Submission

to the

Statutory Policy Review

prepared by

Environment Defenders Office (Victoria) Ltd

Environment Victoria

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About the Environment Defenders Office (Victoria) Ltd

The Environment Defenders Office (Victoria) Ltd (**EDO**) is a Community Legal Centre specialising in public interest environmental law. Our mission is to support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice. In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working to protect Australia's environment through environmental law.

About Environment Victoria

Environment Victoria is one of Australia's leading environment group working to safeguard our environment and the future. We advocate for solutions to our environmental problems and we help people make sustainable choices in their everyday lives. We believe that a healthy environment underpins the lives, health and wealth of all Victorians and that safeguarding it is critical to our future. We have 20,000 individual supporters and 100 community group members.

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INTRODUCTION

The EDO and Environment Victoria welcomes the opportunity to make a submission to the review of statutory policies under the *Environment Protection Act 1970* (Vic) (**EP Act**). The decision by the Environment Protection Authority (**EPA**) and the Department of Sustainability and Environment (**DSE**) to review these policies is a welcome recognition that these policies, and the broader legal framework of which they are a part, need reform.

The EDO and Environment Victoria have extensive experience in the use and application of statutory policy under the EP Act. In particular, as the only community legal centre with planning and environment law expertise, the EDO has advised and represented community groups and individuals on planning and environment law issues for the last 20 years. We have had ample first-hand experience of how they work, their strengths and their weaknesses.

EDO and Environment Victoria believe that reforming these statutory policies, and the environment protection framework of which they are a part, is a 'win-win' opportunity. Consolidating the plethora of confusing and sometimes overlapping legal instruments that apply under the EP Act, improving the clarity and simplicity of their requirements, and ensuring that they are applied and enforced in a robust and consistent way is good for the environment and good for business. Statutory policy that is clear, direct and binding gives business certainty as to what is required of them. It is also more likely to be understood and applied to effectively protect the environment.

EPA and DSE need to take full advantage of that opportunity. These productivity and environmental benefits will not be achieved unless statutory policy is significantly changed to make it far clearer, far simpler, far more integrated with other regimes, far more enforceable, and far stronger environmentally.

The rest of this submission sets out our recommendations for how to do that. Our key recommendations for reforming statutory policy are summarised below, followed by our detailed response to the consultation questions. We are happy to elaborate further on that response or these recommendations if that would be useful.

SUMMARY OF KEY RECOMMENDATIONS

1 Make them clear, simple and accessible

- Consolidate the 15 State Environment Protection Policies (**SEPPs**) and Waste Management Policies (**WMPs**) into 4 SEPPs (for example, for water, air, noise and waste). Abolish WMPs as a separate category of statutory policy.
- Consolidate the plethora of legal, non-legal and quasi-legal instruments, preferably into four types of instrument: legislation, regulations, SEPPs and guidelines.
- Publish consolidated versions of SEPPs immediately (i.e. before the end of this review).

2 Make them effective and enforceable

- Attainment programs should be removed from SEPPs entirely. Obligations should be moved into regulations and enshrined as binding, enforceable legal duties. Vague and general policy statements should be moved into policy and guidance documents.
- SEPPs should be used to set environmental values (i.e. beneficial uses), environmental quality objectives, and environmental quality indicators. Their legal effect should be explicitly spelt out in the *Environment Protection Act 1970* (Vic) (**EP Act**).
- Environmental standards must be coupled with direct, mandatory, enforceable obligations and penalties to achieve them. Standards must be met – not just set.
- Avoid vague, meaningless terms like 'best practice'.

3 Integrate them with other regulators and regimes

- The application of SEPPs to other entities (responsible authorities, for example) should be through clear, enforceable obligations — not general statements as to 'responsibility', or factors to be 'taken into account'.
- Wherever possible, those obligations should be imposed through the regulatory regime primarily relevant to that entity (through planning schemes, for example).

4 Make them stronger

- The environmental standards and quality objectives need to be set at a level where we want our environment to be, not just at a level that we think would be easy to achieve.
- If environmental standards and quality objectives cannot be met in the short-term, the SEPPs need to spell out a trajectory for achieving them over time, in much the same way that climate change legislation sets out emissions reduction targets and budgets.
- We do not support the flexible amendment provision suggested in the Discussion Paper. The procedure for amending SEPPs needs to include more safeguards against weakening environmental standards for economic or political reasons.

A. HOW STATUTORY POLICY WORKS

1 Statutory policies have not worked well

"In your experience, what has worked well with statutory policy? What has not worked well?"

In our experience, statutory policy has not worked well. The main problems have been complexity, unenforceability, a lack of integration other regimes, and environmental weakness.

They are too complex

Statutory policies themselves, and the web of environmental law and policy instruments of which they are a part, are very complex. Business and community groups alike struggle to grasp their meaning. Most lawyers don't fully understand them. In one matter in which EDO has acted, the Victorian Civil and Administrative Tribunal (**VCAT**) member noted that an expert witness had to be called to explain the relevant policies and related instruments.[1]

Victoria has 15 Statutory Environment Protection Policies (**SEPPs**) and Waste Management Policies (**WMPs**) — more than any other State. They are inconsistent and sometimes overlapping in their structure, content and effect. Rather than have one policy for waste management, for example, Victoria has 8 separate WMPs. Rather than have one water policy, there are two separate water SEPPs (Waters of Victoria and Groundwater Management) and one WMP (Ships Ballast Water), and several geographic based schedules that sit beneath these.

The policies form part of a confusing web of legal, non-legal and quasi-legal instruments: legislation, regulations, Protocols for Environmental Management (**PEM**), Best Practice Environmental Management Guidelines (**BPEMs**), Industry Codes of Practice, Technical Guidelines, Australian Standards, Administrative guidelines and explanatory notes. Each of these is given legal effect by different sections of different instruments in a manner that is often not explicit, and usually far from clear.

Some EPA practices compound this confusion. For example, the practice of releasing statutory policies and guidelines in draft form[2] is confusing as it adds another instrument to the already complex mix, and leads to some parties treating it as official policy.

A particular source of confusion and frustration for stakeholders is EPA's failure to publish consolidated versions of SEPPs and WMPs (despite keeping consolidated versions for its own use), instead requiring stakeholders to piece together complex amendments.[3] The public is left with the impression that SEPPs and WMPs are not intended to be used by anyone other than the EPA.

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[1] *SITA and Lyndhurst v Greater Dandenong City Council* [2007] VCAT 156, [54].

[2] For example, the Landfill BPEM – Siting, Design, Operation and Rehabilitation of Landfills, released in draft form in 2010.

[3] For example, the SEPP (Waters of Victoria), which is currently spread across 5 separate documents on the EPA's website: http://www.epa.vic.gov.au/about_us/legislation/water.asp#sepp_waters, visited on 10 August 2011.

They are vague and unenforceable

The legal status and effect of statutory policies is very difficult to ascertain.

Statutory policy is enforced through a combination of offences, licences and works approvals, Pollution Abatement Notices (**PANs**) and third party enforcement. But nowhere is this made clear. Indeed, in many cases it is far from clear, even to lawyers. For example, although failure to comply with a requirement of a WMP is clearly an offence,[4] it is not clear whether a failure to comply with the requirements of a SEPP relating to land, air or water is an offence,[5] and even less clear what the consequences of failure to comply with a noise SEPP are.[6]

The inconsistent legal status of various SEPPs and WMPs is made more confusing by the fact that, even within these policies, the legal effect of various standards and requirements is not clear. SEPPs and WMPs have the legal status of regulations, but they are drafted like policy documents. They contain unnecessarily long statements of values and general intentions. When they do set requirements these are often vague and ambiguous; frequently failing to specify who must meet a given requirement and usually failing to specify the consequences of non-compliance. Terms like 'must', 'will' and 'may' are used without precision, making it very difficult to distinguish aspirational policy commitments from binding legal obligations and criminal penalties.[7] Ironically, therefore, efforts to use the language of 'plain english' actually makes these policies *more* confusing.

Partly because of this uncertainty, most statutory policy is unenforceable. It is so difficult for community members and businesses to understand what their legal obligations are, and so difficult to separate the enforceable legal requirements from the aspirational goals and guidelines, that statutory policies are rarely enforced. Indeed, many of the provisions of statutory policies are inherently unenforceable — even the attainment programs. See, for example, clause 12 of the Groundwaters of Victoria SEPP: "all practicable measures must be undertaken to prevent pollution of groundwater." It is not clear who bears this obligation, or what the consequences of non-compliance are — this clause was never meant to be enforced.

They intersect poorly with other regimes and regulators

Statutory policies have interacted poorly with other regulators and regulatory regimes, particularly the planning regime.

They are not effective at allocating responsibilities to other agencies. Statutory policies often declare that other agencies (like catchment management authorities (**CMAs**), planning authorities, and water corporations) must do certain things, or 'have responsibility' for certain things. See, for example, clause 17 of the Waters of Victoria SEPP, which declares that municipal councils have "a range of responsibilities which impact on surface waters", and requires them to work with other agencies to "ensure their

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[4] *Environment Protection Act 1970* s 27A.

[5] The interaction between sections 38, 40 and 44 of the *EP Act* (requiring discharges to land, air or water to comply with policy) and sections 39, 41, and 45 of the *EP Act* (which makes pollution of land, air and water an offence) is not clear, although it is likely that a breach of the SEPP amounts to the offence of pollution.

[6] Noise emissions must comply with a SEPP under s 46 of the EP Act, but failure to do so does not amount to an offence.

[7] Stan Krpan, *Compliance and Enforcement Review* (2011) p 61.

municipal planning schemes, statutory approvals and municipal programs are consistent with the Policy and regional catchment strategies, and help to protect beneficial uses."

If these types of provisions are aimed at allocating responsibility to other agencies they are not effective. Placing obligations outside the agency's primary statutory regime (in the above example, the planning regime) makes it difficult for the agency to locate their obligations — municipal councils may not even be aware of the policy or provision in question. Placing the obligation in a different regime also makes it hard to reconcile the provision's requirements with the agency's other obligations under other regimes. In the above example, it is not clear whether the obligations imposed under the SEPP override those contained in the relevant planning scheme or the PE Act, or whether they are just another matter to take into account. This failure to integrate the EP Act and planning regimes has been the subject of criticism before.[8]

They are weak

One of the strengths of statutory policies (as opposed to regulations) is that their standard-setting function encourages a focus on environmental outcomes. However, too often in this respect, statutory policy has failed to achieve adequate environmental outcomes.

Neither the EDO nor Environment Victoria has the scientific expertise to comment on the adequacy of the environmental quality objectives and indicators in individual policies. But the tools that the policies use to achieve those objectives have proven far too weak. Requirements that hinge on terms like 'best practice' are inherently vague and malleable. They can hinge on industry availability and economic feasibility, rather than environmental protection requirements, facilitating bad environmental outcomes. EDO has acted in a number of cases, in areas as diverse as toxic waste management to climate change regulation, where the definition of 'best practice' was highly contested.

The standards and requirements in policies are often further weakened by a tendency to balance them against other requirements. Although standards like 'best practice' might appear on their face to be uncompromising, they are often treated as one of a number of factors to be taken into account. They are weighed or 'balanced' against other factors, and their requirements are therefore considerably watered down. This undermines the standard-setting function of statutory policies — there is not much point having environmental standards unless they mean what they say.

All this suggests that statutory policies devote a disproportionate focus to setting different types of environmental standards, and too little focus to ensuring that they are met. Even if the environmental quality objectives and indicators they set were environmentally strong enough, the lack of attention to how they are implemented has led statutory policies to impose very weak environmental standards in practice.

2 Statutory policy is very poorly understood

"How well do you think the features and obligations in statutory policy are understood? Are some parts better understood than others? (We would welcome some examples)"

In our experience, statutory policy is very poorly understood. As discussed above, even lawyers find the meaning and effect of their vague and voluminous provisions difficult to

[8] *SITA and Lyndhurst v Greater Dandenong City Council* [2007] VCAT 156, [36]-[60].

decipher. Community members have even less understanding of them. Without repeating what we have written above, the following examples illustrate this point.

In many of the cases the EDO has worked in, our clients have told us that they find statutory policy very hard to understand. For example, on more than one occasion our clients have expressed surprise that the environmental quality objectives and indicators specified in a SEPP were not binding. After we explain that a SEPP is a legislative instrument with the same legal force as regulations, people assume that the contents of the SEPP will be enforced. Several clients have expressed frustration when we explain that the environmental quality objectives and indicators cannot be directly enforced, and that the attainment programs designed to achieve them are often not enforced or enforceable either.

A useful example in which EDO recently acted is the opposition brought by Residents Against Toxic Waste in the South-East Inc (**RATWISE**) against an application for a planning permit for a waste treatment facility in Lyndhurst. The management of possible air emissions was a key aspect of the proposal, and of significant concern to RATWISE. The case underscores several aspects of the confusion that statutory policies create.

The operative provision of the planning scheme required the responsible authority considering the planning permit application to 'have regard to' relevant SEPPs, including the Air Quality Management SEPP. At the hearing of a Planning Panel appointed to consider this application, there was considerable confusion as to what this actually meant. Did the responsible authority have to assess the proposal's technical compliance with the SEPP? If not, what did it mean to 'have regard' to it? Most importantly, if the responsible authority need only 'have regard to' the SEPP, could they approve the development if it did not comply with it?

There was also confusion as to how the EP Act and planning regimes interacted. It was not clear what was required from the EPA, and what was required from the responsible authority. Was the responsible authority supposed to duplicate the EPA's decision on whether or not the proposal complied with the SEPP? If so, were they supposed to take advice from the EPA in making that decision?

There was also confusion as to what the SEPP actually required. The SEPP relied heavily on terms like 'best practice' air quality management, and the need to reduce the emissions of certain contaminants to the 'maximum extent achievable'. The content of these requirements was extremely open-ended, and there was much argument as to what they required. For example, if the proposal's management of air emissions could be shown to be improved on one or more counts, or if another facility with slightly better management controls could be shown to exist, did this mean that the proposal was not 'best practice'? One of the most important substantive issues — the appropriate buffer distance between the development and residential homes — was not covered by the SEPP at all.

Significantly, the EPA (although a referral authority under the Planning Scheme in relation to the permit application and a party to the Panel hearing) provided very little guidance to the Panel on these issues, suggesting that even EPA was confused as to how the SEPP interacted with the planning system.

3 Prioritising individual policies

"Are there critical issues, risks or relevant processes (e.g. upcoming reviews, strategic planning processes) that should be considered in prioritising individual policy reviews?"

There are two upcoming reviews of Victoria's environmental laws that should be taken into account. One is the report of the Environment and Natural Resources Committee of the Legislative Council into the environment effects statement process in Victoria, details of which are available online.[9] The other is the review of the planning system being undertaken by the Underwood Committee, details of which are available online.[10] Whilst neither of these reviews has any bearing on individual policy reviews, they provide an opportunity to review Victoria's environment protection regulatory framework in a holistic and integrated way. It is important that EPA and DSE take that opportunity.

B. CRITICAL CHALLENGES FOR STATUTORY POLICY

4 Challenges for statutory policy

"What do you think are the main challenges for statutory policy? Are there other challenges not presented in the discussion paper?"

In our view there are four main challenges for statutory policy: to be clear and simple, to be integrated, to be enforceable, and to be set at a level that protects the environment.

To be widely understood

If statutory policies are going to work, they need to be much more simple and direct. They need to be understood and used by people other than lawyers and EPA experts. To achieve this, there need to be much fewer instruments. The statutory policies need to be consolidated, preferably into just four policies like those used in Queensland: Waste, Air, Water, Noise. The baffling hierarchy of regulatory instruments needs to be greatly reduced and simplified, preferably into just four types of instrument: legislation, regulations, statutory policy, and guidelines. The vague, general aspirational policy statements that currently populate statutory policy need to be removed. Statutory policy needs to be drafted with the precision of any other legal instrument, much more like regulations. The format and content of statutory policy will also need to be consistent.

To be integrated with other regimes

Statutory policies need to be integrated with other regulators and regimes to which they apply — especially the planning regime. It needs to be much clearer who has responsibility for doing what, if two regimes overlap (for example, the EP Act and PE Act regimes, and the statutory policies and planning schemes made under them). If statutory policies intend to allocate responsibility to agencies other than the EPA, then they should do so through the legal instruments that govern those agencies (for example, local councils should be given responsibility through the PE Act regime).

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[9] http://www.dpcd.vic.gov.au/planning/panelsandcommittees/current-planning-panels-and-committees/victoria-planning-provisions-and-planning-schemes-review

[10] http://www.parliament.vic.gov.au/enrc/inquiry/303.

To be enforceable

Statutory policy is meaningless unless it is enforceable. It is hardly worth setting environmental quality objectives and indicators if they are not going to be met. If statutory policy is going to give business certainty about its aims and effects, and achieve its primary goal of protecting the environment, it needs to be enforceable. It needs to be drafted in enforceable terms, and it needs to be much clearer exactly how it will be legally enforced. There needs to be clear penalties, for clearly identified people, for non-compliance.

To be set at a level that protects the environment

As recognised in the Discussion Paper, the environment protection challenges we face are unprecedented. If the quality of Victoria's environment is going to be maintained and restored, then the regulatory framework for environment protection — including statutory policies — needs to be much stronger. When setting environmental quality objectives and indicators, statutory policy needs to be set at a level that actually protects the environment. It should not matter if business is unable to meet these standards overnight. If the standards that our environment requires are for the moment out of reach, then statutory policy needs to take an approach analogous to that used in climate change law — set a longer-term target and plot a trajectory to gradually achieving it. This approach, if adopted, would need to be clearly explained so that business and communities understand what is enforceable immediately and what may take time to achieve.

This is the approach taken in some elements of the United States Clean Water Act to regulate water quality. For example, where the EPA believes that standards are not currently achievable, businesses should be required to progressively improve their practices to meet clearly defined benchmarks over a clearly defined time. This improvement program should be binding and enforceable, with incentives for achieving the standards early and penalties for failure to meet the standards.

5 Instruments used most often

"In your work, which instruments or documents under the Environment Protection Act do you (or your organisation) use most often? The Environment Protection Act, Regulations, statutory policies or guidance?"

In advising and representing clients in planning and environment cases, the EDO most often uses SEPPs and the EP Act. We rarely use either the WMPs or EP regulations. We rarely rely on guidance documents. The specific SEPPs that we use most often are the SEPP (Air Quality Management) and the SEPP (Waters of Victoria). Having said that, over the past 20 years EDO has used practically every one of the above legal instruments at one time or another.

Environment Victoria uses the SEPPs most often, particularly with regards to environment quality objectives for water and air quality. However we note that these instruments are limited in their use to Environment Victoria and our supporters as they contain no standards for greenhouse pollution or water extraction from rivers, two of the biggest causes of environment damage in Victoria.

C. APPROACHES TO STANDARD-SETTING

6 Attainment programs

"What types of measures or provisions in the 'attainment programs' of statutory policy do you find most useful? Do you think these need to stay in statutory policy or may be better placed in other regulatory instruments or guidance?"

In our experience, the attainment programs in statutory policies have not been useful. They should be removed from statutory policy altogether, and put into regulations.

We have found the attainment programs to be perhaps the least understood part of statutory policies. Not only is the name 'attainment programs' technocratic and obscure, the programs themselves have proven to be a confusing mix of aspirational policy statements and specific mandatory requirements. They have been poorly enforced, and often ignored. They are dominated by vague and indeterminate standards, like requirements to achieve 'best practice' and commitments to 'working together to ensure', which have caused confusion when applied to specific legal cases. They have failed to turn the objectives and aspirations of statutory policy into actionable legal requirements.

To the extent that attainment programs contain mandatory requirements for government agencies, businesses or individuals, these should be transferred to regulations. Moving them to regulations will ensure that they are drafted with legal precision. It will avoid any doubt as to who must meet the obligation, exactly what that obligation is, and what the consequences of non-compliance are. This will allow the obligations to be easily understood and readily enforced.

To the extent that attainment programs contain general policy statements for how particular problems are to be managed, these should not be in regulations or in statutory policy. If they do not impose legal rights or obligations, they should not be in legal instruments. Statements like '[t]he Authority will work with stakeholders, including other government agencies and the property sector, to encourage occupiers to adopt sound practices for the provision of relevant information regarding contamination of land…" belong in policy documents. They would perform their policy and management functions best if they were placed in policy or guidance documents.

There are considerable benefits to taking this approach. By making the requirements of statutory policies enforceable, statutory policies will contain the tools they need to achieve their environment protection objectives. By clarifying the legal status and effect of the provisions of statutory policies once and for all, it will make them much better understood by the community, and will provide valuable certainty for business. By removing one of the major causes of complexity and confusion in statutory policy, it will improve environmental outcomes and increase productivity at the same time.

7 Environmental standards

"How well do you think statutory policies perform their standard-setting role? Would specific types of standards be better placed in other regulatory instruments or guidance?"

EDO and Environment Victoria recognise the benefits of setting standards for the environment. Setting out specific objectives for environmental quality can provide valuable clarity of purpose for environmental regulation, by ensuring it is outcomes-focussed. It can also

provide business certainty, by sending a clear, consistent and legally sanctioned message about what is expected of business, and what environmental regulation will aim towards. It also offers the promise of a shared community understanding of common environmental and regulatory goals. Most importantly, these standards determine the level of environmental health required to protect fundamental ecological and human uses of the environment. This is done nowhere else in Victorian law and therefore is the core of statutory policy.

Therefore we believe that statutory policies should still perform their valuable standard-setting role. Setting out these environmental quality objectives and indicators is useful, and setting them out in statutory instruments — with Parliamentary imprimatur — gives them valuable clout.

However, it is important to recognise the limitations in the way that environmental standards are currently set. Whether or not the standards are environmentally adequate is a question that deserves close attention (though, as mentioned above, we do not have the expertise to make that assessment). But even if they are scientifically adequate, they are not created or enforced in a way that ensures the standards are actually achieved. Standards must be coupled with direct, mandatory legal obligations that require polluters to reduce their pollution. Without this, proper enforcement is not possible. As valuable as environmental quality standards are, the focus that Victoria's environmental protection framework has given to quality standards has not been matched by a focus on enforceable environment protection laws.[11]

We also note that a number of other 'standards' are set in statutory policy, for example, permissible and non-permissible activities and technology standards such as best practice and commonly available technology. As previously recommended, these standards are best included in regulations rather then statutory polices to ensure they are clear and enforceable.

8 Roles and responsibilities

"Has including the roles and responsibilities of agencies — which often sets out how agencies will jointly tackle particular issues — in statutory policy been valuable? Why/why not?"

In our view including the roles and responsibilities of agencies in statutory policy has not been useful, beyond setting out aspirational goals.

Statutory policies generally contain prose descriptions of the various agencies and their responsibilities in a section of the attainment program. The allocation of responsibility is often not tied to specific tasks or obligations. Rather than clearly specify who must conduct what monitoring programs, or who may issue what notices or orders, statutory policies have too often resorted to general statements about who is responsible for what *areas* of policy, as a preface to the allocation of particular tasks. The SEPP (Waters of Victoria) is a good example of this.

The main problem with this approach is that it is very easily ignored. The generality with which responsibility is allocated allows agencies to ignore this part of the policy. While general descriptions of roles may be appropriate for management or policy documents that merely seek to explain preferred management arrangements, it is an ineffective way to allocate responsibility in legal instruments like statutory policies. And because the allocation of responsibility is buried within the statutory policy itself, rather than in the legal documents that primarily govern the various agencies, the relevant agency (a local

[11] So much has been recognised by Professor Robin Kundis-Craig, *Victoria's Legal Options for Addressing Agricultural Diffuse Water Pollution* (2011) p 30.

council, for example) may in some cases not even know that responsibility has been allocated to them.

If the aim of these sections is to require agencies to fulfil specific functions, they should be included in law so that the agency is aware of its responsibilities and has the mandate (and hopefully the budget) to achieve them. If the aim is to explain preferred management arrangements, it should be in policy. Either way, the agencies in question must be fully aware of their responsibilities and able to implement them.

9 Other fields of regulation

"In your experience, are there features in other fields of regulation that would be useful in the Victorian environment protection framework?"

Corporations law, criminal law and occupational health and safety (**OH&S**) law all have features that would be beneficial in the environment protection framework. We acknowledge at the outset that regulating environmental impacts has inherent complexities that the following regimes do not have to contend with, however it is useful to identify elements of other regimes the environmental framework could aspire to.

Corporations Law

The *Corporations Act 2001* (Cth) is widely regarded as a world-class company law regime. It sets out all the relevant obligations and procedures for all aspects of corporate law in a single piece of clear, explicit, easy-to-navigate legislation. The obligations are easy to understand, the consequences of failing to meet them are clear. Business is left with a high degree of certainty as to what they must do. A high standard of regulatory compliance is maintained, yet economic efficiency is not unduly impeded. The driving force behind these characteristics appears to be the need to facilitate efficient economic activity.

Criminal Law

Criminal law is also instructive in its clarity and enforceability. This is especially true of the 'code jurisdictions' which have incorporated their criminal law into a single piece of legislation.[12] The content of the requirements it imposes is clear, and the consequences of failing to comply are even clearer. The criminal law is well-understood by the community, and relatively easy to understand. The driving force behind these characteristics appears to be fairness — it would be unfair to impose heavy penalties if the law were not clear and easy to understand.

OH&S Law

The *Occupational Health and Safety Act 2004* (Vic) is in many ways similar to the EP Act, in that it attempts to remedy a harmful externality of economic activity. In many respects it is a better legislative framework than the Victorian environmental law framework. It is much clearer and simpler, free of the multiplicity of quasi-legal instruments that afflict the environmental law framework. It imposes easy to understand requirements, with clear consequences for non-compliance, which are routinely enforced. It does not set standards through statutory instruments, instead leaving standards and objectives (i.e. accident rates) to policy documents. And yet it retains a strong outcomes focus through the

[12] See the *Criminal Code Act 1995* (Cth), *Criminal Code Act Compilation Act 1913* (WA), *Criminal Code Act 1899* (QLD), *Criminal Code Act 1924* (Tas).

imposition of general duties on employers, employees and occupiers, which catch a wide range of conduct in a relatively certain way. The driving force behind these characteristics appears to be the strong desire to prevent accidents, preserve the safety and lives of workers, and reduce the burden on government and ultimately the community.

10 Other jurisdictions

"In your experience, what features of statutory policy in other states or overseas work well?"

No other Australian State has as many statutory policies as Victoria. This appears to be due to more consolidated policies, rather than less regulatory content. Queensland has just four environment protection policies: water, air, noise and waste. South Australia has also managed to consolidate all their waste policy into a single Zero Waste environment protection policy. Victoria would do well to follow their lead and consolidate its statutory policies into just four SEPPs: air, noise, water, waste.

New South Wales has no statutory policies at all. Although the *Protection of the Environment Operations Act 1997* (NSW) allows for the creation of Protection of the Environment Policies, not one of these policies has ever actually been made. Environment protection regulation is achieved through a combination of mandatory requirements in legislation, and aspirational commitments in non-statutory policies. This avoids much of the confusion and complexity that is caused by statutory policies in Victoria.

Statutory policies in Western Australia and South Australia are readily enforceable. They contain clear, direct and mandatory requirements, non-compliance with which constitutes an offence. This makes them easy to understand, and ensures that their requirements are not ignored. However in our view their content would be better included in regulations.

D. POTENTIAL MODELS FOR REFORM

11 Proposed reform options

"Which, if any, of the model(s) do you think may work well? Why?"

EDO and Environment Victoria support the second proposed model for reform. This would preserve statutory policies as a way to set ambient environment standards, whilst removing their mandatory requirements to enforceable regulations, and removing their policy aspirations and discursive elements to non-statutory policy documents.

This model cures many of the defects that have been identified above. It will make them easier to understand, and thus more likely to be observed. It will ensure that mandatory requirements are actually followed and enforced, thereby ensuring that environmental quality objectives are actually achieved.

It will also maintain the benefits of environmental quality standards. By retaining a set of official environmental quality objectives and indicators it will create a shared understanding of regulatory goals, give business certainty as to where environment protection regulation is going, and ensure that environment regulation remains focussed on environmental outcomes. By including them in legal instruments with parliamentary imprimatur, it will ensure that the standards have a degree of permanence and are respected.

We stress, however, against placing too much emphasis on environmental quality standards. Ultimately, the important thing for environment protection regulation is not

that such standards are set, but that they are met. Whether or not they are met will depend on the obligations that are imposed on polluters to reduce their pollution, and the extent to which those requirements are actually enforced. That is the area which is most in need of improvement.

Finally, we stress the importance of taking this opportunity to *significantly* reform the environment protection framework. It is important that this process of consultation and deliberation does not result in only minor changes to statutory policy (option 1) which we believe would be ineffective reform.

12 Other reform options

"Are there other models that should be considered?"

We are not aware of any.

13 Specific suggestions for reform

"What do you think of the specific suggestions for reform (on pages 25-26)?"

Publishing a consolidated version of each policy

This is a good idea, and long overdue. EPA should not wait until the end of this review before publishing them. These consolidated versions already exist (or could be quickly compiled) and no legislative change is required to publish them. They should be published immediately.

Avoiding repetition

This is a good idea. Much of the repetition between statutory policies could be avoided by consolidating the policies into just four policies, as we have recommended. It could also be avoided by removing the policy principles from the statutory policies (which add nothing to the principles already in the EP Act).

Using the phrase 'environmental value'

We support this. We believe the statement 'beneficial uses' is not well understood and can imply the environment is important for it uses and not its intrinsic ecological value.

Consolidating the number of statutory policies

We support this. As discussed above, we see no reason why the statutory policies cannot be consolidated into just four SEPPs for air, noise, water and waste. We stress, however, that this should be a consolidation in the number of policies, rather than a reduction in their substantive requirements. There is little doubt that statutory policies could be made shorter by removing the general policy statements with which they are littered — there is no need to reduce their requirements or weaken their standards.

Publishing a users guide

We do not support this. We are wary of adding another guidance document to the hundreds of EPA documents that already exist. It would be much better to write environment protection legislation and statutory policies in such a way that they are easy to understand. Chapter 2 of the *Protection of the Environment Operations Act 1997*

(NSW), for example, sets out very clearly and logically what Protection of the Environment Policies are, how they are made, what their legal effect is and when they are used. The *Corporations Act 2001* (Cth) and the *Criminal Code Act 1995 (Cth)* are drafted in similar terms. It would be a much better idea to amend the EP Act to make all of this clear, explicit, and easy to locate.

Introduce a flexible amendment provision

We do not support this suggestion in its current form. One of the benefits of including environmental quality objectives in statutory instruments, as opposed to non-binding policy documents, is that it has a degree of permanence and authority. There are therefore good reasons to think that statutory policy should not be flexible. We therefore oppose any process that allows 'fast-track' amendments to be made.

Having said that, we are cognisant of the need to ensure that environmental standards reflect the best available science and the best available technical standards, both of which may quickly become out of date. We are therefore in favour of a mechanism that allows statutory policy to be updated to reflect recent science in a not-too-cumbersome way.

In our view, the best way to achieve this is through a mechanism that:

- makes it easy to improve and strengthen the standards, but difficult to weaken or reduce them — perhaps through a two-track process;
- is limited by clear legislative criteria, to ensure that quick amendments are based on scientific and technical developments — not economics or politics;
- provides for more frequent regular review (every 3-5 years, for example) of the technical aspects of the policies.

Confirming EPA, DSE and others' roles

We support this. We note that this is perhaps better resolved as a matter of management and policy, rather than through legislative instruments or statutory policy.

Improving linkages with other statutory systems and agencies

We support this. However, we are wary of supporting an extra suite of quasi-legal or non-binding policy documents to achieve it. The best way to encourage better integration with other agencies is to include any relevant obligations in the regulatory regime that primarily governs the other agency (for example, the planning scheme). See our response to question 16, below.

Improving policy management and reporting

We support this.

Improving reporting on policy implementation to drive accountability

We support this.

14 Clearer, simpler and more effective

"What else should be done to make statutory policy more responsive, accessible and easier to apply?"

In addition to our recommendation that the amount of statutory policies be reduced, the attainment programs removed into regulations, consolidated policies published, and the role of agencies clarified (see question 13, above) we recommend the following.

Amend the legislation to expressly specify the legal effect of statutory policy

As discussed above (see questions 1 and 2 above), one of the greatest sources of confusion and ineffectiveness at the moment is the uncertainty as to exactly what the legal effect of statutory policy is. The best way to resolve this problem would be to clearly and explicitly set out in legislation what their legal effect is. Chapter 2 of the *Protection of the Environment Operations Act 1997* (NSW) provides a useful example of this, as does the *Corporations Act 2001* (Cth) and the *Criminal Code Act 1995* (Cth).

This will provide an opportunity not just to make their legal effect more accessible, but also to rationalise and clarify what the legal effect of statutory policies actually is. The relevant sections of EP Act will likely need to be amended anyway to reflect the changes in how statutory policy is enforced once attainment programs are moved into regulations (if option 2, above, is ultimately pursued).

Avoid vague and general policy statements

As outlined above (see questions 1 and 2), the vague and general policy statements that populate statutory policies at the moment are the source of great confusion and ineffectiveness. This problem is largely taken care of by our recommendation that attainment programs be removed from statutory policy and moved into regulations.

However, to the extent that such statements are left in statutory policies (in particular, if attainment programs remain in statutory policy) we stress the importance of removing policy statements from statutory policies and sticking to clear, specific standards or requirements, with clearly and expressly defined consequences for non-compliance, and clearly identified persons responsible for meeting those standards or requirements.

Reduce the amount of documents on the topic

Reducing the amount of instruments would greatly improve the accessibility and simplicity of statutory policies, and the environment protection framework as a whole. In addition to consolidating existing statutory policies (see section 13 above), the bewildering array of guidance documents, PEMs, BPEMs, technical guidelines and draft statutory policies needs to be simplified. We submit that only four types of instrument are necessary: legislation, regulations, statutory policies, and non-binding guidelines. The rest should be abolished and folded into one of these four instruments.

15 Better integration

"How could the links between statutory policy, catchment planning, statutory planning and other frameworks be improved?"

As discussed above (see question 8), the best way to achieve integration and coordination between the requirements of statutory policy and other regulators and regulatory regimes is to include any SEPP requirements in the regulatory regime that governs the relevant regulator.

This integration is especially necessary in the planning regime, which has been criticised for poor integration with the EP Act regime in the past. The best way to make sure that

responsible authorities properly apply SEPPs is to require them to consider it through the planning scheme or planning law regime. This will also allow greater clarity and precision to be brought to the question of exactly what the SEPP requires from the other agency, avoiding the confusion that currently pervades the relationship between the planning system and SEPPs.

16 Other suggestions

"Do you have any other suggestions for reforms to the statutory policy framework?"

Make them stronger

Although we recognise that this review is limited to the structure and format of statutory policies, rather than the individual content of the policies themselves, we think it is important to comment on the strength of the environmental standards that the statutory policies set.

It is vitally important that statutory policies and the environment protection framework as a whole retain an unrelenting focus on regulatory outcomes — what they are actually trying to achieve. There is little point in having statutory policies unless they actually protect the environment.

It is therefore important that any reform to statutory policies or the environment protection framework as a whole makes sure that:

- environmental standards are set high enough to protect the environment; and
- they are accompanied by strong, binding obligations on polluters to reduce their pollution, in order to achieve those standards.

We recognise that meeting environmental standards is often difficult for business, and sometimes may not be possible in the short-term. This does not mean that the environmental standards should be lowered to a level that can easily be achieved. Instead the Government and EPA need to plot a course for achieving those standards over time. In a climate change context, countries set long-term emissions reduction targets and plot a course to achieving them. The same logic applies to the Victorian environment protection framework — EPA needs to maintain tough environmental targets and if they can't be immediately met, EPA must plot a trajectory to achieving them.

Just as important as setting strong standards is setting strong mandatory requirements requiring polluters to achieve them. As noted in section 7 above, Victoria's environment protection framework has to date had a strong focus on environment quality standards, but a weak focus on the point-source regulation that is necessary to achieve those standards. If statutory policies and the goals they set are to mean anything, they must be accompanied by the regulatory requirements necessary to achieve them.

In addition to this, people may be more motivated to meet the objectives if they understand what meeting them would actually mean. These objectives are not simply numbers but represent clean water, clean air, healthy ecosystems etc. The link between beneficial uses (or environmental values) and environmental quality objectives should be made clear. This way, it is clear that a decision to not meet the objectives is actually shown for what it really is, a decision to pollute and damage the environmental, social and economic values of ecosystems.