EPA may only determine to withhold information if it meets explicit criteria, for example it is in the public interest to do so.

Clause 18 – offences

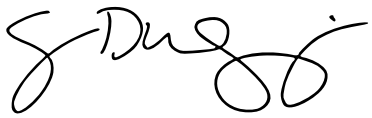
EDONT strongly supports this clause, which improves the drafting for the offence of providing misleading information in relation to the administration of the Act. This would enable the prosecution of those who include misleading information in an environmental impact statement.

However, we consider the penalties remain inadequate. A maximum penalty of 200 penalty units ($31,000) is unlikely to act as an appropriate deterrent when a multi-million dollar project is at stake. We suggest this should be significantly increased.

We also note that it may be difficult to enforce these provisions, particularly with the requirement to prove the person had knowledge that the information was misleading. In these circumstances, we would strongly suggest that the government consider further measures to be included in the Act to deliver better quality assurance over data and information provided, for example, by requiring consultants be professionally accredited to provide advice and reports under environmental impact assessment legislation.

Yours sincerely

Environmental Defenders Office (NT) Inc



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