Legislation

Public consultation

Local Nuisance and Litter Control Bill 2015 explanatory report

Issued July 2015

EPA 1074/15: This information sheet describes the proposed Local Nuisance and Litter Control Bill 2015, including a clause-by-clause explanation.

Introduction

Littering and activities that cause nuisance such as noise, smoke and dust impact on our enjoyment of local areas. The aim of the draft *Local Nuisance and Litter Control Bill 2015* is to reduce the prevalence of nuisance complaints through a greater understanding of nuisance, better consideration of nuisance by Councils in development assessment and improved methods of resolution, and to lower the prevalence of litter across South Australia, particularly in tourist and shopping precincts.

There is considerable confusion within the community about state and local government roles and responsibilities related to local nuisance issues. These are the relatively minor complaints that impact primarily on amenity at a local level such as dust, noise, smoke and other minor issues.

The draft Bill seeks to formalise the role of local government in managing local minor nuisances. The legislation will establish consistency in the management of nuisance across the state and provide the community with more effective local management of nuisance complaints.

This Bill will not create new functions for Councils, as the majority of Councils are already actively engaged in the management of local nuisance, as well as littering and illegal dumping. However the type and volume of nuisances managed varies significantly between Councils, and there is still an expectation that the Environment Protection Authority (EPA) should manage some or all types of nuisance complaints. South Australia is the only state where local government responsibility in this area is not legislated to some degree (Table 1).

The Bill also proposes a modern legislative scheme for litter control in South Australia, including tiered offences depending on the type of litter, improvements in the use of surveillance for evidence gathering in the case of illegal dumping (linking an offence to the registered owner of a vehicle) and allowing other agencies (such as KESAB) to undertake compliance activities. The proposed legislation also implements the State Government's 2014 election commitment to establish a 'dob in a litterer' scheme.

The proposed legislation will provide social, environmental and economic benefits through improved management of local nuisance and reduced prevalence of litter.

Table 1 Jurisdictional comparison of legislative requirements for Councils to manage nuisance

Jurisdiction	Description
New South Wales	*Section 6 – Protection of the Environment and Operations Act 1997* Councils are 'appropriate regulatory authority' for non-scheduled activities (non-licensed) in its area.
Tasmania	*Section 20A – Environmental Management and Pollution Control Act 1994* Councils have a 'duty' to prevent or control pollution in its area. Non-licensed.
Queensland	*Section 514 – Environmental Protection Act 1994* *Regulations 98–101 – Environmental Protection Regulations 2008* Devolution of powers to Local Government and includes licensing of certain minor activities. This provides some level of funding for local government.
Victoria	*Environment Protection Act 1970* Local Government responsible for noise, septic tanks and litter.
Western Australia	*Environment Protection (Noise) Regulations 1997* Local Government responsible directly for noise but able to be delegated authority for other issues.

Comments on the draft Local Nuisance and Litter Control Bill 2015 are sought by 5pm, Monday, 31 August 2015.

Your comments may be forwarded by mail or email to:

Local Nuisance and Litter Control Bill 2015 project
Environment Protection Authority
GPO Box 2607
ADELAIDE SA 5001

Email: epainfo@epa.sa.gov.au (mark Subject as Local Nuisance and Litter Control Bill 2015)

Emailed submissions are preferred.

All submissions received by the EPA during the consultation period will be acknowledged and treated as public documents unless provided in confidence, subject to the requirements of the *Freedom of Information Act 1991*, and may be quoted in EPA reports.

1 Background

This paper provides background information on how nuisance and litter control has been managed, the drivers of reform and how the draft Bill has been developed. This paper also outlines the functionality of the draft Bill and key reforms, and provides explanation of each clause within the Bill.

Management of nuisance and litter – past and present

Councils have a long history of involvement in environment protection and particularly in the management of nuisance matters. Prevention of fires, pollution of waterways, management of septic tanks, general nuisances and nuisance from animals are provided for, or have previously been provided for, through by-law making provisions of the *Local Government Act 1934*.

Specific offences for nuisance caused by dust, fumes, smoke or gases from non-residential properties and littering were included in the *Local Government Act 1934* in section 540a (operating from 1973–2000) and section 748a (operating from 1976–2000), prior to the *Local Government Act 1999* being proclaimed. Councils also exercise environment protection responsibilities relating to noise, littering, waste and stormwater pollution prevention through the *Development Act 1993*, *Public Health Act 2011, Dog and Cat Management Act 1995* and *Local Government Act 1999*.

In addition, the majority of Councils currently undertake some level of responsibility for management of local nuisance matters using the *Environment Protection Act 1993* (EP Act) and *Environment Protection (Burning) Policy 1994* either by appointing authorised officers, as delegates of the EPA or as administering agencies, whereby the Council administers the EP Act, and has access to all of its tools, for non-licensed matters.

An informal phone survey of environmental health officers from 66 of the 68 South Australian Councils was undertaken by the EPA in January 2013. The results of the survey show that:

- 88% of Councils surveyed responded to complaints regarding minor water pollution from domestic, commercial and industrial premises;
- 85% responded to complaints regarding odour and smoke nuisance (non-burning in open) from domestic premises;
- 65% responded to complaints regarding dust nuisance from domestic, commercial and industrial premises, and
- 40% responded to noise complaints from domestic, commercial and industrial premises.

Differentiation between metropolitan and non-metropolitan Councils' service provision can be seen in Figures 1 and 2.

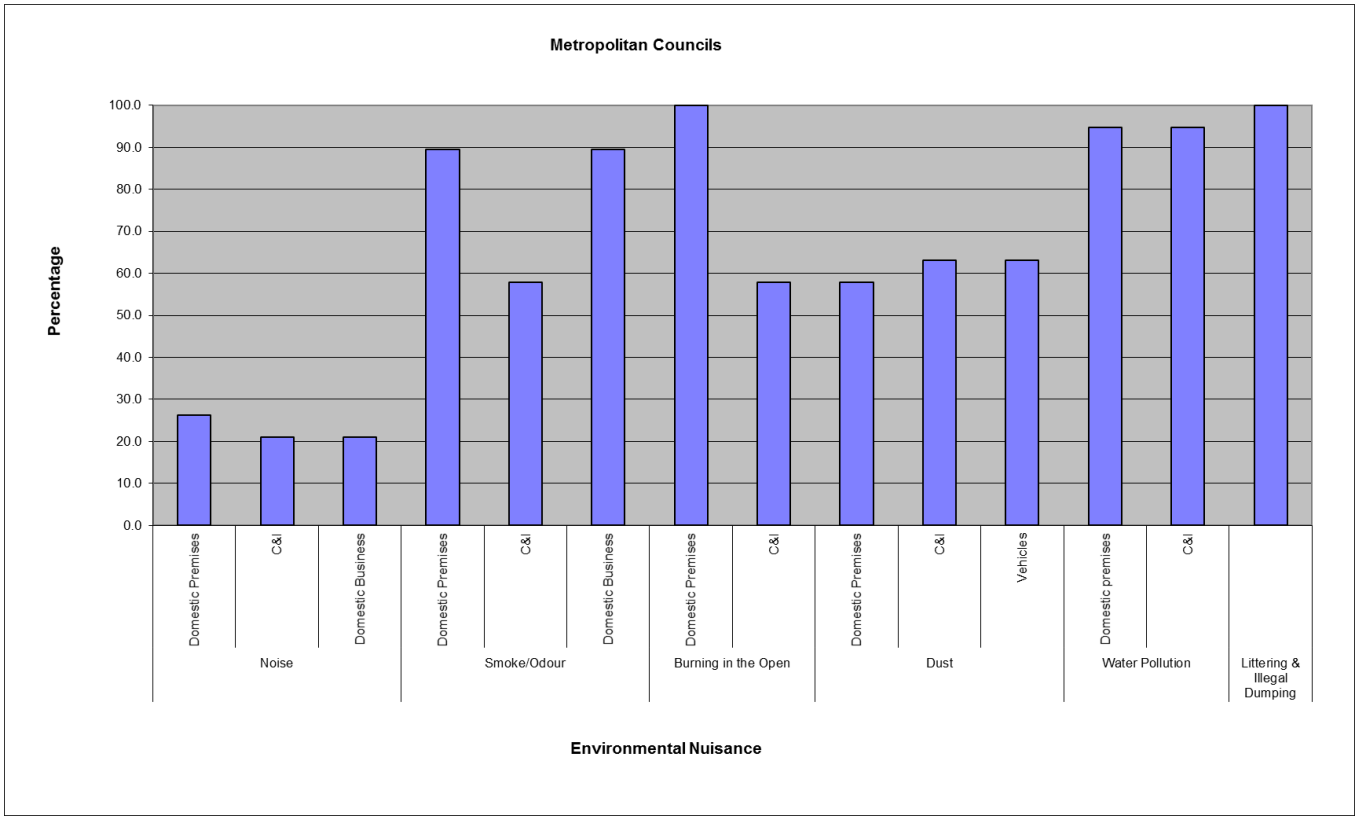

Figure 1 Percentage of metropolitan Councils responding to local nuisance complaints

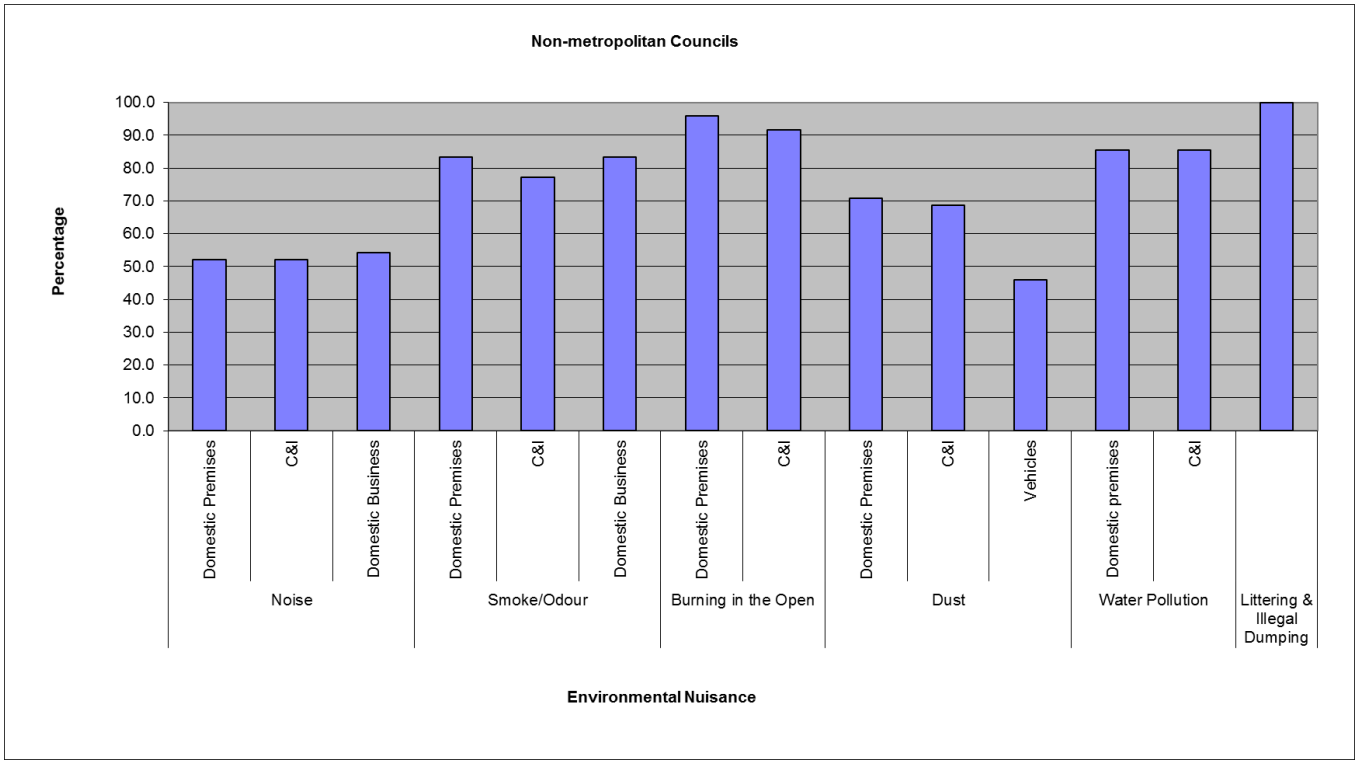

Figure 2 Percentage of non-metropolitan Councils responding to local nuisance complaints

Since the introduction of the EP Act and the creation of the EPA, there has been general confusion in the community around the planning and operational responsibilities between Councils and the EPA with regard to preventing and managing local nuisance associated with non-licensed activities and issues termed more generically as ‘environmental

nuisance'[1]. This confusion has had considerable impact on community confidence about effective regulation of environment protection. The 2013 survey results highlight the current inconsistency in service delivery across the state and the need for reform.

Since it was established in 1995, the EPA has handled some local nuisance complaints. These are either through direct contact from the public or from people who have been referred by their Council. The EPA responded to an average of 708 complaints per year regarding nuisance between 2011–12 and 2013–14. In each year more than 80% of these complaints were from callers living in metropolitan Adelaide. An average of 94 complaints each year came from callers in non-metropolitan South Australia. This is partly due to the greater occurrence of landuse conflicts in the metropolitan area and also because regional Councils more often manage nuisance complaints themselves due to the impracticality of having Adelaide-based EPA Officers attend.

Over 65% of complaints received related to noise, demonstrating the need for legislation to provide better tools for managing noise complaints. The EPA uses administrative (educative) approaches to resolve complaints in the first instance, sending letters to complainants and alleged offenders outlining responsibilities to prevent nuisance from occurring. This approach resolves more than 90% of complaints. Only approximately 5% of complaints required physical attendance by EPA staff.

Table 2 EPA nuisance complaints analysis summary

EPA nuisance complaints analysis	2011–12	2012–13	2013–14	Avg
Stage 1 complaints (total complaints received)	638	739	748	708
• Metropolitan area	549 (86%)	636 (86%)	658 (88%)	614 (87%)
• Non-metropolitan areas	89 (14%)	103 (14%)	90 (12%)	94 (13%)
Stage 3 escalations (those needing physical investigation)	23 (3.6%)	47 (6.4%)	37 (4.9%)	37 (5.2%)
Number of council areas where complaints are received	44	45	47	–
Highest number of complaints in an individual council area	105	112	83	–
Average complaints per council (those represented)	14.5	16.8	15.9	15.7
Average complaints per council (all councils)	9.4	10.9	11	10.4
Median complaints received by a council (those represented)	5	6	6	–
Median complaints received by a council (all councils)	2	1.5	2	–

The other area of reform proposed to be addressed in this Bill is litter management. At present, litter provisions are included in the *Local Government Act 1999*, *Crown Lands Act 1929*, *Forestry Regulations 2005, Libraries Regulations 1998* and *South Australian Museum Regulations 2004*. The Local Nuisance Bill seeks to provide modern provisions that allow for tiered offences depending on litter type (eg lit and unlit cigarettes, syringes, etc) and for other agencies and organisations (such as KESAB) to administer the provisions if they choose. Once agencies and organisations other than

[1] environmental nuisance means—

(a) any adverse effect on an amenity value of an area that—

(i) is caused by pollution; and

(ii) unreasonably interferes with or is likely to interfere unreasonably with the enjoyment of the area by persons occupying a place within, or lawfully resorting to, the area; or

(b) any unsightly or offensive condition caused by pollution [section 3(1) *Environment Protection Act 1993*].

Councils choose to use the legislation and are doing so effectively there will be opportunity to repeal the myriad of other laws that exist.

Drivers of reform

There are numerous drivers for reform of nuisance and litter regulation. The current approach to regulation of nuisance outlined earlier results in inconsistent regulation and service to the community across the state, and general confusion regarding management of nuisance complaints. Local government is best placed to respond quickly and effectively to local nuisance complaints and its services are better understood and easier to access by the community. The EPA only has a physical presence in Adelaide and the South East, which limits its ability to respond effectively and in a timely manner to nuisance complaints in other areas of the State.

There is also a direct link between the development assessment process (generally undertaken by councils) and subsequent environmental nuisance issues arising from approved developments. Many nuisance issues emanate from planning decisions that give no consideration to potential for nuisance once a dwelling is inhabited, such as poorly located air conditioner units and pool pumps, and the location of sleeping areas in mixed use zones.

It is anticipated that mandating council management of nuisance complaints will encourage consideration of potential nuisance issues that is better integrated with existing planning functions, thereby proactively reducing nuisance in the community. Councils will have an increased interest in identifying and preventing potential nuisance through the planning system and reducing the incidence of complaints as a result

This benefit is particularly significant, given the infill targets contained in the 30 Year Plan for Greater Adelaide and the greater potential for nuisance complaints due to closer proximity of neighbours.

There are also significant community expectations that local government should manage minor environment protection matters. The Local Government Association (LGA), through McGregor-Tan Research, conducted community surveys in 2001, 2003, and 2006[2], which indicated considerable community sentiment that local government is best placed to monitor/police pollution. The results were consistently high, with up to 72% of respondents supporting this role across the surveys.

The issue of responsibility for local nuisance matters has also been investigated by the Statutory Authorities Review Committee of Parliament and an excellence expert panel established by the Local Government Association. Both investigations recommended reform to clearly delineate responsibilities for local nuisance.

The Statutory Authorities Review Committee of Parliament, in its inquiry into the EPA (56th Report) recommended that:

> The Minister should consider the possibility of legislative reform to clearly define the roles and responsibilities between the EPA and other authorities (eg local councils, etc.) when dealing with minor/local environmental nuisances.

The LGA's excellence expert panel, in its report, Council of the Future[3], recommended that:

> The responsibility for investigating and resolving matters of local environmental nuisance be accepted as part of the function of a regional council on condition that the EPA provide support in the form of expertise and equipment.

Regulation in South Australia has fallen behind other jurisdictions for non-container deposit litter. The key driver for reform is the need to modernise litter regulation and provide greater deterrents to littering and illegal dumping. South Australia rates favourably in litter surveys largely due to the success of its container deposit legislation. However, other litter streams, such as cigarette butts, fast food wrappers and illegally dumped waste, have been identified as needing

2 http://www.lga.sa.gov.au/page.aspx?u=275

3 http://www.lga.sa.gov.au/webdata/resources/files/LEP_FinalReport_final_121213_BW.pdf pg 58

better regulation. There is also the benefit of consolidating the numerous disparate litter laws in South Australia by providing legislation that can be used by all agencies involved in litter regulation (eg Forestry SA, National Parks, etc).

How has the Bill been developed?

The concept of a Local Nuisance Bill was endorsed at the State/Local Government Minister's Forum by the previous Minister for Sustainability, Environment and Conservation, then Minister for Local Government and then President of the LGA in December 2012. As a result of the forum, a discussion paper was released in March 2013 to commence consultation with councils.

A Ministerial Working Group was established at the request of the Ministers' Forum, to guide the drafting of legislation and provide governance for the project. The Ministerial Working Group consisted of representatives from EPA, LGA, Department of Health and Ageing, SA Police (SAPOL), KESAB and the Office for Local Government. The Ministerial Working Group approved drafting instructions for consideration by the Minister for Sustainability, Environment and Conservation on 20 January 2015.

The LGA also established a reference group to assist with development and review of the detail of the drafting instructions. The reference group consists of local government officers from the City of Charles Sturt, City of Salisbury, Rural City of Murray Bridge, and Alexandrina Council as well as representatives from Eastern Health Authority, LGA and the EPA.

Support from the EPA

The EPA will support local government in its transition to primary management of local nuisance complaints. This support will be tailored based on the needs of councils. This consultation process aims to ascertain from councils what support they would need from the EPA to assist with, transition and to make the new arrangements as functional and effective as possible.

Services that the EPA are able to provide to councils and their staff include the following:

- Training in compliance techniques and approaches to complaint management.
- Lending equipment and providing training on use.
- Assisting in developing policy (eg compliance standards).
- Managing a referral desk to facilitate effective transfer of complaints that are determined to be more serious than nuisance.
- Providing ongoing support as necessary.

2 Key elements of the Local Nuisance and Litter Control Bill 2015

The guiding principle of the draft Bill is that it clearly delineates council responsibility for local nuisance issues that are not associated with activities of environmental significance.[4] Conversely, it formalises EPA responsibility for all nuisance issues arising from activities of environmental significance and any incidents that cause potential or actual material or serious environmental harm[5]. This approach is outlined in Figure 3.

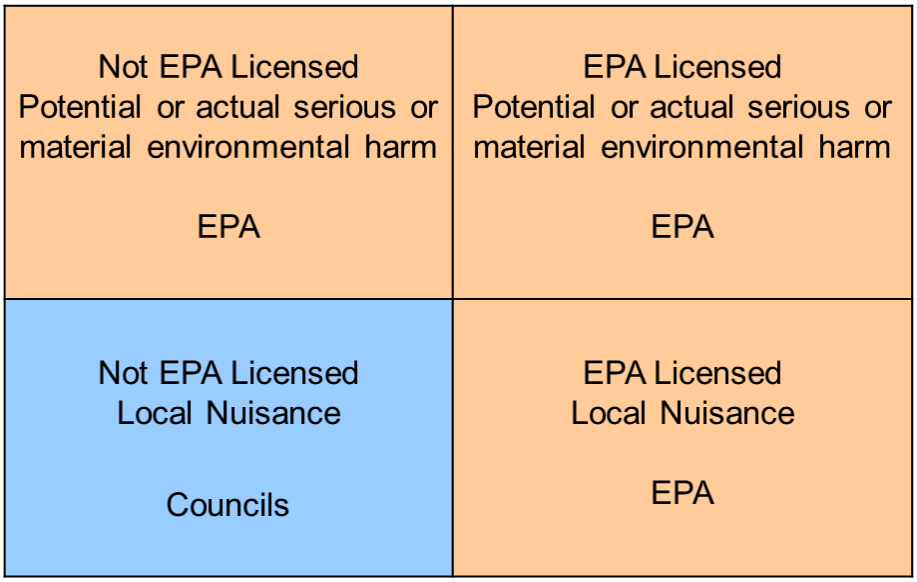

Figure 3 Delineation of responsibilities between councils and the EPA

The draft Bill provides an opportunity to make the management of nuisance complaints more efficient and effective, and to provide clarity within the community around what constitutes nuisance. The draft Bill also seeks to modernise the regulation of litter and illegal dumping in South Australia by introducing tiered offences and providing more effective use of surveillance to reduce the incidence of illegal dumping. A summary of key features of the legislation is provided below.

Liability of vehicle owners

Littering and illegal dumping are significant issues for the community, given their impacts on amenity, and potentially, public health. Littering has significant impacts for local government, State Government and private land owners due to the clean-up costs involved. Illegal dumping and littering are often associated with vehicles. It is commonplace to see cigarette butts and other litter thrown from vehicles, and illegally dumped waste has typically been transported by vehicle to its destination, particularly where large quantities are involved. Currently, it is not sufficient to identify the license plate details and a description of the vehicle to prove a vehicle-related littering or illegal dumping offence. It is further required to establish the identity of the offender, which is problematic as the offender may not necessarily be the registered owner of the vehicle.

To improve enforcement ability, the draft Bill seeks to apply an onus on the owner of the vehicle for an offence committed in association with or from that vehicle. This function operate similar to speed camera and red-light camera infringements, where the owner of a vehicle has the option to declare a third party was responsible for the vehicle at the time of the offence.

This provision will also be critical to establishing enforceable public litter reporting as it will allow for an expiation to be issued to the owner of a vehicle identified via licence plate and other identifying attributes under such a program.

[4] As defined in Schedule 1 of the *Environment Protection Act 1993*

[5] As defined in Section 5 of the *Environment Protection Act 1993*

Public litter reporting

While it is possible to report littering in South Australia to Police, there is currently no dedicated public litter reporting program in place as is the case in most other Australian jurisdictions. This is in part because it is difficult to determine the offender under current South Australian laws. The draft Bill, in addition to applying responsibility to the owner of a vehicle, contains a provision to allow for improved public reporting of litter by formalising a citizen's notification of littering. This provision stipulates that the contents of the notification may constitute evidence of the offence, which will allow expiations to be issued as a result of public litter reports.

Councils required to manage nuisance and litter in their areas

Councils already have provisions available to manage littering offences and some types of nuisance complaints under the *Local Government Act 1999* (sections 235 and 254). Councils also have the ability to 'opt in' to become administering agencies or authorise their own authorised officers under the EP Act in order to utilise the powers to regulate nuisance complaints under that Act.

The voluntary nature of this arrangement has led to Councils providing inconsistent levels of service. The proposed legislation confers certain functions on Councils so that there is no ambiguity regarding primary responsibility for dealing with local nuisance and littering. The legislation will also repeal the relevant provisions of the *Local Government Act 1999*, to provide further clarity.

Significant provision for civil remedy by affected parties

The proposed legislation will provide the ability for courts to order civil remedies. This allows administering agencies, individuals or other body corporates who have been impacted by a contravention or a potential contravention to apply to the courts for a civil remedy.

The inclusion of civil remedies provisions will provide an alternative route for complaint resolution that may be exercised separately from the Council or administering body. This will be particularly useful for circumstances where a Council or administering body has been unable to determine a contravention through its own investigation and is unable to progress a complaint to the satisfaction of the complainant. It will also be a useful alternative option for complainants where complaints are deemed unjustifiable or unreasonable by a Council or administering body.

Ability to negotiate a civil penalty

This provision will allow Councils or administering bodies to enter into negotiation, or apply to the relevant court, for a civil penalty. The EPA has used civil penalties successfully in administering the EP Act.

The draft Bill contains an option for the Minister, Councils or administering bodies to negotiate a civil penalty with an alleged offender rather than applying to the court for a criminal penalty. This will provide a lower cost alternative to court prosecution that benefits the regulator as well as the alleged offender. Negotiations are voluntary and if an alleged offender chooses not to negotiate the Minister, Council or administering body have the opportunity to ask the court for a penalty.

The draft Bill contains another option for the Minister, Councils or administering bodies to apply to the Environment Resources and Development Court for a civil penalty as an alternative to criminal prosecution. The burden of proof for a civil court penalty is 'on the balance of probabilities' which is lower than the criminal burden of proof 'beyond reasonable doubt'. Therefore the Bill proposes that an alleged offender may elect to be heard in the criminal jurisdiction of the court rather than be party to a court imposed civil penalty application. Civil penalties may only be used for offences that do not require proof of intention or some other state of mind.

Compliance standards set via regulation

The Minister will be able to establish, via regulation, standards to further guide the implementation of the Bill. There will be provision for standards to be constructed to guide evidentiary provisions that would prove an offence. For example, a

standard test for what constitutes nuisance in so far as amount of smoke from a solid fuel heater would be prescribed as a standard that must be met. It may also be appropriate to determine prohibited hours for certain activities to reduce noise nuisance similar to provisions within the *Environment Protection (Noise) Policy 2007*. This provision will not limit the ability to prove an offence where a standard is not in place but be used as an improved determination where it is possible to define such standards. Councils or administering bodies would be able to permit activities to occur outside of the standards where appropriate. The Minister will consult with Councils, administering bodies, the LGA, and the community in developing a standard.

Councils may work together to address nuisances

The *Local Government Act 1999* allows for Councils to establish regional subsidiaries. This option for Councils to work collaboratively will be supported by allowing for sharing of authorised officers between Councils, and for other administering bodies to act on behalf of one or more Councils.

Regional arrangements will allow smaller Councils in particular to administer the Act by agreements with adjoining Councils. These provisions will allow for one authorised officer to undertake duties across multiple council areas. However, such arrangements may also benefit larger metropolitan Councils given their proximity to each other.

Other organisations may undertake compliance

The Minister may prescribe other organisations or public authorities as administering bodies through regulation for all or part of the Act (i.e. KESAB and government agencies). Administration of the Act by such agencies may be limited by the Minister, including the limitation of powers for authorised officers.

This provision would allow broader access than local government and enable greater enforcement of the proposed Act. For example, KESAB, who have advocated litter prevention for over 40 years, has shown interest in taking on an enforcement role. Such a provision would allow this to occur, subject to approval from the Minister who would need to be comfortable that such an organisation was equipped to undertake such work. It would also allow other organisations to contract to Councils to provide this service. There is precedence in this approach with the Royal Society for the Prevention of Cruelty to Animals (RSPCA) administering the *Animal Welfare Act 1985*.

Where an organisation seeks to be an administering body (i.e. not a Council) the Minister must consult with the Local Government Association in making their decision. The Minister may approve an administering body with conditions. For example, a condition may be applied that, in order to operate in the area of a Council there must be an agreement in place with that Council to do so.

The Minister may also allow administering bodies that are not Councils to regulate all or some Council generated nuisance or littering as part of the prescription/authorisation process. This would allow KESAB, as an example, to regulate litter from Council activities.

Clause-by-clause explanation of the Local Nuisance and Litter Control Bill 2015

Below is a clause-by-clause explanation of the draft *Local Nuisance and Litter Control Bill 2015* which is to be read alongside the draft Bill.

Part 1 – Preliminary

Clause 1: Short title

Clause 1 names the Bill.

Clause 2: Commencement

Clause 2 provides that the proposed Act will come into operation on a day to be fixed by proclamation.

Clause 3: Interpretation

Clause 3 provides specific explanations as necessary for the proper interpretation of the legislation.

Part 2 – Objects, principles and application of Act

Clause 4: Objects of Act

The Objects of the Act provide a basic description of the purpose of the legislation and context for the remaining contents of the Bill. The objects described in Clause 4 are clear and straightforward as to the intention of the legislation.

Clause 5: Interaction with other Acts

This clause sets out the interactions between this legislation and other Acts. The majority of the clause is general in its guidance. Subclause 4 specifies that the proposed Act does not apply to activities licensed under the EP Act, other than mobile activities (due to potential litter aspects that may impact Councils), and noise generated by on licensed premises (under the *Liquor Licensing Act 1997*) where the premises has a condition regarding noise control. The purpose is to define and limit responsibilities of Councils against those of other regulators with an interest in nuisance type matters associated with their licensing regime.

Clause 6: Territorial and extra-territorial application of Act

The proposed Act is to apply when a local nuisance occurs outside the state boundaries but affects the state. The proposed Act will be enforceable upon any local nuisance which affects property or people within the state.

Part 3 – Administration

Division 1 – Councils

Clause 7: Functions of Councils

A Council will be the principal authority for dealing with local nuisance and littering under the proposed Act for its council area.

The clause details a number of functions that Councils are to undertake in administering the legislation. These functions relate to prevention, enforcement, provision or supporting the provision of educational materials, and a catch-all for other functions assigned in other parts of the legislation.

The clause also includes a provision that a Council or administering body must, in performing its functions under the legislation, have regard to guidelines adopted or prescribed by regulation for managing unreasonable complainant conduct and any other guideline prescribed to assist Councils and administering bodies in performing their functions under the Act. While there will be general guidelines developed, the main intent of this provision is to allow for a guideline to be prescribed to ensure a consistent and fair approach to managing unreasonable complainant conduct that can be relied on to demonstrate fair consideration of a complaint.

It is proposed that the *Better Practice Guide to Managing Unreasonable Complainant Conduct* produced by the Commonwealth Ombudsman will be prescribed for this purpose. This will ensure that management of unreasonable complainant conduct by a Council or administering body meets community expectations, and those of the Ombudsman, should they have cause to investigate the handling of a complaint. This is not intended to add complexity to Council complaint management processes but instead provide the support of legislated guidance and processes to deal with unreasonable complainant conduct, particularly in relation to those complaints that are vexatious or frivolous.

The alignment of guidelines with those of the Ombudsman is aimed at strengthening their ability to be relied upon if the complainant refers their issue to state or federal Members of Parliament or the Ombudsman.

Clause 8: Cooperation between Councils

This provision allows for Councils to work collaboratively in performing functions or exercising powers under the Act. There may be joint areas of concern whereby a collaborative approach is a preferred option. An example of this might be dealing with illegal dumping in a regional area across two or more Councils, or dealing with other issues of nuisance or litter in neighbouring precincts within the metropolitan context. For the same reasons, the provision also allows the Minister to request that such an approach be considered.

Clause 9: Council failing to perform functions under Act

Councils are the principal authority for dealing with matters under the Act (Clause 7). This clause provides the Minister with appropriate legislative tools to ensure that Councils are suitably performing their functions under the legislation. The Minister may become aware of perceived or actual poor performance through reports from the community, local politicians or state agencies that are being approached to manage such issues. A first step, prior to any contemplation of use of this clause, will be to validate any report of under-performance. If poor performance is established, it is likely that the matter would be resolved, prior to the provisions of this clause being used, through consultation and negotiation.

This provision operates as a point of engagement between the Minister and Councils that may not be suitably performing their duties under the legislation. The engagement mechanisms within the clause are the most important element and are designed to resolve underperformance prior to any substantial action being taken by the Minister. This provision acts as a driver for resolution, but also provides the Minister with suitable powers should resolution of issues not be possible through the engagement mechanisms.

Clause 10: Annual reports by Councils

Councils must include details of the performance of functions under this legislation within their annual reports, as required by section 131 of the *Local Government Act 1999*. Information is likely to include the number of expiations issued under each offence, any court proceedings that have occurred and any other activity conducted by the Council in performing its functions. Other administering bodies will have annual reporting requirements considered as a component of the declaration that establishes them (via regulation), as proposed under Clauses 11 and 13. Reporting on the effectiveness of the legislation will be important to ensure it is operating effectively and will also be useful for the purpose of reviewing the legislation in the future.

Division 2 – Administering bodies

Clause 11: Administering bodies

Bodies other than Councils may be declared via regulation to be administering bodies for the purpose of administering all or part of the Act. Allowing other administering bodies to be declared will enable greater enforcement. KESAB has indicated a strong interest in assuming an enforcement role with regard to litter control, to complement their educational programs. There are numerous current statutes that contain litter provisions[6]. Each of the bodies with responsibilities under these other statutes may wish to be declared as administering bodies for the purpose of this legislation. Engagement with these agencies will occur during the consultation phase, and if they intend to operate under the proposed legislation, the relevant transitional and repeal provisions will be added to the Bill. Other agencies, such as the EPA, may seek to become an administering body under the legislation to access the vehicle-owner responsibility provisions in the proposed legislation to provide better tools for regulating illegal dumping.

Administration of the Act by such agencies may be limited by the Minister, including the limitation of powers for authorised officers. As part of the declaration process, administering bodies that are not councils may also be able to regulate all or some Council generated nuisance or littering. This would allow KESAB, as an example, to regulate litter from Council activities.

Clause 12: Delegation

This provision allows the administering body, as an entity, to delegate powers conferred by the proposed Act to a committee of the body, an employee of the body, or to an employee by virtue of their position or office. The delegation may be conditional at the discretion of the administering body and is revocable at any time.

Clause 13: Periodic reports by administering bodies

Administering bodies must report their activities to the Minister and Parliament. This is particularly important to ensure oversight of the proper administration of the Act, and will also inform future reviews of the legislation. It is envisaged that these reports will include the number of expiations issued under each offence, any court proceedings that have occurred and any other activity conducted by the administering body to support the objects of the Act.

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6 *Recreation Grounds Regulations 2011, Art Gallery Regulations 2002, Carrick Hill Trust Regulations 2012, Correctional Services Regulations 2001, National Parks and Wildlife (National Parks) Regulations 2001, National Parks and Wildlife (Unnamed Conservation Park—Maralinga Tjarutja Lands) Regulations 2004, National Parks and Wildlife (Breakaways Conservation Park) Regulations 2013, Wilderness Protection Regulations 2006, Marine Parks (Zoning) Regulations 2012, Botanic Gardens and State Herbarium Regulations 2007, Crown Land Management Act 2009, Forestry Regulations 2013, Pastoral Land Management and Conservation Act 1989, Harbors and Navigation Regulations 2009, Road Traffic Act 1961 (s.108), Irrigation Regulations 2009, Renmark Irrigation Trust Regulations 2009, Summary Offences Act 1953 (s.57 and s.56), History Trust of South Australia Regulations 2010, Libraries Regulations 2013, Passenger Transport Regulations 2009, South Australian Motor Sport Regulations 2014, South Australian Museum Regulations 2004, West Beach Recreation Reserve Regulations 2003*

Division 3 – Authorised officers

Clause 14: Authorised officers

This clause provides for the appointment of authorised officers. All Police officers are automatically authorised under the proposed legislation to ensure continuity with their current responsibilities under the EP Act in relation to environmental nuisance as a result of party noise and domestic disturbances. Police also enforce litter controls under the *Summary Offences Act 1953*.

The clause allows for the Minister and Councils to appoint authorised officers. The Minister will appoint authorised officers for administering bodies, noting that the Minister may delegate this function under clause 37. Councils may appoint their own authorised officers or a class of employee as authorised officers. For example, a Council may appoint all General Inspectors or Environmental Health Officers as authorised officers.

The clause also allows a person to be appointed as an authorised officer by more than one Council. This brings about regional collaboration through part-time arrangement or through regional subsidiaries (under the *Local Government Act 1999*).

Clause 15: Identity cards

It is acknowledged that Council compliance staff will already have identification under other Acts. This clause stipulates that an authorised officer must be issued with an identity card in a form approved by the Minister. It has been drafted in this manner so that the 'form' approved may include the necessary information under clause 15(1) being added to an existing Council compliance officer's identity card.

The provision also includes the requirement to present identification upon request. The clause does not include requirements to hand in an identity card when an authorised officer ceases to be in the role. Instead, the Bill includes an offence to impersonate an authorised officer at clause 16(6)(e).

Clause 16: Powers of authorised officers

This clause provides for all necessary powers of an authorised officer. It has been drafted to align to powers of authorised officers under the *South Australian Public Health Act 2011,* given the likelihood that officers authorised under that Act are also likely to be authorised for the purpose of the proposed legislation. This will prevent confusion among officers that may arise should different powers be contemplated by the proposed legislation.

The ability to use reasonable force to enter premises has been limited in the Bill to requiring a warrant in all circumstances, and only for the purpose of stopping a local nuisance. This is in recognition that the gravity of offence within the legislation is of lesser gravity than that of a public health risk, and therefore immediacy of action is not likely to be needed.

Subclause 6 also provides for various offences relating to interactions with an authorised officer and impersonating an authorised officer. These include requirements not to hinder or obstruct; use abusive or threatening language; comply with directions; and answer questions appropriately. Subclause 9 provides offences for an authorised officer or person assisting an authorised officer who uses offensive language or unlawfully hinders, obstructs or threatens any person.

This provision also requires information to be provided under this clause regardless of whether to do so might incriminate the person or make the person liable to a penalty. However, there is also protection provided against self-incrimination regarding the act of producing the document or information (as distinct from its contents) and for any answer given in compliance with the requirement to furnish that information. Such things are not admissible in evidence against the person for an offence or imposition of a penalty. This protection does not apply for proceedings related to the provision of false or misleading information (Clause 44).

Clause 17: Limit of area of authorised officers appointed by Councils

This provision limits the area to which an authorised officer appointed by a Council can operate. It allows an authorised officer to operate within the area of another Council where there is a written agreement in place. The provision also allows an authorised officer to use powers conferred by the Act outside of the Council area (including extra-territorial application) in the case of local nuisances that emanate from the Council area.

Part 4 – Offences

Division 1 – Local nuisance

Clause 18: Meaning of local nuisance

This clause is a key element of the legislation. It defines 'local nuisance' for application across the Act. The definition has been derived following a review of similar legislation across Australia. The definition includes elements from South Australian and Queensland environmental protection and public health legislation.

The definition of 'nuisance' needs to link closely, in part, to that used in the EP Act to allow for referral of certain nuisance complaints which are of a gravity that may constitute an offence of serious or material environmental harm under that Act. There is a formalised referral mechanism between Councils and the EPA for nuisance matters that fit within the scope of these higher penalties (see clause 32 – Notification to EPA of suspected serious or material environmental harm).

The Queensland *Environment Protection Act 1994* (section 15) provides a comprehensive definition for what is considered to be a nuisance. The definition of environmental nuisance in the Queensland legislation includes aerosols, fumes, light, noise, odour, particles or smoke, and an unhealthy, offensive or unsightly condition because of contamination. It also allows for any other causes of environmental nuisance to be prescribed by regulation.

While use of the term 'contamination' is limiting for unsightly and offensive conditions and is not proposed to be used, the structure of the definition with the ability to prescribe further nuisances will be useful for local government in allowing the legislation to evolve to meet future needs.

The ability to prescribe specific nuisances will provide local government certainty in the application of the proposed legislation. The intention is to reduce the burden of proving a nuisance as far as possible by providing strong articulation of the nuisance types via regulation as necessary. Equally, there is provision to prescribe matters that are not to be considered nuisance under the legislation.

The LGA reference group, through consultation on the drafting of the legislation, has indicated a need for better tools to manage insanitary conditions following the repeal of the *Public and Environmental Health Act 1987*. Inclusion of insanitary conditions as a nuisance that can be managed under the legislation will address this issue.

Linkage to existing environment protection policies under the *Environment Protection Act 1993*

Certain parts of current and future environment protection policies (EPPs) under the EP Act may be useful tools under this legislation. To avoid duplication of legislative provisions, components will be able to be adopted via regulation in full or in part under this Act and implemented by authorised officers. This provision avoids the need for authorisation under both Acts and will provide a streamlined mechanism for the application of minor environmental nuisances. Environmental nuisance matters on licensed premises will remain the responsibility of the EPA, under the EP Act.

This approach is similar to section 29 of the *Development Act 1993*, which allows EPPs to be adopted within Development Plans in whole or in part, but will operate more effectively given the similar legislative application.

Examples of current EPP provisions that will have application and crossover include the permitting and compliance roles under the Environment Protection (Burning) Policy 1994 and the permitting of early starts for construction noise under the Environment Protection (Noise) Policy 2007. Other elements of EPPs such as prohibited discharges or emissions to

water or air, for example, could be declared a local nuisance under the proposed Act rather than creating duplicate provisions that may then evolve separately under each Act.

A regulation under this provision (or any other regulation) can only be made after consultation with the Local Government Association, councils, or other persons or bodies likely to be affected by the regulation.

Environment protection policy provisions that are likely to feature in the regulations under the proposed Act are:

- *Environment Protection (Air Quality) Policy 1994 – nil*
- *Environment Protection (Burning) Policy 1994*
  - Clause 4, Fires in the open on non-domestic premises
  - Clause 5, Domestic burning and burning on streets, roads or laneways.
- *Environment Protection (Motor Vehicle Fuel Quality) Policy 2002 – nil*
- *Environment Protection (Movement of Controlled Waste) Policy 2014 – nil*
- *Environment Protection (National Pollutant Inventory) Policy 2008 – nil*
- *Environment Protection (Noise) Policy 2007*
  - Part 6, Division 1, Construction noise
  - Part 6, Division 2, Domestic noise
  - Part 6, Division 3, Rubbish collection, street sweeping machines, etc
  - Part 6, Division 4, Building intruder alarm systems
  - Part 6, Division 5, Frost fans
  - Part 7, Clause 33, Audible bird scaring devices.
- *Environment Protection (Used Packaging Materials) Policy 2012 – nil*
- *Environment Protection (Waste to Resources) Policy 2010*
  - Clause 14,General waste transport
  - Clause 18, Disposal of medical sharps.
- *Environment Protection (Water Quality) Policy 2003**
  - Clause 17, Obligation not to discharge or deposit listed pollutants into waters or onto certain land
  - Clause 19, Obligation not to discharge listed pollutants or waste into bores, mine shafts, etc.

  *Note: This policy is currently being revised.

Clause 19: Causing local nuisance

This clause is the main offence provision for local nuisances and is in two parts. It provides for a standard offence with no requirement to determine state of mind and an 'aggravated' offence that requires proof of intention or recklessness. Only the standard offence allows an expiation fee.

The provision also stipulates that the occupier or person in charge of a place at or from which an activity is carried on that results in local nuisance, will be taken to have carried on the activity. This provision does not affect the liability of any other person. If an activity resulting in local nuisance is carried on, in, at or from a vehicle rather than a place then the owner of the vehicle is taken to have committed the offence under clause 29.

Clause 20: Person must cease local nuisance if asked

This provision allows for an authorised officer to direct a person to cease an activity or remove any substance, material or thing that the authorised officer considers to be causing a local nuisance. The provision is expiable with a proposed fee of $160.

Clause 21: Exemptions

This provision allows Councils to grant exemptions from a nuisance offence upon application. This may be reasonable for short-term activities that cannot reasonably prevent a nuisance from occurring. Examples include events or major construction activities where some level of noise nuisance is unavoidable. As part of the exemption process, a Council will be able to apply strict conditions to ensure that the applicant does everything reasonable to minimise the impact of the nuisance.

The provision includes notification requirements so that people affected will be made aware of the application for exemption. The council must also have regard to environment protection policies under the EP Act to ensure an exemption is not contrary to requirements under that Act. Councils will have the ability to charge a fee for an application made under this clause. The fee will be set via regulation.

Clause 22: Regulations

This provision operates alongside clause 54 and provides specific guidance, without limitation, as to regulations that may be made for the purpose of this Division of the legislation. The provision aligns to the major causes of nuisance that might be regulated under this legislation and will also allow for prescribed compliance criteria to be developed to assist compliance staff and the community to understand what constitutes nuisance and what does not.

Division 2 – Littering

Clause 23: Disposing of litter

This clause includes the majority of the litter offences under the Act. It provides four tiers of littering offences to cover the variation in severity for different types of littering. This is a significant reform for local government, which currently relies on a single broad offence of littering under section 235 of the *Local Government Act 1999* (with a maximum penalty of $5,000 and an expiation fee of $315) to regulate the spectrum of littering. This can range from small personal litter to large quantities of litter, commonly referred to as illegal dumping.

The clause differentiates by both the quantity and the type of litter discarded to determine the seriousness of the offence. The types of litter include ‘general litter’, ‘class B hazardous litter’ and ‘class A hazardous litter’. The components of these types of litter are explained in detail in subclause 5. For littering that involves a mix of litter types the highest penalty is applied. For example, a pile of litter that includes ‘class A hazardous litter’ and ‘general litter’ will be applied with the offence for ‘Class A hazardous litter’. A similar approach is used in Victoria, New South Wales, Queensland and Western Australia (Table 4).

Table 4 Jurisdictional comparison of litter laws

Proposed for South Australia	Victoria	New South Wales	Queensland	Western Australia
General litter up to 50 L Max penalty: $5,000 Expiation fee: $210 **Dangerous litter (Class B hazardous) up to 50 L** Max penalty: $10,000 Expiation fee: $500 **General or dangerous litter (Class B hazardous) greater than 50 L** Body corporate $60,000 (max penalty) Natural person $30,000 or 6 months imprisonment Expiation fee: $1,000 **Any quantity of hazardous (Class A hazardous) litter** Body corporate $250,000 (max penalty) Natural person $120,000 or 2 years imprisonment	**General litter** Max penalty: 40 penalty units (from 1 July 2015, $6,066.80) Expiation fee: $295 **Aggravated litter** Max penalty: 60 penalty units (from 1 July 2015, $9100.20) or 1 month imprisonment Expiation fee: $590	**Littering small items, such as bottle tops and cigarette butts** Expiation fee: $80 **General littering** Expiation fee: $250 **Littering from a vehicle** Expiation fee: Individual $250 Corporation $500 **Littering in dangerous circumstances, such as depositing a syringe or a lit cigarette** Expiation fee: Individual $450 Corporation $900	**General littering** Max penalty: $3,415 Expiation fee: Individual $227 Corporation $1,138 **General littering if the offence involves dangerous littering** Max penalty: $4,554 Expiation fee: Individual $455 Corporation $1,821 **Illegal dumping of waste – volume of less than 2,500 L of waste** Max penalty: $45,540 Expiation fee: Individual $1,821 Corporation $3,415 **Illegal dumping of waste – volume of more than 2,500 L of waste** Max penalty: $113,850 Expiation fee: Individual $2,277 Corporation $7,286	**Littering – cigarette butt** Expiation fee: Natural person $200 Body corporate $500 **Littering- general** Expiation fee: Natural person $200 Body corporate $500 **Depositing domestic or commercial waste in a public receptacle** Expiation fee: Natural person $200 Body corporate $500 **Transporting load inadequately secured** Expiation fee: Natural person $200 **Littering that creates a public risk** Expiation fee: Natural person $500 Body corporate $2,000

The clause also includes a provision regarding the management of abandoned vehicles as a form of litter. This provision comes directly from section 237 of the *Local Government Act 1999* and is supported by seizure provisions further on in the Act (Clause 27). Inclusion of this provision in the Act will allow that section to be repealed from the *Local Government Act 1999*. The clause also allows for recognition of provisions of environment protection policies under the EP Act to constitute littering in the same way that is provided for nuisance provisions. An example is the stormwater provisions of the Environment Protection (Water Quality) Policy 2003 that prohibit various discharges to water (including gutters that link to waters).

The clause clarifies that litter blown or falling from a vehicle also constitutes littering under the proposed Act. This is important in allowing regulation of uncovered and unsecured loads of waste or soil that becomes litter. The clause provides for types of disposal of litter that are not unlawful under subclause (3) including the ability to discern accidental littering that, once made aware, the individual attempts to retrieve.

There is also a requirement for the court by which a person is convicted, on application by a Council, to order the convicted person to pay any costs incurred by the Council in removing or lawfully disposing of the litter.

Clause 24: Bill posting

The offence of bill posting currently exists in South Australian legislation, in the *Summary Offences Act 1953* (section 48) and can be included in a Council bylaw under section 240 of the *Local Government Act 1999*. The addition of a bill posting offence in the draft legislation will provide the ability for authorised officers as well as the police to enforce the provision, and consolidates the offence under a single piece of legislation. The penalty structure proposed differs from the *Summary Offences Act 1953* in that it does not contemplate a custodial sentence and better aligns to penalties for other nuisance type issues contemplated by this Bill. It is proposed that this provision will allow for repeal of the offence under the relevant sections of the *Summary Offences Act 1953* and the *Local Government Act 1999*.

Clause 25: Litterer must remove litter if asked

This provision allows for an authorised officer to direct a person to remove litter deposited or a bill posted on property by that person in contravention of the legislation. This provision aligns nuisance matters in clause 20, and is also expiable with a proposed fee of $160.

Clause 26: Citizen's notification

Litter may currently be reported to the Police as with any other criminal offence, but all reports are prioritised against other crime reports which are often more serious offences. This provision allows for improved public reporting of litter. Citizen's notifications may be made to the Minister (or a delegate of the Minister) or Councils in a form set out in the regulations. This will include systems for notifying via the internet, an 'app', and written declaration. It is envisaged that the regulation will require that litter reporters be registered prior to making a report and declare a willingness to attend court to provide evidence of the offence if requested. These public litter reports, subject to being verified and of a sufficient quality, will constitute evidence of an offence and enable the issuing of expiations.

Public litter reporting, using this approach, is available in all states and territories except for the Northern Territory. There is significant precedence in how such schemes should be established in legislation and the provisions within the proposed Act draws from the experience of other jurisdictions in this area.

Division 3 – Seizure of goods

Clause 27: Seizure of abandoned vehicles

This clause has been included to support the incorporation of abandoned vehicle provisions as a form of littering, from the *Local Government Act 1999*, and outlines responsibilities regarding seizure of a vehicle, the allocation of costs and the dispersal of proceeds from sale. It also assists in determination of ownership issues attached to such an offence. The provisions are a reproduction of those currently in the *Local Government Act 1999*.

Clause 28: Seizure of other goods

This provision allows for seizure of property other than an abandoned vehicle (dealt with in the preceding clause) where an authorised officer reasonably suspects that any substance, material or thing has been used in, or may constitute evidence of, a contravention of this Act. The provision also guides the handling of goods that are seized under the provision and forfeiture by court order, should it be appropriate.

Division 4 – Miscellaneous

Clause 29: Liability of vehicle owners

The ability to associate an offence with a vehicle will provide an additional tool in identifying litterers and illegal dumpers, as well as for other nuisance-related complaints. Littering from a vehicle, or littering that is associated with a vehicle, is often witnessed by other drivers and this provision associated with public reporting of litter offences will provide tools necessary to fine these offenders and curb this type of offending. Illegal dumping usually occurs in isolated areas. However the use of surveillance cameras in known illegal dumping hotspots combined with the ability to determine the

owner of a vehicle as responsible for the offence will provide a significant deterrent. Current legislation requires evidence of the identity of the person using the vehicle, which limits the ability to prove an offence even if the vehicle involved is readily identifiable. All other Australian States, and the Northern Territory, have similar legislation in place to support their litter regulation[7].

Section 174A of the *Road Traffic Act 1961* relates to vehicle owner-onus for an offence, without derogating from the liability of any other person. If a vehicle is involved in a prescribed offence, the owner of the vehicle is guilty of an offence and liable to the same penalty as is prescribed for the principal offence and the expiation fee that is fixed for the principal offence applies in relation to an offence against this section. This provision also applies where a person is witnessed offending outside of a vehicle but nonetheless a vehicle is used by the offender at the time of the offence. Section 45G of the Victorian *Environment Protection Act 1970* provides a similar provision.

The owner, driver and passenger of a vehicle are not all liable, through the operation of this section, to be convicted of an offence arising out of the same circumstances. Consequently, conviction of the owner exonerates the driver or passenger and conversely conviction of the driver or passenger exonerates the owner.

This proposed provision provides for an owner, via statutory declaration, to state that someone else is responsible for the offence as is the case with speed and red-light camera offences. There is also a defence provision should the vehicle have been stolen or otherwise was not in the possession or control of the owner through some unlawful act at the time of the alleged offence.

There is also provision for the exemption of drivers of passenger vehicles where there is littering from the vehicle (buses and taxis) due to the action of passengers. However, such persons are deemed responsible where they are witnessed as committing the offence themselves.

Clause 30: Defence of due diligence

This proposed provision provides a defence where the alleged offender can demonstrate that they took all reasonable precautions and exercised all due diligence to prevent the offence being committed.

The proposed provision includes additional elements specific to activities of environmental significance within the scope of this legislation, such as waste transporters and dredging or earthworks drainage. This is in order to align with their obligations as a licensed entity under the EP Act. Subclause 3 provides some exclusions to this provision.

Clause 31: Alternative finding

This provision allows a court, where it is not satisfied that the defendant is not guilty of the offence charged but is satisfied that the defendant is guilty of a lesser charge, to find the defendant guilty of the lesser offence.

Clause 32: Notification to EPA of suspected serious or material environmental harm

This provision supports the delineation between the offences under the proposed legislation and the more serious offences of causing material or serious environmental harm, under the EP Act. A concern of local government was that there would be an expectation that they manage more serious matters reported to them under this legislation. This provision ensures that the EPA can focus on matters that may cause significant environmental harm.

The definition of serious and material environmental harm in the EP Act will provide the criteria for referral. The harm must be referred if is considered to be an environmental nuisance of high impact or on a wide scale, involves actual or potential harm to the health or safety of human beings that is not trivial or other potential environmental harm that is not trivial or it results in actual or potential loss from property damage exceeding $5,000[8].

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[7] Western Australia – *Litter Act 1979* section 27A, Tasmania – *Litter Act 2007* section 24, Victoria – *Environment Protection Act 1970* section 45G, New South Wales – *Protection of the Environment Operations Act 1997* section 146, Northern Territory – *Litter Act* section 8, and Queensland – *Waste Reduction and Recycling Act 2011* Part 3.

[8] Section 5(3) of the *Environment Protection Act 1993* – definition of material environmental harm

This differs from sections 83 and 83A of the EP Act that require notification where serious or material environmental harm is caused or threatened. These provisions apply to those responsible for the activity that has caused or threatened the harm (section 83) or the owner, occupier or site contamination auditor or consultant with regard to site contamination (section 83A). The provision in the proposed legislation requires the Minister (through delegation) or Council or administering body [see clause 13(2)] to report suspected material or serious environmental harm to the EPA. This will have the added benefit of identifying possible non-compliance with sections 83 and 83A by those required to notify under that Act.

Part 5 – Notices

Clause 33: Nuisance and litter abatement notices

This clause outlines the 'notices' that may be issued to seek compliance with the Act. The two types of notices proposed are a 'Nuisance Abatement Notice' and a 'Litter Abatement Notice'. Notice-making powers align closely to the order making powers in section 254 of the *Local Government Act 1999* that these will, in part, replace and are similar in structure to environment protection orders under the EP Act.

Both types of proposed notices may impose the following requirements:

- discontinue or not commence an activity indefinitely or for a specified time
- limit an activity to specified times
- that a person take specified action
- undertake specified monitoring or testing
- make good damage or clean up litter
- furnish results or reports
- develop a plan of action to secure compliance.

Specific to a 'Litter Abatement Notice' this plan may include requirements to ensure litter clean up, prevention of further litter, keeping an area around the premises (no greater than 100 m) litter free, or repair or remediate any damage caused by a contravention.

These 'notices' may be issued orally if it is the authorised officer's opinion that urgent action is required. Such a notice will cease to have effect after 72 hours if it is not followed up by a written notice.

Another important element of this provision is the ability for two or more Councils to issue a notice to a person. The aim of this is to ensure suitable control of mobile businesses that may cause nuisance in one Council area and simply move to a neighbouring council to avoid compliance.

Failure to comply with a notice carries a significant court imposed penalty and may be expiated to the amount of the expiation fee for the contravention the notice is seeking compliance with.

Clause 34: Action on non-compliance with notice

This provision details the remedies available on non-compliance with a notice. The Minister or a Council or administering body [Clause 11(2)] may take any action required by the notice, meaning an authorised officer or another person authorised by the Minister or Council or administering body can undertake the work. For persons who are not authorised officers the clause provides that person powers of an authorised officer relevant to undertaking the task.

The clause also includes cost-recovery provisions to allow for reasonable costs to be recouped. A penalty mechanism to discourage late payment or non-payment is included as is the ability to take a charge on land for the amount owed.

Clause 35: Appeals

This clause provides appeal rights against a notice and establishes the Environment, Resources and Development (ERD) Court as the appropriate jurisdiction. The clause provides necessary guidance and requirements for an appeal, and requires that any appeal is first referred to a conference under section 16 of the *Environment, Resources and Development Court Act 1993*.

Part 6 – Civil remedies and penalties

Clause 36: Civil remedies

The Act will provide the ability to apply to the ERD Court to order various civil remedies. This allows the Minister, Councils, administering bodies, individuals or other body corporates who have been impacted by a contravention or a potential contravention to apply to the courts for a civil remedy. The different types of orders that the court may make are outlined in Clause 36(1).

Inclusion of civil remedies provisions will provide an alternative route for complaint resolution that may be exercised separately from the Council or administering body. This will be particularly useful for a complainant in circumstances where a Council or administering body has been unable to determine a contravention through its own investigation and is unable to progress a complaint to the satisfaction of the complainant. It will also be a useful alternative option for complaints are deemed unjustifiable or unreasonable by a Council or administering body.

The civil remedies available will also be useful to regulators to ensure compliance with administrative orders issued under the legislation and for those issued with orders to apportion cost to others liable for those costs. This clause also allows the court, if it considers appropriate, to award exemplary damages[9] to be paid to the consolidated account. This provides further deterrence for wilful or reckless contravention of the legislation.

Clause 37: Minister may recover civil penalty in respect of contravention

This clause provides the ability for the Minister, relevant Council or administering body to enter into negotiation with an alleged offender or apply to the ERD Court for a civil penalty. Civil penalties may only be used for offences that do not require proof of intention or some other state of mind, and are an alternative to criminal prosecution. Negotiated civil penalties provide the ability to deliberate on a significant penalty directly with the alleged offender, avoiding the costs and time associated with Court proceedings.

The clause establishes the maximum penalty as the sum of the maximum penalty for the offence plus any economic benefit accrued by the defendant as a result of the contravention. This recognises that any penalty is negotiated voluntarily and there should be like outcomes possible between a court imposed penalty and a negotiated civil penalty to ensure both parties are willing to negotiate in good faith. If a civil penalty was not able to reflect illegally obtained economic benefit but a court penalty was able to include this element, it would reduce the likelihood that the regulator would agree to negotiate.

The draft Bill contains another option for the Minister, councils or administering bodies to apply to the ERD Court for a civil penalty as an alternative to criminal prosecution. The burden of proof for a civil court penalty is ‘on the balance of probabilities’ which is lower than the criminal burden of proof ‘beyond reasonable doubt ‘. The Bill proposes that alleged offender may elect to be heard in the criminal jurisdiction of the court rather than be party to a court imposed civil penalty application.

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[9] Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff’s rights. Cited: JD Mayne and H McGregor, *Mayne & McGregor on Damages* (Sweet & Maxwell Limited, 12th ed, 1961) pg 196.

A civil penalty scheme operates successfully under the EP Act (section 104A). The EPA has negotiated 15 civil penalties and received one civil penalty from the ERD Court to June 2015.

The EPA calculates the negotiated civil penalty amounts by applying its calculation policy under the EP Act. It will only enter into negotiations for offences where the maximum penalty is less than $120,000. The civil penalty amounts negotiated to date have been between $1,957.50 and $42,656.25.

Part 7 – Miscellaneous

Clause 38: Constitution of the Environment, Resources and Development Court

The ERD Court is to be constituted in the same way as in the EP Act when exercising jurisdiction under the proposed Act. This is outlined in section 110:

> 110—Constitution of Environment, Resources and Development Court
>
> The following provisions apply in respect of the constitution of the Environment, Resources and Development Court when exercising jurisdiction under this Act:
>
> (a) the Court may be constituted in a manner provided by the *Environment, Resources and Development Court Act 1993* or may, if the Senior Judge of the Court so determines, be constituted of a Judge and one commissioner;
>
> (b) the provisions of the *Environment, Resources and Development Court Act 1993* apply in relation to the Court constituted of a Judge and one commissioner in the same way as in relation to a full bench of the Court;
>
> (c) the Court may not be constituted of or include a commissioner unless—
>
> (i) in a case where only one commissioner is to sit (whether alone or with another member or members of the Court)—the commissioner; or
>
> (ii) in any other case—at least one commissioner,
>
> is a commissioner who has been specifically designated by the Governor as a person who has expertise in environmental protection and management.

Clause 39: Delegation by Minister

This provision allows the Minister to delegate powers. These powers feature throughout the legislation within terms such as 'The Minister may' or 'The Minister must'. This provision will allow an agency of the Minister to administer certain elements of the legislation on the Minister's behalf.

Clause 40: Service of notices or other documents

This clause provides necessary requirements for service of notices or documents under the Act. These are reasonable methods for service of notices and documents. There is also the ability to define other methods of service via regulation. This is to accommodate any new technologies that might provide appropriate methods of service in the future. The clause provides for methods of service under the *Corporations Act 2001* of the Commonwealth. Nuisance abatement and litter abatement notices must be served in person.

Clause 41: Immunity

This clause provides protection from personal liability for the Minister and authorised officers engaged in the administration of the Act for an honest act or omission in administering any function, power or duty under the proposed

Act. Instead, liability lies with the Council for acts or omissions from a Council officer, employee, agent or contractor and with the Crown for other persons.

Clause 42: Protection from liability

A failure by the Minister, Council or administering body [clause 11(2)] to perform a function under this Act, does not give rise to any civil liability.

Clause 43: Statutory declarations

This clause covers if a person is required by or under this Act to provide information to the Minister, Council or administering body [see clause 11(2)]. The information should be verified by statutory declaration and this is provided under Part 3 of the *Oaths Act 1936*.

Clause 44: False or misleading information

This is a very important provision, which protects, as much as is reasonably possible, the validity of complaints and reports made under the proposed Act. The maximum penalty proposed for a natural person is $20,000 and for a body corporate $50,000.

There are a number of other safeguards that will be used to protect the integrity of reports made under the legislation. In relation to a citizen's notification (litter report), this includes providing multiple elements of a vehicle's description and requiring a reporter to register their details with any report made and nominate that they will attend court if the fine is appealed.

Clause 45: Confidentiality

This provision protects the confidentiality of information related to trade processes or financial information obtained in the administration of the proposed Act. There are a number of exceptions outlined in the clause where to divulge such information is lawful.

Clause 46: Offences

This provision details those persons that may commence proceedings for an offence against the Act, including a person acting on the written authority of the Minister, and also provides that a genuine document purporting to be under the hand of the Minister and to authorise the commencement of proceedings under the Act must be accepted as proof of such an authorisation in the absence of proof to the contrary.

Clause 47: Offences and Environment, Resources and Development Court

This provision allocates the offences constituted by the proposed Act within the criminal jurisdiction of the ERD Court.

Clause 48: Orders in respect of contraventions

This clause outlines the orders that may be made by the ERD Court, where the contravention has resulted in damage to property or the environment, in addition to any penalty imposed. These orders may include the following:

- action to make good any damage or prevent or minimise further damage
- action to publicise the contravention and its consequences, and any orders made against the person
- to pay reasonable costs and expenses, or compensation for injury caused or loss or damage suffered, in such amount as is determined by the court.
- to pay an amount, in addition to any penalty, the court's estimation of the economic benefit acquired by the person, or accrued or accruing to the person, as a result of the contravention.

Where the Minister brings the action, any economic benefit component paid will go to the Environment Protection Fund and where action is brought by a Council or administering body it will go to that entity.

Clause 49: Offences by bodies corporate

This provision applies appropriate individual deterrents for directors or governing bodies of bodies corporate where a body corporate has contravened a provision of the Act. The provision of liability improves the likelihood of compliance given the ability to impact the individual. This will be an important element of the legislation where business is the source of nuisance complaints.

Clause 50: Continuing offences

This clause provides deterrent mechanisms to deal with continuing offences. These provisions are similar to those in section 123 of the EP Act and mirrored in the *South Australian Public Health Act 2011*. In addition to the penalty otherwise applicable to the offence, an additional penalty of not more than one-fifth of the maximum penalty for that offence is applicable for each day that the act or omission continues. If a person is convicted of an offence and the act or omission continues after conviction then the person is guilty of a further offence and the above provision regarding additional daily penalties applies.

Clause 51: Recovery of administrative and technical costs associated with contraventions

This provision is to assist in providing for cost recovery of investigative or administrative costs associated with contraventions of the proposed Act. Administering agencies will be able to recover administrative and technical costs associated with contraventions. These costs may have been incurred during investigation, issuing of notices incurred ensuring a person has complied with orders, and notices or expiations under this Act. Relevant costs include those incurred for taking samples or conducting tests, examinations or analyses.

For recovery of costs related to investigation of a contravention or issuing of a notice under Part 5, the appropriate fee or methodology for determining the fee, will be prescribed via regulation. Costs associated with ensuring compliance with a notice or court imposed order will be the reasonable costs and expenses incurred in taking that action. These costs will be subject to judicial review.

An expiable offence for not paying an amount under this clause is included to deter non-payment. Further, if an amount payable under this clause is not paid, the amount may be recovered as a debt by the Minister, Council or administering body [see Clause 11(2)].

Clause 52: Assessment of reasonable costs and expenses

This clause provides guidance that to determine reasonable costs and expenses incurred by the Minister, Council or administering body [see Clause 11(2)] reference must be made to the reasonable costs and expenses that would have been incurred were that action undertaken by an independent contractor. This ensures that market value is applied to determining costs.

Clause 53: Evidentiary provisions

The Bill is designed to allow evidence of an offence to be of a sensory nature. This will allow officers to use their senses to administer an order or a notice. Sensory evidence is not new in the Australian context. In South Australia it is provided for under section 139(4) of the EP Act. In Tasmania, section 53A of the *Environmental Management and Pollution Control Act 1994* provides for sensory evidence to be used. The Tasmanian Act allows an officer to provide evidence of their own senses, that a nuisance was admitted and detectable at a place occupied by another person. In Queensland, the *Environmental Protection Act 1994* (section 491) also enables an officer to form a basis for an offence of environmental nuisance, including noise, by their own senses.

Providing the ability for officers to use their senses to determine whether a nuisance has occurred will allow for easier administration of the Act. This is because sensory evidence removes the need for more complicated equipment and

techniques. The difficulty with sensory evidentiary provisions is consistent application. The provision develops compliance standards via regulation in clause 22(d) of the Bill which will result in detailed standards for using sensory evidence. These standards will provide consistency in the use of sensory evidence.

The clause provides for certification by an authorised officer of various elements of evidence as proof, in the absence of proof to the contrary. With regard to litter an authorised officer may certify that specified matter was litter for the purposes of the proposed Act and the quantity of litter that was disposed. While all effort will be made to determine the volume of litter there will be circumstances where the quantity is either well below, or well above the offence categorisation point of 50 litres in which case the determination of the authorised officer should be upheld unless proven otherwise to reduce regulatory burden on the officer.

A balance is necessary between providing natural justice for an alleged offender and ensuring that proving an offence is not overly burdensome on the Minister, Council or administering body. The above evidentiary provisions will reduce the burden of gathering evidence yet retain natural justice elements for the alleged offender.

Clause 54: Regulations

The provision of regulation-making powers is necessary to support the operation of the proposed Act. Such powers should be as broad as possible within the confines of what is contemplated by the proposed Act and what is required for the effective operation of the Act. The specific examples of the types of regulations outlined in this clause are not limiting and in addition to those provided in Clause 22 and elsewhere in the legislation.

Examples of when regulations may be required include:

- requiring information to be kept by a person or reported
- prescribing fees and ancillary requirements regarding their application in respect of any matter under the Act
- exempting persons or activities from the application or specified provisions of the Act
- prescribing fines and expiations for contravention of a regulation
- prescribing further administering bodies
- adopting existing standards from other bodies or jurisdictions
- allowing for any other causes of nuisance to be prescribed
- defining compliance standards for nuisance specified in the Act or via regulation

These examples are not limiting of the broad power in subclause 1.

Schedule 1 – Related amendments, repeal and transitional provisions

Part 1 – Preliminary

Clause 1: Amendment provisions

This clause puts beyond doubt that the clauses under each part heading have the effect of amending the Act referred to in each part heading.

Part 2– Amendment of Local Government Act 1999

Clause 2: Repeal of Chapter 11 Part 3

The provisions to be repealed from the *Local Government Act 1999* are as follows:

- section 235 – Deposit of rubbish, etc
- section 236 – Abandonment of vehicles and farm implements
- section 237 – Removal of vehicles.

These provisions cover actions that are considered examples of littering and illegal dumping, and are secondary elements to the purpose of the *Local Government Act 1999* in establishing a robust local government sector. The above provisions are dealt through proposed clause 23 and the remainder of Part 4 of the Bill. The provisions will operate more effectively within this legislation as it has been designed specifically for the purpose of better regulating these types of offences.

Clause 3: Repeal of section 240

This section allows Councils to make bylaws prohibiting the posting of bills, advertisements or other papers or items on a building, structure on a road, other local government land or other public place, without the permission of the Council.

The proposed legislation makes this redundant as all Councils will be able to control the posting of bills in a straightforward manner without the burden of developing bylaws. Bill posting is addressed in clause 24 of the Bill.

Clause 4: Amendment of section 245 – Power to make orders

This clause will remove item 1 – 'unsightly condition of land' and item 3 – 'animals that may cause a nuisance or hazard' from order-making powers in the *Local Government Act 1999*. These issues will now be dealt by Part 4 of the Bill. The Bill has been designed specifically to provide for best practice management of nuisance matters and provides improved tools to manage such nuisances.

Part 3 – Amendment of Motor Vehicles Act 1959

Clause 5: Amendment of section 139D – Confidentiality

The proposed amendment of this section of the *Motor Vehicles Act 1959* is necessary to allow for details of vehicle registrations to be divulged for the purpose of determining the liability of vehicle owners for an offence pursuant to Part 4 Division 3 of this Bill.

Part 4 – Amendment of Summary Offences Act 1953

Clause 6: Repeal of section 48

This clause deletes section 48 from the *Summary Offences Act 1953* dealing with bill posting. The provision is to be replaced by clause 24 of the Bill.

Further information

Legislation

Online legislation is freely available. Copies of legislation are available for purchase from:

Service SA Government Legislation Outlet
Adelaide Service SA Centre
108 North Terrace
Adelaide SA 5000

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