

Our Ref: 1148

4 November 2011

The Director
Select Committee on the Kooragang Island Orica Chemical Leak
Legislative Council
Parliament House
Macquarie Street, Sydney NSW 2000

By email: oricainquiry@parliament.nsw.gov.au

Dear Ms Callinan,

Inquiry into the Kooragang Island Orica chemical leak

Thank you for the opportunity to provide a submission to this Select Committee. The Environmental Defender's Office Ltd (NSW) (**EDO**) is a community legal centre specialising in public interest environmental law. In recent years the EDO has been involved in law reform and has represented clients in litigation relating to the impact of pollution on communities in NSW.¹

This submission comments on the proposed reforms to the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) and the *Protection of the Environment Administration Act 1991* (NSW) contained in the *Protection of the Environment Legislation Amendment Bill 2011* (**the Bill**) currently before the NSW Legislative Council; and the recent report on the Orica chemical leak by Brendan O'Reilly (**O'Reilly Review**).²

In general, the EDO supports the proposal set out in the O'Reilly Review³ that good practice supports taking a 'worst case scenario' response approach when the health of the community is concerned. We also agree with recommendations that facilitate streamlined communications between response agencies, the public and persons responsible for polluting activities. We particularly emphasise the need for accessibility of information by its publication in useful, educative and informative ways.

¹ In 2010, we provided a submission on the *Protection of the Environment Operations (Clean Air) Regulation 2010* to the Clean Air Regulation Review: http://www.edo.org.au/edonsw/site/pdf/subs/100701poeo_submission.pdf. In 2005, we provided a submission on the consultation draft of the *Protection of the Environment Operations Amendment Bill*: <http://www.edo.org.au/edonsw/site/pdf/subs/050725poeobill.pdf>. We have also acted for the Blue Mountains Conservation Society in their legal action against, and mediation with, Delta Electricity regarding the release of pollutants into the Cocks River.

² *Review into the response to the serious pollution incident at Orica Australia Pty. Ltd. ammonium nitrate plant at Walsh Point, Kooragang Island on August 8, 2011*
http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0012/131160/A_review_into_the_response_to_the_serious_pollution_incident_at_Orica_Australia_Pty._Ltd._ammonium_nitrate_plant_at_Walsh_Point,_Kooragang_Island_on_August_8,_2011.pdf

³ See p. 34



5/263 Clarence Street
Sydney NSW 2000
Tel (61 2) 9262 6989
Fax: (61 2) 9264 2414

Office1 Level 1
71 Molesworth Street
PO Box 868
Lismore NSW 2480
Tel: 1300 369 791
Fax: (61 2) 6621 3355

email: edonsw@edo.org.au
web: www.nsw.edo.org.au

In addition, while it may be beyond the scope of the present Inquiry, we would emphasise that there is a need to undertake a broad examination of the regulation of pollution in NSW. This should take into account the fact that a considerable amount of responsibility for the regulation of polluting activities rests with local governments, which often do not have sufficient resources to perform this function fully.

The submission addresses the following topics more specifically:

1. Notification Requirements
2. Reform of the Environment Protection Authority

1. Notification Requirements

- 1.1 The EDO supports the alteration to the ‘as soon as practicable’ time limit for notification of a ‘pollution incident’, currently set out in s 148(2) of the POEO Act. We note that Recommendation 1 of the O’Reilly Review proposed an amendment that would require notification ‘immediately or within one hour of the incident occurring’, but that the Bill, in Sch 2[2], omits ‘within one hour’. The reasoning behind this omission is unclear.

In the absence of a specified time period, the EDO submits that further guidance should be given on the meaning of the term ‘immediate’ in this circumstance. We note that the Courts have interpreted requirements of ‘immediate notice’ and similar phrases, depending on the circumstances in question, as requiring notice ‘at the first reasonable opportunity’;⁴ or ‘with all reasonable speed considering the circumstances of the case’.⁵ Without further guidance on what constitutes ‘immediately’ in the circumstances of pollution incidents under the POEO Act, the term could be interpreted in a number of ways, ranging from being no more stringent than the ‘as soon as practicable’ standard; or, alternatively, applying comparatively harshly, especially in light of the increases in penalties proposed in the Bill.⁶ We note that we otherwise support the increase in penalties.

The EDO would support further guidance in the form of setting out specific classes of pollution or environmental harm that have degrees of urgency attached to them. This information could also be used to inform the requirements of the proposed pollution incident response management plans to be prepared by holders of environment protection licences, and others engaged in industry.⁷

- 1.2 The EDO notes the requirement, proposed in Sch 2[4] of the Bill, that up to six authorities must be notified of a pollution incident. The Committee may wish to consider whether this requirement has the potential to disrupt effective communication between response agencies; and may additionally be unduly burdensome on the notifying entity.
- 1.3 We also note that at present, the POEO Act provides that pollution incidents must be notified when “material harm to the environment is caused or threatened”.⁸ The EDO would support the provision of further guidance regarding this threshold.⁹ Such guidance might also be incorporated in pollution incident response management plans, noted at 1.1 above.

⁴ See *Newnham v Baker* [1989] 1 Qd R 393

⁵ See *Farrell v Federated Employers Insurance Association Ltd* [1970] 3 All ER 632.

⁶ \$2,000,000 for a corporation, and \$500,000 for an individual – see Sch 2[11] to the Bill.

⁷ Proposed in Sch 2[12] of the Bill.

⁸ Section 148(1).

⁹ We note that the POEO Act provides a degree of guidance on the meaning of ‘materiality’ in s 147.



2. Reform of the Environment Protection Authority

2.1 *Independent EPA*

The EDO supports the proposal, set out in Recommendation 7 of the O'Reilly Review, to create an Environmental Regulatory Authority independent of the NSW Office of Environment and Heritage (**OEH**). The EDO notes the proposal in the Bill to appoint a Chairperson of the EPA who will assume most of the functions of the Director-General of the Department of Premier and Cabinet under the relevant legislation.

The EDO cautions, however, against any change that would limit the ability of the EPA, or any other group within OEH, to carry out functions in areas such as natural resource management, biodiversity conservation and the protection of cultural heritage. In particular, the EDO cautions against withdrawing or reallocating resources in ways that may diminish the capacity of the OEH to prosecute offences under other legislation, such as that relating to native vegetation,¹⁰ threatened species,¹¹ national parks, wildlife and Aboriginal heritage.¹²

We also look forward to receiving further details as to how the EPA will be created as an independent statutory authority.¹³ It is debatable whether the acts of creating a statutory office of Chairman, and reconstitution of the Board, are themselves sufficient to drive lasting cultural change. We would recommend a clear definition of the priorities of the organisation as newly constituted. We note that in Victoria, the role of that State's EPA has recently been subjected to comprehensive review, particularly as this relates to its compliance and enforcement activities.¹⁴ One noteworthy finding in that review has been the need for the Victorian EPA to articulate regulation as its core function.¹⁵

2.2 *Community representation on, and independence of, the EPA Board*

The EDO opposes the removal of community representatives from the Board of the EPA, as part of the restructuring of the Board under Sch 1 of the Bill. This removal is contrary to Recommendation 7 of the O'Reilly review. We submit that community representatives should remain on the Board, both as a means to ensure the Board's accountability to the public, and as a conduit for feedback on community concerns and priorities.

The EDO further notes the proposal in the Bill for the employment of the Chairperson of the EPA to be subject to the *Public Sector Employment and Management Act 2002* (NSW), making this a Senior Executive Service position. The EPA has a vital function in regulating pollution emissions, including, significantly, for State owned corporations such as electricity generators. Accordingly, the EDO submits that the retention of the current arrangement with an independent chair is a better model for ensuring the ongoing independent exercise of the EPA's regulatory functions. This would also be more consistent with the Government's stated aim increasing the EPA's independence.¹⁶

¹⁰ *Native Vegetation Act 2003* (NSW).

¹¹ *Threatened Species Conservation Act 1995* (NSW).

¹² *National Parks and Wildlife Act 1974* (NSW).

¹³ See media release of the Hon Barry O'Farrell MP, *Tough New Pollution Laws: O'Reilly Report Accepted in Full* <http://www.premier.nsw.gov.au/sites/default/files/111005-O%27Reilly.pdf>, 5 October 2011.

¹⁴ Stan Krpan, *Compliance and Enforcement Review: a Review of EPA Victoria's Approach*, February 2011, [http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/2c81c8735bc744d9ca25783700094c64/\\$FILE/1368.pdf](http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/2c81c8735bc744d9ca25783700094c64/$FILE/1368.pdf)

¹⁵ See p. 9 of the review and recommendation 3.1.

¹⁶ See, for example, speech of The Hon Robyn Parker MP, *Protection of the Environment Legislation Amendment Bill 2011 – Agreement in Principle*, 11 October 2011



2.3 *Compliance activities*

While bearing in mind the resourcing concerns noted above, the EDO strongly urges that the EPA's resourcing be increased so as to strengthen its compliance activities. In particular, the EDO notes its involvement in the legal dispute between the Blue Mountains Conservation Society (**BMCS**) and Delta Electricity. In that dispute, despite having been aware for a substantial period of time that Delta (a State-owned corporation) was emitting pollutants into the Cocks River, the Department of Environment and Climate Change¹⁷ took no enforcement action. To pursue the breach, BMCS was required to take protracted civil enforcement action in the public interest, resulting in a mediated settlement in October 2011.¹⁸ We would urge an approach to enforcement activities that has as its end goal the creation of a culture of compliance.

The EDO notes that the Bill introduces a requirement for environment protection licence holders to prepare pollution incident response management plans (Sch 2[12]), and allows the EPA to direct that other persons prepare such plans. The EDO looks forward to viewing the content of the regulations that provide guidelines on preparing such plans. We note that the proposed s 153C of the POEO Act, which sets out the regulatory authorities that must be notified, again raises the issues noted at 1.2 above in relation to effective communication to, and between, government agencies.

The EDO supports the strengthening of conditions under which a mandatory environmental audit will be required under s 175 of the POEO Act.

2.4 *Community Consultative Committees*

The EDO supports, in principle, the establishment of community consultative committees. We submit, however, that work is required to determine best practice on how such committees should be managed. There should be transparency in terms of the information being given to committee members; and particularly in relation to the use being made of the input of community members. The EDO submits that the EPA should be required to report on its community engagement activities, under similar terms as those set out in the proposed s 16(2)(b) of the POEO Act.¹⁹

More generally, the EDO supports involvement by the community both when environment protection licences are granted under the POEO Act, and when they are varied. We would support clearer processes for public participation where environment protection licences are proposed to be issued for matters of State significant development, noting that under the *Environmental Planning and Assessment Act 1979* (NSW), such licences cannot be refused when this kind of development has received consent.²⁰

2.5 *Publication of Data*

In order to facilitate greater public participation in licensing decisions, the EDO further supports the requirements for licence holders to publish monitoring data, as set out in Sch 2[1] to the Bill. The EDO generally supports measures that may help to reduce overall

[http://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/131a07fa4b8a041cca256e610012de17/346631a724ea7b19ca257926001549c2/\\$FILE/PROTECTION%20OF%20THE%20ENVIRONMENT%20LEGISLATION%20AMENDMENT%20BILL%202011.pdf](http://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/131a07fa4b8a041cca256e610012de17/346631a724ea7b19ca257926001549c2/$FILE/PROTECTION%20OF%20THE%20ENVIRONMENT%20LEGISLATION%20AMENDMENT%20BILL%202011.pdf)

¹⁷ Which at that time incorporated the EPA.

¹⁸ See joint settlement statement at

http://www.bluemountains.org.au/documents/letters_articles/media_release_bmcs_delta_mediation_17oct11.pdf

¹⁹ This would require that the Board assess the performance of those industries regulated by the EPA terms of their environmental and health impact reduction activities.

²⁰ See Part 4, Div 4.1 of the *Environmental Planning and Assessment Act 1979*, and in particular s 89K.



pollution over time, and considers the publication of this monitoring data will help inform debate on this issue. We submit, however, that this data must be presented in a manner that is readily accessible to the public; and that the public should be made aware that it is available.

Yours sincerely

Environmental Defender's Office (NSW) Ltd

Nari Sahukar

Acting Policy and Law Reform Director

