
Options for Sustainability Legislation in the ACT

A critical analysis of sustainable development legislation in other jurisdictions to inform drafting of ACT sustainability legislation.

Submission to the Minister for the Environment

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Prepared by Alison Gurr (lead author) and Dr. James Prest.



Level 1, Public Trustee House
4 Mort St
Canberra A.C.T 2601.

GPO Box 574 Canberra A.C.T. 2601

Telephone (02) 6247 9420
Fax (02) 6247 9582
Email edoact@edo.org.au

www.edo.org.au

Environmental Defender's Office (ACT)

Introduction

1. EDO ACT takes this opportunity to make representations to the Chief Minister and his Department in relation to the possible future shape of proposed sustainability legislation. We recognise that there has been no formal call for submissions as yet by the CMD but we feel that it is appropriate to make some preliminary submissions at this point in time. This is largely because of the vital importance of government taking steps to address issues of ecological sustainability through the vehicle of a strategic legislative enactment that attempts to integrate and incorporate sustainability principles across government and broader society in the Australian Capital Territory.
2. We note that the ACT Planning and Land Authority is presently engaged in a major process of review of the Territory's land use planning and environmental laws, particularly the *Land (Planning and Environment) Act 1991*. It is imperative that reforms to the *Land Act*, the implementation of the intent of the *Canberra Spatial Plan*, and proposed sustainability legislation should be integrated, complementary and developed from a whole of government perspective.

The EDO's interest

3. The Environmental Defender's Office ACT Inc. is a non-profit community legal centre advising on environmental and planning law with the aim to assist and increase public awareness of environmental laws and remedies. The Environmental Defender's Office Inc is the only legal office in the ACT that provides specialist advice about public interest environmental law matters, with little if any overlap between the functions of the EDO and the work of any other organisation.
4. The EDO is part of a national network of independent EDOs that now extends to nine offices around Australia. Since 1985, EDOs have pursued a mission of providing public interest legal services to ensure compliance with environmental and planning legislation.
5. EDO ACT has a track record of providing legal advice and information on environmental and planning law to the ACT public since 1996.
6. The EDO was set up to meet a need in the community for a legal service providing planning and environmental law advice and assistance to the people of the ACT, in light of the fact that Legal Aid is not available for environmental matters in the Territory and the fact that many citizens cannot otherwise afford legal representation in the private sector in relation to such matters.
7. Over the years, the various EDO offices have been involved in a number of important conservation cases, which have helped to significantly develop public interest environmental law. These cases have had particularly important outcomes in the public interest which would often not have been achieved but for the role of the EDO.

Activities of the EDO

8. The EDO (ACT) has three main roles:

- *Provision of legal advice to members of the ACT community.*

The EDO (ACT) provides specialised legal advice in relation to matters of environmental and planning law. These include, but are not limited to, Administrative Appeals Tribunal appeals; the impact of changes to ACT planning, environment and heritage legislation; pollution and dumping law; tree protection; torts of nuisance and negligence; incorporation and insurance law; indigenous heritage law, neighbourhood disputes, as well as trade practices and defamation law.

- *Law reform.*

The EDO (ACT) makes formal submissions to government on environmental laws and policies. The EDO (ACT) is also consulted in relation to proposed amendments to legislation by government. The EDO (ACT) has most recently made detailed submissions in relation to the Commissioner for the Environment Review, the Human Rights Bill, the Tree Protection Bill and in relation to Crown immunities for Territory owned Corporations.

- *Community legal education.*

The EDO(ACT) assists the ACT community to understand their legal rights and responsibilities. This is achieved via presentations on the law to ACT schools, colleges and community groups; the publication and distribution of 'Plain English' fact sheets explaining ACT laws; the distribution of the ACT Environmental Law Handbook (140pp.) (launched November 2003 by the Chief Minister); and the regular distribution of electronic newsletters informing community members of legal and other developments in the ACT. The EDO ACT website www.edo.org.au also provides publications and other information to the public.

Introduction

The ACT Government has indicated its commitment to sustainable development by establishing an Office of Sustainability, appointing an ACT Commissioner for the Environment and introducing a number of environmental strategies.¹ However, the 2003 ACT State of the Environment Report revealed that the ACT was not sustainable in a number of significant areas.² While principles of sustainable development are

¹ For example, the *No Waste by 2010* initiative, the *Sustainable Transport Plan* and the *Greenhouse Strategy*.

² These areas include land and fresh water health, air quality and biodiversity. ACT Commissioner for the Environment, *State of the Environment Report 2003 'Towards Sustainability'* (2003), 2, 3. Available on-line at <http://www.environmentcommissioner.act.gov.au/2003actreport.html>.

integrated into a number of ACT statutes through the inclusion of these principles into the objects of the legislation,³ the ACT has no statute specifically promoting sustainable development. Accordingly, there is no requirement that all government agencies and statutory authorities consider the principles of sustainable development when making decisions. During the last Territory election, the Stanhope Government promised to introduce sustainable development legislation to further promote sustainability within the ACT. In recent years, several sub-national and national governments overseas have introduced sustainable development legislation. In Australia, South Australia and Western Australia have developed draft sustainable development legislation which is yet to be passed. This paper will critically examine all current sustainable development legislation and bills with the aim of informing the drafting of the ACT's own sustainability legislation.

What is Sustainable Development?

Since the 1960s, the concept of sustainable development has achieved international recognition, culminating in the development of the Rio Declaration, a statement setting out the principles of sustainable development, and Agenda 21, a plan for sustainable development at the United Nations Conference on Environment and Development in 1991. The term 'sustainable development' encompasses a wide range of principles which aim to foster 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'⁴ The concept recognises that environmental protection, economic development and quality of life are interrelated. Sustainable development requires a balancing of these issues to ensure that humans can live sustainably. The term 'sustainable development' has been criticized for lacking clarity and certainty.⁵ However, accepted principles of sustainable development include intergenerational equity, the polluter pays principle, the precautionary approach, biodiversity conservation and improved valuation, pricing and incentive mechanisms.⁶

Oregon: Sustainability Act 2001

Overview of the Act

In 2001 Oregon introduced the Oregon Sustainability Act⁷ which establishes a policy of sustainability and sets out goals. These goals focus upon government decision making and range from agencies making purchasing decisions, and performing operations

³ See i.e. s3 *Environmental Protection Act 1997* (ACT), s6 *Planning and Land Act 2002* (ACT), s3B *AAT Act 1989* (ACT), s3(e) *Utilities Act 2000* (ACT).

⁴ Report of the World Commission on Environment and Development (WCED), *The Brundtland Report, Our Common Future* (1987).

⁵ G Bates, *Environmental Law in Australia* (5th Ed., 2002) 121.

⁶ For more information concerning the principles of sustainable development, the Brundtland Report, *Our Common Future* sets out the principles in greater detail. Above n 4. In particular, the precautionary principle requires that 'where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation'. Bates, above n 5, 129.

⁷ *Oregon Sustainability Act 2001* (HB 3948) Legislation available on-line at <http://www.biodiversitypartners.org/Leg/3948.shtml>.

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consistently with the principles of sustainable development, to encouraging local communities to achieve objectives such as an independent and productive citizenry. The Act creates a Sustainability Board whose function is to analyse sustainability practices as well as to advise government agencies and the private sector.⁸ It also establishes the Institute for Natural Resources at Oregon State University.⁹ The Board is required to evaluate and report on the achievement of the Act's goals and consider mechanisms to measure progress toward sustainability.¹⁰ A general criticism of the Act has been its focus on government and its failure to directly promote sustainable development principles in the private sector.¹¹

Definition

Under s(1)(4), 'sustainability' is defined as 'using, developing and protecting resources in a manner that enables people to meet current needs and provides that future generations can also meet future needs, from the joint perspective of environmental, economic and community objectives.' While this is a succinct definition, it overlooks significant principles such as the precautionary principle. However, the goals in s4 reflect many of the principles of sustainable development. By making these goals more specific than the usual more aspirational principles of sustainable development, the Act provides greater direction to government agencies.¹²

Oregon Sustainability Board

Achievements

The Oregon Sustainability Board has been relatively active since its establishment. In 2003 it published State Agency Guidance to provide directions on how to implement sustainability and achieve specific objectives.¹³ In 2004, the Board evaluated and finally approved the sustainability plans of Oregon state agencies. Some of these plans have led to a significant reduction in energy and resource consumption.¹⁴ Since 2004, the Board has required all Oregon state agencies to publish semi-annual Statements of Progress regarding their Sustainability Plan.¹⁵ This encourages a constant commitment to sustainable development. The Board has also been involved with projects such as the

⁸ Section 2 *Oregon Sustainability Act 2001*.

⁹ Section 12 *Oregon Sustainability Act 2001*. See Institute of Natural Resources website at <http://inr.oregonstate.edu/> for more details.

¹⁰ Section 11 *Oregon Sustainability Act 2001*.

¹¹ Sara Vickerman, member of the Oregon Sustainability Board and a Defender of Wildlife, email 11/05/2005.

¹² For example, State operations should be conducted in ways that significantly increase the efficient use of energy, water and resources. Section 4(1)(i) *Oregon Sustainability Act 2001*.

¹³ Oregon Sustainability Board, *Oregon State Agency Guidance 'A Sustainable Oregon for the 21st Century* (2003). Available online at <http://www.sustainableoregon.net/documents/sb/State-Agency-Guidance.pdf>. Downloaded 13 May 2005.

¹⁴ The plans of the Department of Corrections, Parks, Agriculture and the Department of Administrative Services have been particularly successful. Cylvia Hayes, Executive Director for Earth Connections and member of the Sustainability Committee of the Oregon Progress Forum, email 20/05/2005.

¹⁵ Oregon state agencies, *Oregon Statement of Progress*, (2004). Available on-line at http://www.sustainableoregon.net/documents/agency/All_Agencies_Progress_2004Q01.pdf. Downloaded 13 May 2005.

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Sustainable School Program¹⁶ and has played a role in establishing Renewable Energy and Global Warming Initiatives.¹⁷

Problems

Despite the Board's achievements, its effectiveness has been limited by the terms of the Act which require that the Board propose only positive incentives and act to remove all negative incentives to achieve sustainable development.¹⁸ The Board is also unable to overturn rules, orders, agreements or policies of government agencies or affect rulemaking or other regulatory functions of these agencies. The Board's inability to promote sustainability through ways which do not involve positive incentives, such as through regulations or fines, has hampered its ability to effectively endorse sustainability.^{19,20} The small size of the seven member board has also restricted the exercise of the Board's functions and has led to moves to increase its membership.²¹ Another failing of the Act is the inclusion of a sunset clause inserted in the Act regarding the life of the Board. Concern has been expressed that the State may not reauthorize the Board in 2006, particularly if the Board adopts an agenda which does not mirror that of the Government.²² This clause interferes with the independence of the Board and its ability to make significant improvements to government decision-making. Lack of sufficient funding has also hindered the Board's ability to adopt a meaningful role. It has been forced to rely on temporary staff from different agencies rather than having a permanent and expert staff.²³

The Institute for Natural Resources

The Institute for Natural Resources appears to have been effective in its role of providing research and policy analysis, encouraging information-sharing and actions and working with other government agencies, universities, conservation groups and private businesses.²⁴ Examples of its work include; collaboration with the Oregon Watershed Enhancement Board to establish a conservation strategy for the Willamette Basin, a review of the Oregon Fire Program, a report on aggregate mining and the holding a conference on climate change.²⁵

Manitoba: Sustainable Development Act 1997

Overview of the Act

¹⁶Oregon Sustainability Board, Minutes of Meeting, 28 January 2005. Available on-line at http://www.sustainableoregon.net/documents/sb/minutes_2005jan.pdf. Downloaded 13 May 2005.

¹⁷ Hayes, above n 14.

¹⁸ Section 3(1)(a) and s3(2)(a) *Oregon Sustainability Act 2001*.

¹⁹ Hayes, above n 14.

²⁰ Vickerman, above n 11.

²¹ Oregon Sustainability Board, above n 16.

²² Vickerman, above n 11.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Institute for Natural Resources 'INR Projects' (2005). Available online at http://inr.oregonstate.edu/projects_index.html. Downloaded 13 May 2005.

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The Canadian province of Manitoba introduced The Sustainable Development Act in 1997, 'to create a framework through which sustainable development will be implemented in the public sector and promoted in private industry and in society generally.'²⁶ This Act requires the creation of a Sustainable Development Strategy for Manitoba, the introduction of Provincial sustainability indicators and the establishment of a Round Table to promote sustainable development and to provide advice to Government.²⁷ It also requires cabinet to establish a provincial sustainable development code of practice to assist in the integration of sustainable development into the operations of the provincial public sector.²⁸ Crown corporations are obliged to adopt corporate sustainable development code of practice, financial management and procurement guidelines and action plans to meet sustainable development objectives and they must report on their progress in implementing sustainable development practices.²⁹ Local authorities, schools, universities, and health authorities are also required to follow financial management guidelines and procurement guidelines.³⁰ The Act supports the continuation of the Sustainable Development Innovations Fund³¹ which allocates grants for innovative projects, activities, research and developments to foster sustainability.³² The principles of Sustainable Development and the Guidelines for Sustainable Development are set out in the schedules.

General

Despite the impressive objectives of the Act, it has been strongly criticised. Cunningham claims that 'it is no more than an empty shell of a law which allows for the status quo to prevail'³³ and argues that the Act has not been successful in influencing government operations.³⁴ Miller agrees that the Act has not had a 'dramatic effect' and believes that no cases have been launched on the basis of the Act.³⁵³⁶ The Act has been criticised for overemphasising economic issues to the detriment of environment issues,³⁷ for focusing on the public sector and for not utilising public consultation as required under s7(4).³⁸ However, the Act has been responsible for some progress. The introduction of provincial sustainability indicators and the progress report, although it is a year behind schedule, have been applauded by environmental groups.³⁹ In 2005, there are plans for new measure concerning crown corporations and public schools and universities.⁴⁰

²⁶'Objects' s 2, *The Sustainable Development Act 1997* (Manitoba). Available on-line at <http://web2.gov.mb.ca/laws/statutes/ccsm/s270e.php>.

²⁷ Section 4(1), s7(1) and s9(1) *The Sustainable Development Act 1997* (Manitoba).

²⁸ Section 13 *The Sustainable Development Act 1997* (Manitoba).

²⁹ Section 14 *The Sustainable Development Act 1997* (Manitoba).

³⁰ Section 15 *The Sustainable Development Act 1997* (Manitoba).

³¹ Section 17(1) *The Sustainable Development Act 1997* (Manitoba).

³² Section 17(2) *The Sustainable Development Act 1997* (Manitoba).

³³ Glen Koroluk, Manitoba Eco-network, email 04/05/2005.

³⁴ Dennis Cunningham, International Institute of Sustainable Development (IISD) Knowledge Communications Project Manager, email 04/05/2005.

³⁵ Peter Miller, Professor, Senior Scholar and past Chair of Philosophy and a member of the Centre for Forest Interdisciplinary Research at the University of Winnipeg. Adjunct Professor in both the Natural Resources Institute and the Department of Philosophy at the University of Manitoba, email 25/04/2005.

³⁶ *Ibid.*

³⁷ Koroluk, above n 33.

³⁸ Cunningham, above n 34.

³⁹ *Ibid.*

⁴⁰ Miller, above n 35.

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Sustainability indicators have been developed, as required by the Act and procurement and financial guidelines have also been established for government operations.⁴¹

Definition

The Manitoban Act has an interesting approach to defining sustainable development. Under s1, "sustainable development" is briefly defined as 'meeting the needs of the present without compromising the ability of future generations to meet their own needs'. This principle of intergenerational equity is enlarged upon in Schedule A, which states that sustainable development includes concepts such as 'integration of environmental and economic decisions' and 'stewardship and global responsibility'. However, these principles seem very aspirational and are unlikely to have much effect. For example, they direct Manitobans to 'think globally when acting locally'. The guidelines for sustainable development set out in Schedule B provide more direction, with aims which include the efficient use of resources, public participation, waste minimization and substitution and research and innovation. The dispersal of the definition of sustainable development throughout the Act is unsatisfactory; it does not aid clarity and is liable to lead to confusion.

Sustainable Development Innovations Fund

The Sustainable Development Innovations Fund has been successful in funding a range of initiatives which promote sustainable development.⁴² For example, in 2002-2003 \$2.96 million was shared among groups including the Environmental Youth Corps, Manitoba Climate Change Action Fund, Orphan Mine Site Rehabilitation Program and a Pollution Prevention Fund.⁴³ According to Fund's Annual Report, these programs have been successful.

Round Table for Sustainable Development

The Manitoba Round Table for Sustainable Development is required under the Act. However the Government has failed to comply with the Act and the Round Table is currently defunct.⁴⁴ It appears that there was a lack of consensus concerning the role of the Round Table which focused on existing programs rather than new issues.⁴⁵ Those initiatives the Round Table did suggest were often met with a lack of interest from the Government and the Round Table also found it difficult to access the information it need,

⁴¹Sustainable Resource Management Branch, Manitoba Sustainability Indicators And Reporting Initiative (2003). Available on-line at <http://www.gov.mb.ca/conservation/susresmb/indicators/> . Downloaded 7 May 2005. Manitoba's Sustainable Development Procurement Guidelines, (December 2000). Available on-line at http://www.gov.mb.ca/gs/psb/sustainable_development_procurement_guidelines.pdf. Downloaded 5 May 2005. Miller, above n 35.

⁴² Cunningham, above n 34.

⁴³See Manitoba Sustainable Development Innovations Fund Annual Report 2002 -2003 (2003). Available on-line at <http://www.gov.mb.ca/conservation/pollutionprevention/sdif/annual-report-2002-2003.pdf>. Downloaded 20 May 2005.

⁴⁴ Miller, above n 35.

⁴⁵ *Ibid.*

which impaired informed decision making.⁴⁶ There was also insufficient communication and resource sharing between the Round Table and other environmental research bodies in Manitoba.⁴⁷ Following the abolition of the Round Table, the Government created other consultative bodies to deal with more specific issues of sustainability instead, such as the Lake Winnipeg Stewardship Board. However, these bodies are not adequate replacements for the Round Table, whose broader roles in promoting sustainable development and providing the Government with advice have not been replaced. The experience of the Manitoban Round Table emphasises the need for a strong vision and government support for successful sustainable development initiatives.

Minnesota: Sustainable Development Act 1996

Overview of the Act

The Sustainable Development Act was introduced in Minnesota in 1996. This Act requires sustainable development planning guides and a model ordinance to be developed for local government use and to be reviewed every five years.⁴⁸ Every state department, agency, and board was required to report to the Environmental Quality Board by 1996 on how their programs reflected sustainable development principles and any changes which could be made to ensure that these principles were promoted.⁴⁹ The Environmental Quality Board was required to report to the legislature by January 1997, on the state agencies' review of their missions and programs.⁵⁰

General

Unlike other Acts examined, this Act appears to be only a temporary measure to increase sustainability in Government decision-making. After 1997, the only active parts of the Act are the provisions concerning the review of the planning guides and a model ordinance. Minnesota has relied upon other more specific Acts to further sustainable development, such as the Sustainable Forest Resources Act 1995.⁵¹ Despite the Act's lack of content, Minnesota has introduced a number of initiatives and boards which are usually established under similar legislation. For example, there are sustainability indicators, a Sustainable Development Initiative and a Round Table on Sustainable Development, which has put forward policies and principles concerning sustainable development.^{52,53} However, the Round Table was ended in 1998, an action which may not have happened had it been enshrined in legislation.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Section 1(2), s1(3) and s1(5) *Sustainable Development Act 1996* (Minnesota). Available on-line at <http://www.eqb.state.mn.us/SDI/sdact.html>. Downloaded 7 May 2005.

⁴⁹ Section 2 *Sustainable Development Act 1996* (Minnesota).

⁵⁰ Section 3 *Sustainable Development Act 1996* (Minnesota).

⁵¹ See also the *Community-Based Planning Act of 1997* (Minnesota). The Department of Administration, State and Community Services, Environmental Quality Board, *Sustainable Development Legislation*. Available on-line at <http://www.eqb.state.mn.us/SDI/legislation.html>. Downloaded 8 May 2005.

⁵² Department of Administration, State and Community Services, Environmental Quality Board, *Minnesota Progress Indicator* (1999). Available on-line at <http://www.eqb.state.mn.us/SDI/progressind.html>. Downloaded 7 May 2005.

Definition

Under s(1)(b) "Sustainable development" is defined as 'development that maintains or enhances economic opportunity and community well-being while protecting and restoring the natural environment upon which people and economics depend. Sustainable development meets the needs of the present without compromising the ability of future generations to meet their own needs.' As the Act does not build on this definition in other sections, this definition is too broad and vague to be of much direction when making decisions.

Wales: Government of Wales Act 1998

Overview of the Act

The 1998 Government of Wales Act inserted into the Welsh Constitution a section devoted to sustainable development.⁵⁴ This section requires the Welsh Assembly to develop a scheme, to be reviewed regularly, setting out how it proposes to promote sustainable development.⁵⁵ There is also a reporting requirement, obliging the Assembly to publish a report on the scheme's implementation each financial year.⁵⁶ These brief provisions are in contrast to the far more detailed Acts in Canada and the US. The Act establishes no boards, consultative groups or research or funding bodies, instead leaving the Assembly with significant discretion as to what should be included in the scheme to promote sustainable development. There is no definition of what sustainable development is in the Act.

Despite the lack of detail and direction in the Act itself, the Action Plan for 2004-2007, the scheme required under s121, establishes a number of admirable goals and measures to improve sustainability in Wales.⁵⁷ These include: using energy from renewable sources in Welsh Assembly buildings by 2010; requiring government agencies to report on energy use; investigating the adopting of alternative fuels; and establishing an ECO Homes environmental assessment process. The plan also sets out guidelines for promoting sustainable development through government procurement and grants and improving monitoring, reporting and the sustainable development indicators.⁵⁸ The sustainable development scheme for the Assembly sets out in broad terms the means by which the Assembly will meet its obligations under s121.⁵⁹

⁵³Department of Administration, State and Community Services, Environmental Quality Board, *Sustainable Development Initiative*. Available on-line at <http://www.eqb.state.mn.us/SDI/>. Downloaded 7 May 2005.

⁵⁴ *Government of Wales Act 1998* (Wales). Available on-line at <http://www.opsi.gov.uk/acts/acts1998/19980038.html>.

⁵⁵ Section 121(2) *Government of Wales Act 1998* (Wales).

⁵⁶ Section 121(6) *Government of Wales Act 1998* (Wales).

⁵⁷ Welsh Assembly Government, *Sustainable Development Action Plan 2004-2007 (2004)*. Available on-line at <http://www.wales.gov.uk/themessustainabledev/content/action-plan-e.pdf>. Downloaded 10 May 2005.

⁵⁸ *Ibid.*, 27-28, 32-3.

⁵⁹ Means include through decision making, through policies, working with others, leading by example, setting and using indicators and targets section and review and reporting. *Ibid.*

Achievements

The requirements under s121 has led to the Welsh Assembly adopting an important role in 'building in' sustainable development principles into policy as well as in practice.⁶⁰ However, according to the 2004 Sustainable Development Annual Report, while a number of conferences and seminars and public consultations have been held, there appears to be little significant progress towards sustainable development.⁶¹ A Sustainable Housing Plan and Planning Policy and the Constructing Excellence Program, to encourage sustainable construction industry, appear to be some of the few concrete successes.⁶² As Williams and Thomas state, while a 'coherent framework has been established, which has included ... establishing political aims and encouraging policy integration' there have been problems 'converting policy intent into practice and service delivery on the ground'.⁶³ They express concern that there is a lack of 'evaluation and evidence-based policy making' and that there are problems of collaboration between groups and agencies.⁶⁴ It is clear that the Assembly must take greater action to ensure that the principles of sustainable development are adequately introduced into government decision making.

Estonia: Act on Sustainable Development 1995

Overview of the Act

In 1995 Estonia introduced its Act on Sustainable Development.⁶⁵ The Act establishes a national strategy of sustainable development. It includes provisions for Government to establish rates and plans of use of renewable natural resources and use of non-renewable natural resources.⁶⁶ Article 8 and 9 of the Act requires that environmental impact assessment and environmental auditing procedure be established by law and that the basis of sustainable development for other sectors of economy also be established, through law, regulation or programs. An action plan and national program must be introduced to preserve biological diversity.⁶⁷ Environmental monitoring procedures and programs, development plans, planning documents, and funds should also be established.⁶⁸ There is no specific definition of sustainable development in the Act rather the principles are scattered throughout the articles. This approach lacks clarity.

⁶⁰ P Williams and A Thomas 'Sustainable Development in Wales: Understanding Effective Governance' September 2003. Available on-line at www.jrf.org.uk/knowledge/findingd/housing/924.asp. Downloaded 10 May 2005

⁶¹ Welsh Assembly Government, *Sustainable Development Annual Report (2004)* 3. Available on-line at <http://www.wales.gov.uk/themessustainabledev/content/annual-report-e.pdf>. Downloaded 12 May 2005. Examples include a conference concerning the World Summit on Sustainable Development and policy seminars held with Pan-European network partners.

⁶² Welsh Assembly Government, above n 61, 5. Available on-line at <http://www.wales.gov.uk/themessustainabledev/content/annual-report-e.pdf>. Downloaded 12 May 2005.

⁶³ Williams and Thomas, above n 60.

⁶⁴ *Ibid.*

⁶⁵ *Act on Sustainable Development 1995 (Estonia)*. Available on-line at http://www.agenda21.ee/juhend/act_sd.doc. Downloaded 10 May 2005.

⁶⁶ Article 5, article 6 *Act on Sustainable Development 1995 (Estonia)*.

⁶⁷ Article 10 *Act on Sustainable Development 1995 (Estonia)*.

⁶⁸ Article 11, article 12 *Act on Sustainable Development 1995 (Estonia)*.

Progress

In 1996 the Estonian Commission on Sustainable Development was established to advise the Government on sustainable development and to examine the national sustainable development policy.⁶⁹ The role of this Commission appears similar to the various Sustainability Boards in North America. In pursuance of the Act, the National Environmental Strategy was approved in 1997, the National Environmental Action Plan has been revised and a national forestry policy has been developed.⁷⁰ There is a lack of information about the success of these policies. As Estonia is in a significantly different economic and social situation to other developed Western countries, such as Australia, an analysis of the Act is less likely to be relevant when considering sustainability legislation for the ACT. However, it appears that despite Estonia's initiatives, its record in environmental sustainability has been relatively poor. For example, Estonia's sustainability indicators show that it is one of the highest emitters of greenhouse gases in Europe per capita.⁷¹ While Estonia has made some advancements on the environmental front, such as significantly increasing its use of energy from renewable sources, in particular in hydro energy and wind energy, it is difficult to determine whether these improvements can be attributed to the Act on Sustainable Development.⁷²

Australian Developments

South Australia and Western Australia have recently taken steps to introduce sustainability legislation into their jurisdictions.

South Australia: Development (Sustainable Development) Amendment Bill 2005

Overview of the Bill

The South Australian Development (Sustainable Development) Amendment Bill 2005⁷³, was introduced into Parliament for debate on 7 April 2005. It amends the *Development Act 1993*. However, this legislation appears to focus purely on development and planning issues, rather than broader sustainability issues. This is reflected in the proposed definition which defines sustainable development as development that is undertaken taking into account the principle that decision-making processes should effectively integrate both long term and short term economic, environmental, social and equity

⁶⁹ *Official Journal: Riigi Teataja Lisa* 1999,137, 1922, in Estonian. Available on-line at <http://www.envir.ee/eng/sustainable.html>. Downloaded 10 May 2005.

⁷⁰ UN, 'Estonia', Chapter 8: Integrating Environment and Development in Decision-Making (date unknown), 26. Available on-line at <http://www.un.org/esa/agenda21/natinfo/wssd/estonia.pdf>. Downloaded May 2 2005.

⁷¹ Statistical Office of Estonia, 'Environmental Indicators' (2004). Available on-line at <http://www.stat.ee/files/eva2004/KK200401.pdf>. Downloaded May 2 2005.

⁷² *Ibid.*

⁷³ *Development (Sustainable Development) Amendment Bill 2005*. Available on-line at <http://www.planning.sa.gov.au/sdbill/pdf/bill070405.pdf>. Downloaded 20 April 2005.

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considerations. Accordingly the South Australian draft bill is of little assistance when drafting the ACT legislation.

Western Australia: Sustainability Draft Bill **Overview of the Bill**

The Western Australian Sustainability Draft Bill aims to establish the principles of sustainable development and ensure that State organisations implement these principles.⁷⁴ For example, under s7, sustainability reports must be prepared, in consultation with the Sustainability Round Table, to review the progress on implementing the State Sustainability Strategy. State organisations must comply with the Sustainability Code of Practice by preparing Sustainability Action Plans and reporting on their actions to comply with the Code annually.⁷⁵ The Code must be reviewed after each Sustainability Report is prepared, in consultation with the Roundtable and relevant parties.⁷⁶ The Minister may request the Round Table to review the Action Plans of state organizations.⁷⁷ Throughout the Act there are references to public participation in the planning, review and decision making processes.

Definition

In the Western Australian *Sustainability Draft Bill*, the principles of sustainable development are listed in schedule 1. Sustainability is defined as the meeting of the needs of current and future generations through an integration of environmental protection, social advancement and economic prosperity. The schedule then proceeds to set out 'foundation principles'⁷⁸. The process principles are then established. They include the integration of economic, social and environmental factors, accountability, transparency and engagement and precaution. While this is the most comprehensive definition of the Acts examined, the principles are so broad that it would be difficult to put into practice. More prescriptive principles would be more appropriate. The principle of 'Hope, vision, symbolic and iterative change' is particularly vague as it is unlikely to lead to any real improvements change. The definition also overlooks other important principles, such as concept of improved valuation, pricing and incentive mechanisms, which has been adopted in some ACT Acts. There is no mention of principles such as polluter pays or the requirement for the use of natural resources and disposal of wastes to be included in the costs of good and services.⁷⁹

Criticisms of the Western Australian Draft Bill

While it is unfortunate that the Bill still in draft form and thus there are no outcomes to evaluate, the Bill appears to have some obvious flaws. For example, it allows the Minister to exempt departments or organisations from the requirements. Furthermore,

⁷⁴ *Western Australian Sustainability Draft Bill* Available online at http://www.sustainability.dpc.wa.gov.au/docs/documents/Draft_Sustainability_Bill_2004.pdf. Downloaded 4 May 2005.

⁷⁵ Section 8 *Western Australian Sustainability Draft Bill*.

⁷⁶Section 9 *Western Australian Sustainability Draft Bill* There is also a requirement that each state organization should review its Action Plan after each review of the Sustainability Code Of practice and amend its Sustainability Action Plan if required.

⁷⁷ Section 10 *Western Australian Sustainability Draft Bill*.

⁷⁸ Foundation principles includes long-term economic health, equity and human rights, biodiversity and ecological integrity, settlement efficiency and quality of life, community, regions, "sense of place" and heritage, net benefit from development and common good from planning.

⁷⁹ See Bates, above n 5, 137.

s17 provides the minister with the power to direct Round Table members to perform in certain ways which could compromise the Round Table's independence. The Bill would be more effective if the Minister was required to take into account the advice of the Round Table.

Recommendations for an ACT Sustainability Act

A *Sustainable Development Act* for the ACT should express the ACT's commitment to sustainability and clearly set out the principles of sustainable development. Such an Act should be intended to be permanent, unlike the Minnesotan Act which appeared to be a temporary measure.

Definition

A variety of definitions of sustainable development have been adopted in the various Acts. Most have been too brief or have failed to mention important principles of sustainable development while others have been spread throughout the Acts to the detriment of clarity. Whether the principles of sustainable development are included in the objects section or in a schedule, it is recommended that they are kept together. As sustainable development is a complex concept, a relatively high level of detail is required when defining it. The definition adopted in the Western Australian Bill provides a good guide when drafting the ACT legislation. However, it is vital that all of the essential principles of sustainable development are included in the Act.⁸⁰ Furthermore, the principles should be drafted precisely to enable them to be put into practice more effectively. The most successful way of doing this would be to translate the principles into minimum standards. By including a more prescriptive definition of sustainable development and by clearly establishing targets and time frames, the ACT legislation will better promote sustainable development.

Sustainability Body

Many of the Sustainability Acts examined establish a sustainability board. As demonstrated in Oregon, these bodies can play an important role in promoting sustainability within government and introducing successful programs and policies. While the ACT already has a Sustainability Expert Reference Group (SERG), which appears to have a similar role to these sustainability boards, *it is preferable to have the SERG and its functions, compositions, appointment and removal processes established in the Act to ensure that SERG is a long-term commitment and to protect its independence.* The importance of enshrining SERG in legislation is evidenced by the failure of the Minnesotan Board to continue after 1998, a body which was not given legislative backing. The experience of the Oregon Board indicated the need for sufficient funding and expert staff for such a body to be a success. As demonstrated by the failure of the Manitoban Board, a strong vision and the support of the government are also crucial factors for an effective body.

Government Codes of Practice, Actions Plans and Reporting

The ACT legislation should require the introduction of a sustainability code of practice to be developed in consultation with SERG, the Commissioner for the Environment and members of the public, to provide direction for incorporating sustainability principles into government decision-making and actions.

⁸⁰ See The Brundtland Report, above n 4, for the essential principles of sustainable development.

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The code should be regularly reviewed to ensure it adapts to changing circumstances. Government departments and statutory authorities should be required to develop sustainability action plans which set out how they will conform to the Code of Practice.

Section 58A of the *Environment Protection Act 1997* (ACT) currently requires departments and public authorities to include, in their annual report, a report on how their activities have accorded with sustainable development principles. However, a requirement for separate, more detailed, reports would emphasise the importance of sustainability and provide greater useful information.

SERG should adopt the role of reviewing the action plans of ACT departments and statutory authorities and providing advice on improvements.

Legislation should also ensure the continuance of the ACT Sustainability Report by including a provision in the Act requiring an annual sustainability report to be prepared by ACT Office of Sustainability in conjunction with the SERG.

Sustainability Audit

The EDO would like to stress the necessity to require ACT government Departments and agencies to audit current legislation and programs to examine their impact on the achievement of sustainability outcomes. Without such a sustainability audit, the perverse effects of certain subsidies (direct and indirect) and taxes/charges/rates (as broadly defined) on consumer and business decision making as they relate to environmental impacts will not be sufficiently addressed for the wide-ranging achievement of sustainability goals. The EDO recommends that the ACT government engage and apply expert professional economic analysis of the unintended and intended environmental impacts of present ACT subsidies and charges to ensure that sustainability decisions are made from a fully informed standpoint.

By undertaking such an economic analysis and such a legislation audit the ACT government will be in a position to have greater influence through its sustainability program than merely considering questions that are internal to government. *There is a grave danger that the path of least resistance could be followed within the ACT government, to merely describe and codify existing sustainability initiatives within government, and to repackage and re-badge these existing efforts as something new.* In making this statement it is definitely not our intention to denigrate existing and recent initiatives which are both welcome and very important - but to stress the need to exceed present standards in order to meet the challenge of pressing issues such as climate change.

In this sense, the sustainability audit and sustainability legislation that is developed – for maximum effectiveness - should be directed at the achievement of particular environmental goals and targets (rather than vague generalities).

Key matters that need to be specifically addressed in sustainability legislation and sustainability audits of existing legislation and programs include:

- Addressing climate change and reducing carbon emissions;
- Reducing energy use and improving energy efficiency;

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- Reducing impacts of future ACT development on biodiversity and threatened ecological communities;
- Reducing the production of waste and increasing rates of re-use and recycling.

Strategic EIA and Links to Planning Reform

We note that the ACT Planning and Land Authority is presently engaged in a major process of review of the Territory's land use planning and environmental laws, particularly the Land (Planning and Environment) Act 1991.

It is imperative that reforms to the Land Act, the implementation of the intent of the Canberra Spatial Plan, and proposed sustainability legislation should be integrated, complementary and developed from a whole of government perspective.

In relation to proposed reforms to the Land Act and development approvals systems in the ACT we wish to make the point that individual project based assessment does not deliver sustainability outcomes. There is also a need for strategic assessment of broader policy, programs and planning decisions.

As has been pointed out elsewhere by the Conservation Council, there is a useful tool available in the form of Strategic Environment Assessment. SEA aims to bring environmental considerations into the planning process as early as possible in order to determine what is to take place, leaving EIA to resolve how activities should be carried out. SEA of government policy, plans and programmes is the essential tool to ensure that the principles of sustainability are built into key government decisions.

On this basis, the EDO supports and reiterates the Conservation Council's recent recommendations for some form of process to further investigate how "strategic environmental assessment" could be incorporated into the ACT planning system or other Government decision-making processes such as the proposed sustainability legislation.

The EDO also endorses the Conservation Council's recent recommendations to ACTPLA that proposed ACT sustainability legislation and reforms to the Land Act be complementary and in particular – use the same terminology in relation to sustainability definitions, objectives, principles and definitions of the environment.

It is vitally important that these law reform processes are complementary and developed from a whole of government perspective.

Sustainable Development Innovations fund

The success of the Manitoban Sustainable Development Innovations Fund, which has supported a number of innovative sustainable development programs, indicates that a similar body could play an important role in fostering sustainable development in the ACT.

Research Institute

A sustainable development research institute with similar research and policy analyses functions to that of the successful Oregon Institute for Natural Resources could significantly contribute to the promotion of sustainable development in both the private and public sector.

Private Sector

A reoccurring criticism of the sustainability Acts in other jurisdictions has been the emphasis on government actions rather than those of the private sector.

For this reason the ACT should attempt to heed this legitimate critique and attempt to ensure that the legislation influences the decision making behaviour of the private sector

Possible ways to influence the private sector could involve SERG creating guidelines for private businesses when carrying out their activities (perhaps in conjunction with ACTPLA in relation to development activities). Secondly government could seek to explore and review the role of positive and negative incentives arising as a result of government policy – both direct and indirect instances - that are presently in operation.

An innovations fund could provide funding to private sector innovations and a research institute could provide the private sector with information so that they can improve their sustainability record.

Conclusion

Sustainable development legislation could significantly assist in the promotion of sustainable development principles in the ACT. Making a formal and long term statutory commitment to sustainable development will mean that these principles will prevail over short-term economic and political trends.

While the ACT already has a Sustainability Expert Reference Group (SERG), which appears to have a similar role to these sustainability boards, it is preferable to have the SERG and its functions, compositions, appointment and removal processes established in the Act to ensure that SERG is a long-term commitment and to protect its independence.

There is a risk that a path of least resistance may be followed, whereby existing sustainability initiatives within government are merely described and codified; where existing efforts are repackaged and re-badged as something new, and where the impact of the legislation on broader society outside of the ACT government is extremely

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limited. At the same time there is an urgent need to exceed present standards and to challenge present mind-sets in order to meet the challenge of pressing issues such as climate change.

A sustainability Act could set out the Government's responsibilities, ensure that sustainability concerns guide all decision-making and consolidate already existing initiatives. This approach needs to be taken into account in the course of, and the recommendations of, ACTPLA's Planning System Reform Project.

It is imperative that reforms to the Land Act, the implementation of the intent of the Canberra Spatial Plan, and proposed sustainability legislation should be integrated, complementary and developed from a whole of government perspective.

Depending on commitments made in the legislation, a *Sustainable Development Act* could establish the ACT as a leader in Australia in the field of sustainable development.

As international experience has indicated, the most significant factor leading to the success of sustainable development legislation appears to be the level of government support. The Manitoban and Welsh experience demonstrated that while implementing a legislative framework is important, it is not enough. Unless Government is willing and able to institute practical changes, an Act is worthless.

The EDO has stressed the necessity to require ACT government Departments and agencies to audit current legislation and programs to examine their impact on the achievement of sustainability outcomes.

For maximum effectiveness the sustainability audit and sustainability legislation should be directed at the achievement of particular environmental goals and targets rather than vague generalities.

The ACT Government's stated commitment to sustainable development suggests that a *Sustainable Development Act* for the ACT could be highly effective in addressing some of the pressing environmental problems that over the long-term are likely to threaten the future economic well-being of the Territory. For that reason the Environmental Defenders Office (ACT) commends the Stanhope Government for its commitment to introduce sustainability legislation.

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