



## Environmental Defender's Office ACT Inc.

Ph: (02) 6247 9420 ♦ Fax: (02) 6247 9582 ♦ Email: [edoact@edo.org.au](mailto:edoact@edo.org.au) ♦ GPO Box 574 Canberra ACT 2601  
♦ [www.edo.org.au](http://www.edo.org.au) ♦ ABN 32 636 009 247

### ENVIRONMENTAL DEFENDER'S OFFICE A.C.T. INC

### SUBMISSION ON THE NEED FOR AN A.C.T. BILL OF RIGHTS

#### SUMMARY OF EDO RECOMMENDATIONS:

1. Although human rights are recognised in the human rights Covenants that constitute the international Bill of Rights, a new generation of human rights and responsibilities are recognised in international environmental instruments. The EDO recommends that human rights and responsibilities in relation to the environment and ecologically sustainable development be included in the A.C.T. Bill of Rights. The Bill of Rights should provide that everyone has the right to an environment that is not harmful to their health or well-being, and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
2. The EDO submits that procedural rights in relation to environmental issues are generally reasonably well protected in the A.C.T. however. Relevant Acts containing these rights were not listed in the Issues Paper released by the Committee. The EDO requests that the Committee recognises environment-related human rights legislation in its recommendations to the A.C.T. Government.
3. The EDO requests that the Committee recommends to the A.C.T. Government that the *Nature Conservation Act 1980 (ACT)* be amended to better recognise and protect the environment-related human rights of indigenous Australians and other local stakeholders in the A.C.T..
4. The EDO also suggests that the Committee should also consider recommending that the ACT Government create a right of enforcement of environment-related human rights in ACT Courts by complainants, an ACT Human Rights Commissioner, and the ACT Commissioner for the Environment.
5. The EDO recommends that the terms of reference of the Standing Committee on Legal Affairs in the A.C.T. Legislative Assembly be amended to better define human rights, including human rights in relation to the environment or, alternatively, the principles of ecologically sustainable development.
6. The EDO suggests that the Committee consider recommending that the *Legislation Act 2001 (ACT)* be amended to require Parliamentary Counsel in the A.C.T. Public Service to draft legislation so as to be consistent with specified human rights or principles of ecologically sustainable development which should be specified in that Act. Any Bill being presented to the Legislative Assembly should be required to have circulated prior to resumption of second reading debate, a statement or certificate specifying the extent to which the legislation complies with prescribed fundamental legislative principles.

## INTRODUCTION

### *'Mainstream' human rights and the environment*

There is a growing recognition in multilateral and regional international law and policy that human rights and responsibilities, and environmental protection, are interdependent. It is recognised that longstanding human rights in the international Bill of Rights, including rights to culture, education, association, due process, information, and freedom of speech, need to be protected so that persons can participate in economic, social and cultural activities that promote ecologically sustainable development.<sup>1</sup>

The human rights of indigenous peoples is another area where mainstream human rights in the Bill of Rights Covenants are clearly linked to environmental rights.<sup>2</sup> In 1997 the United Nations Committee on the Elimination of Racial Discrimination issued a General Recommendation, calling on states parties to take measures to ensure indigenous peoples' equality and freedom. In particular, the Committee called on states to ensure that indigenous peoples:

- were not discriminated against and enjoyed freedom and equality;
- were provided with conditions allowing for sustainable economic and social development compatible with their cultural characteristics;
- could participate in public life and give their informed consent to decisions which affect their rights and interests; and
- could revitalise their cultural traditions and customs and preserve and practise their languages.

The Committee called on states to recognise and protect indigenous peoples' rights to communal lands, territories and resources, or where that or restitution was not possible, to provide just, fair and prompt compensation.<sup>3</sup>

At the regional level there are also numerous decisions of human rights commissions and courts which have dealt with human rights violations linked to environmental harm.<sup>4</sup>

### *The Ksentini Report and the 1994 Draft Principles on Human Rights and the Environment*

In 1989 a special rapporteur to the UN Human Rights Commission produced a report on the links between human rights and the environment. These issues continue to be debated and progressed by non-government organisations and human rights experts.<sup>5</sup> In 1989 the Friends

<sup>1</sup> See generally A.E. Boyle and M.R. Anderson eds, *Human Rights Approaches to Environmental Protection*, Clarendon Press, Oxford, 1996.

<sup>2</sup> See for example the Human Rights Committee's views in relation to Article 27 of the International Covenant on Civil and Political Rights eg. General Comment no.23, *Kitok v. Sweden*, Communication no.197/1985, *Lansman v. Finland*, Communication no.511/1992, *Ominayak v. Canada*, Communication no.167/1984, *Lovelace v. Canada*, Communication no.24/1977, discussed in S. Pritchard, 'The International covenant on civil and political rights and Indigenous peoples', in Pritchard, ed., *Indigenous Peoples, the United Nations and Human Rights*, pp.184-202 at pp.197-198.

<sup>3</sup> Committee on the Elimination of Racial Discrimination: General Recommendation XXIII concerning Indigenous Peoples, 18 August 1997, UN Doc. CERD/C/51/Misc.13/Rev.4; General Recommendation XX on Article 5, UN Doc A/51/18; General Recommendation XXI on self-determination, UN Doc A/51/18.

<sup>4</sup> See for example: D. Shelton, *Human Rights and Environment Issues in Multilateral Treaties adopted between 1991 and 2001, Background Paper No. 1*, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002, accessible via <http://www.unhchr.ch/environment/bp1.html>, p.5.

<sup>5</sup> *Human Rights and the Environment, Conclusions: Final Text (16 January 2002), Meeting of Experts on Human Rights and the Environment 14-15 January 2002*, accessible via <http://www.unhchr.ch/environment/conclusions.html>.

of the Earth, the Sierra Club Legal Defense Fund, and the Association of Humanitarian Lawyers successfully lobbied to have the Sub-Commission on Prevention of Discrimination and Protection of Minorities examine the linkages between human rights and the environment, resulting in the commissioning of the 'Ksentini report'<sup>6</sup> which includes an overview of relevant international environmental and human rights law, participatory democracy and the environment, indigenous peoples, peace and conflict issues, environmental degradation and its impact on vulnerable groups, analyses of the effects of the environment on the enjoyment of fundamental rights, and conclusions and recommendations. It also included an annex of 'Draft Principles on Human Rights and the Environment'. Various Governments and international institutions have since provided comments on the report.

Although neither the recommendations of the Ksentini report nor the draft principles have yet been moved forward for inter-governmental negotiation, the interdependence between human rights and the environment continues to be discussed internationally. In January 2002 the Office of the United Nations High Commissioner for Human Rights convened a meeting of experts on human rights and the environment in Geneva to review and assess progress achieved since the 1992 United Nations Conference on Environment and Development (UNCED) in promoting and protecting human rights in relation to environmental questions and in the framework of Agenda 21. The interlinkages between human rights and the environment are likely to be further discussed at the 2002 World Summit on Sustainable Development and may be referred to in its final Declaration.

#### *Multilateral environmental agreements and human rights*

In addition to the environment-related human rights in the international Bill of Rights, there is also a new generation of rights and responsibilities in international environmental instruments, which also should be recognised as human rights. These were explicitly addressed in international environmental instruments as long ago as 1972. The 1972 Declaration of the UN Conference on the Human Environment for example, recognised that environmental protection was essential for human well-being and the enjoyment of basic human rights, and even the right to life itself.<sup>7</sup> The Stockholm Declaration also recognised the importance of education for 'responsible conduct' to protect and improve the human environment,<sup>8</sup> and the need for science and technology to respond to environmental risks and solve environmental problems for the common good of mankind.<sup>9</sup>

Twenty years later, the Rio Declaration on Environment and Development proclaimed that human beings are entitled to a healthy and productive life in harmony with nature,<sup>10</sup> and that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.<sup>11</sup> Principle 10 of the Rio Declaration affirms the right of citizens to information, to participate in decisions, and to effectively

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<sup>6</sup> *Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Human Rights and the Environment: Final Report prepared by Mrs Fatma Zohra Ksentini, Special Rapporteur*: 6 July 1994, UN Doc. E/CN.4/Sub.2/1994/9 and UN Doc. E/CN.4/Sub.2/1994/Corr.1. See

'The 1994 Draft Declaration of Principles on Human Rights and the Environment', Sierra Club Legal Defense Fund Pamphlet.

<sup>7</sup> Principle 1 of the Stockholm Declaration declares that man has a fundamental human right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being. It also recognises the 'solemn responsibility' to protect and improve the environment for present and future generations. Principle 8 refers to the need for economic and social development for ensuring a favourable living and working environment and for creating conditions on earth that are necessary for the improvement of the quality of life.

<sup>8</sup> Principle 19.

<sup>9</sup> Principle 18.

<sup>10</sup> Principle 1.

<sup>11</sup> Principle 3.

access judicial and administrative proceedings, including redress and remedy. The Declaration extends the right to information to that which is relevant to transboundary developments.<sup>12</sup> Principle 13 calls on States to develop liability and compensation regimes for the victims of pollution and other environmental damage. Principles 20 and 21 promote the participation of women and youth respectively in environmental management and sustainable development. Principle 22 of the Declaration recognises that indigenous and local communities have a vital role in environmental management and calls on States to recognise and support their identity, culture and interests, so as to enable their effective participation in the achievement of sustainable development. Principle 23 states that '[t]he environment and natural resources of people under occupation shall be respected'.

Many other international environmental treaties include human rights principles.<sup>13</sup> Partly as a consequence of the emergence of this new generation of human rights, many UN instruments and NGO publications, projects and work programs include commitments to participatory democratic governance in relation to the environment. Such commitments are increasingly evident in multilateral agencies, treaty bodies and programs, and domestic government agencies entering into 'partnership arrangements' with non-governmental organisations and civil society. The right to political participation protects the rights of environmental campaigners to participate in the political process.<sup>14</sup>

#### *Environment-related human rights of groups with special needs*

The human rights of social groups that have traditionally been disadvantaged despite longstanding rights to equality and non-discrimination in the international Bill of Rights, including youth, women and indigenous peoples, are also recognised in many international environmental instruments. For example, the 1995 Fourth World Conference on Women in Beijing produced a Declaration and Platform of Action which recognised equality between men and women and recognised the important role women play in promoting sustainable development as producers, consumers, family carers and educators. The Declaration and Platform promote women's active involvement in environmental decision-making, the integration of gender concerns and perspectives in policies and programs for sustainable development, and the strengthening or establishing of mechanisms at the national, regional and international levels to assess the impact of development and environmental policies on women. It also recommended the effective protection and use of the knowledge, innovations and practices of women of indigenous and local communities, subject to national legislation and the Convention on Biological Diversity.<sup>15</sup> The 1992 Agenda 21 proposed a series of

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<sup>12</sup> Principles 18 and 19.

<sup>13</sup> See for example the Protocol on Environmental Protection on the Conservation of Antarctic Fauna and Flora (Madrid 1991), the Framework Convention on Climate Change (June 4, 1992), the Protocol to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage and the Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage (London, November 27, 1992), the Convention on Biological Diversity, the International Convention to Combat Desertification in those Countries Experiencing Drought and/or Desertification, particularly in Africa (Paris, June 17, 1994); Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal, January 29, 2000) and the Convention on Persistent Organic Pollutants (Stockholm, May 22, 2001), amongst others, cited and discussed in *Human Rights and the Environment, Conclusions: Final Text (16 January 2002), Meeting of Experts on Human Rights and the Environment 14-15 January 2002*, accessible via <http://www.unhchr.ch/environment/conclusions.html>.

<sup>14</sup> See Art. 25 of the International Covenant on Civil and Political Rights; Art. 19 of the Universal Declaration of Human Rights; Art. 2(d) of the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of all Types of Forests; Principle 10 of the Rio Declaration on Environment and Development.

<sup>15</sup> See *Report of the Fourth World Conference on Women, held in Beijing from 4 to 15 September 1995; including the Agenda, the Beijing Declaration and the Platform of Action*, UN Doc. A/CONF.177/20,

objectives to be achieved in order to ensure the promotion of women's rights and to realise their integration and effective participation in the development process. Similarly, Principle 20 of the 1992 Rio Declaration stipulates that 'women have a vital role to play in environmental management and development. Their full participation is therefore essential to achieve sustainable development.'

Article 8(j) of the Convention on Biological Diversity further demonstrates the growing interdependence of the human rights norm of non-discrimination on the basis of race, with international obligations regarding ecologically sustainable development. It provides that contracting parties are to respect, preserve and maintain indigenous and local communities' knowledge, innovations and practises relevant for biodiversity conservation and sustainable use, 'as far as possible and as appropriate'. Parties are also to promote such knowledge and practises with the approval and involvement of the holders of such knowledge, and to encourage the equitable sharing of the benefits arising from the use of that knowledge.

#### *Specific human rights and responsibilities with respect to the environment*

International environmental agreements also recognise human *responsibilities* in relation to the environment, as noted above. Principle 2 of the 1972 Stockholm Declaration, for example, provides that the Earth's natural resources must be safeguarded for the benefit of present and future generations. Principle 4 states that man(sic) has a special responsibility to manage the heritage of wildlife and its habitat, which are gravely imperilled by a combination of adverse factors. Since the 1972 Declaration the rights of present and future generations and inter-generational equity have been recognised in numerous other international legal instruments and domestic law.<sup>16</sup>

International environmental law recognises that the present generation is morally obliged to not only ensure that the environment is maintained for its own benefit, but also for the benefit of future generations. Canadian scholar Paul Woods has theorised about the philosophical basis of these responsibilities in relation to the environment and future generations. He argues that if only the interests of current generations were to be taken into account in environmental decision making, this would not necessarily ensure that future generations have sufficient environmental resources for survival. Wood argues that this would constitute a tyranny of the current majority over more vulnerable and dependent interests that should also be taken into account. Constraints on such abuses of power through the use of mechanisms such as Constitutional Bills of Rights, he suggests, are legitimate in liberal democratic theory and practice.<sup>17</sup>

Several regional agreements, most national constitutions, and various domestic Acts recognise a broad and general human right to a healthy and satisfactory environment, for current and future generations. The South African Constitution, for example, provides that everyone has the right to an environment that is not harmful to their health or well-being, and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. The Preamble to the Convention on Access to Information, Public Participation and Access to Justice in

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extracted in *The United Nations and the Advancement of Women 1945-1996*, United Nations, pp.649-748.

<sup>16</sup> Such as, for example, the 1992 Rio Declaration on Environment and Development (Principle 3) noted above, the 1992 Convention on Biological Diversity (Article 2 definition of 'sustainable use') and the 1992 Framework Convention on Climate Change (Art.3(1)).

<sup>17</sup> P.M. Wood, *Biodiversity and Democracy: Rethinking Society and Nature*, UBC Press, Vancouver, 2000.

Environmental Matters (Aarhus, 25 June 1998)<sup>18</sup> states: ‘Every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.’ Domestic legislation including environmental Bills of Rights include the Canadian Northwest Territories *Environmental Rights Act 1990*, and the Yukon Territory’s *Environment Act 1991*, and in the United States, the Minnesota *Environmental Rights Act 1971*.<sup>19</sup>

The EDO recommends that human rights and responsibilities in relation to the environment and ecologically sustainable development be included in the A.C.T. Bill of Rights. The Bill of Rights should provide that everyone has the right to an environment that is not harmful to their health or well-being, and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

#### **CURRENT A.C.T. LEGISLATION – PROTECTION OF PROCEDURAL RIGHTS**

The A.C.T. community is generally well-served by legislation and political practices which, at least to a reasonable extent, protect basic *procedural* rights to environmental information and to public participation in policy and decision-making, despite not referring explicitly to international environmental and human rights instruments.

Some examples are as follows:

- The *Nature Conservation Act 1980 (ACT)* provides for public notification of draft nature conservation strategies, consultation with the public in relation to the development of relevant criteria and guidelines for declarations about special protection status for species, ecological communities and threatening processes and public notification about the making of draft Action Plans. The A.C.T. Administrative Appeals Tribunal (AAT) can be asked to review decisions made by the Conservator of Flora and Fauna. The *Land (Planning and Environment) Act 1991 (ACT)* includes extensive provisions regarding public consultation and the involvement of the elected Legislative Assembly in variations of the Territory Plan, good protections and processes regarding indigenous cultural heritage, and participatory environmental impact assessment procedures. The Act complements the *Australian Capital Territory (Planning and Land Management) Act 1988 (Cth)*, which provides for the creation of a Territory planning authority responsible for preparing and administering a Territory Plan. The 1991 ACT Act says that the Territory, the Executive, a Minister or a Territory authority shall not do any act, or approve the doing of any act, that is inconsistent with the Plan. The Plan specifies a range of general principles and policies within which it is to be administered, including broad objects and goals, strategic principles, and plan administration policies. These incorporate many of the precepts of ecologically sustainable development, further discussed below. Under the Act, members of the public can also apply to have places listed on the Heritage Places Register, and there is public consultation in relation to, for example, the preparation of the Interim Register. The limited time-bound rights to challenge variations to a Plan and decisions made under the Act are better than no rights at all, but could be improved. This Act comes closest to safeguarding substantive environment-related human rights in the ACT.

<sup>18</sup> Signed by 35 States and the European Community: Shelton, *Human Rights and Environment Issues in Multilateral Treaties adopted between 1991 and 2001*, p.10.

<sup>19</sup> Discussed in Wood, *Biodiversity and Democracy*, Ch.7.

- The *Environment Protection Act 1997 (ACT)* provides for public inspection of documents, prescribes a general environmental duty and specific duties to notify of actual or threatened environmental harm and the existence of contaminated land, notification and consultation about draft environment protection policies, and consultation in relation to applications for environmental authorisation.
- The *Water Resources Act 1998 (ACT)* preserves the operation of civil remedies and the common law, provides for consultation in relation to the A.C.T. Water Resource Management Plan, creates a general duty not to damage waterways, creates a right to compensation in specified circumstances, and provides for review by the A.C.T. AAT of specified decisions made under the Act.
- The *Heritage Objects Act 1991 (ACT)* provides for public consultation and notification (including with Aboriginal organisations and the Heritage Council specifically) on a range of matters, and protection mechanisms for Aboriginal and other heritage (including protection for restricted information), and review of specified decisions by the A.C.T. AAT.
- The *Commissioner for the Environment Act 1993 (ACT)* creates the office of Commissioner for the Environment which has the function of investigating complaints regarding the management of the environment by the Territory or a Territory authority, conducting investigations directed by the Minister, and conducting investigations of his or her own motion, into actions of an agency where those actions would have a substantial impact on the A.C.T. The Commissioner is also required to prepare state of the environment reports for the A.C.T..
- The *Administrative Appeals Tribunal Act 1989 (ACT)* includes broad standing provisions which enable persons whose interests are affected by a reviewable decision to apply for review by the AAT. Under subsection 25(2), an organisation or association of persons, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association. ‘Person’ is defined to include an unincorporated association (Subsection 25(4)). Standing is not available to organisations or associations where a decision was given before the organisation or association was formed or before the objects or purposes of the organisation or association included the matter concerned.

The EDO submits that procedural rights in relation to environmental issues are reasonably well protected in the A.C.T. Relevant Acts containing these rights were not listed in the Issues Paper released by the Committee. The EDO requests that the Committee recognises environment-related human rights in its recommendations to the A.C.T. Government.

## **BETTER PROTECTION OF ENVIRONMENT-RELATED HUMAN RIGHTS IN THE ACT**

### *Nature Conservation Act 1980 (ACT)*

Despite having generally good legislation with respect to human rights and the environment, there is still room for improvement. For example, the *Nature Conservation Act 1980 (ACT)* is arguably inconsistent with international environmental law standards with respect to human rights because it does not include specific provisions protecting the environment-related rights of local Ngun(n)awal families and other Aboriginal and Torres Strait Islander people living in the A.C.T., nor local communities involved in nature conservation activities (including ‘community involvement in parkcare or Friends of...’ protected areas) in the ACT. The Act does not give statutory recognition or protection to the co-management agreements and arrangements that are evolving as part of the settlement of native title claims over Namadgi

National Park, or co-management arrangements or volunteer conservation work involving other local community organisations in the ACT. In April 2001 an agreement between the ACT Government and representatives of some native title claimants in the ACT was signed regarding the claim over Namadgi National Park. A Special Aboriginal Lease is to be granted to the Aboriginal parties to the Agreement. An Interim Namadgi Advisory Board comprising five indigenous and non-indigenous members will provide strategic advice to the A.C.T. Conservator of Flora and Fauna regarding the preparation of a revised Plan of Management for Namadgi National Park. Such arrangements would be on a more secure footing if for example, Part 9 of the Act were to be amended to recognise these and other participatory or co-management arrangements. Commonwealth Boards of Management with indigenous membership are recognised in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), for example.

The Act also has other shortcomings from a human rights perspective, especially regarding its lack of recognition of the responsibility of the A.C.T. Government to maintain, protect and promote the cultures, knowledge, innovations and practices of indigenous and local communities, and to recognise the contributions that these can make to ecologically sustainable development. For example, there is no statutory guarantee in this Act that traditional indigenous cultural activities may continue in the A.C.T., subject to express restrictions for the conservation of biodiversity. (Native title rights and interests are partially protected by the *Native Title Act 1994* (ACT).) Nor is there a requirement that indigenous Australians' interests are to be addressed when Action Plans are developed under the Act. Such interests could include community education about prior and/or contemporary values and uses attached to species, ecosystems and/or genetic resources. The Act does not include benefit sharing provisions regarding commercial use of genetic resources in the A.C.T. There is also no requirement for recognition of Ngun(n)awal names for places in protected areas, or for Ngun(n)awal names for native flora and fauna to be included alongside common names in the protective instruments and plans, including Declarations of Special Protection Status that can be made under the Act. In relation to plants for example, whilst the International Code of Botanical Nomenclature prescribes internationally recognised principles for the assignment of formal plant names, this would not preclude the use and recognition of common names currently or formerly used by Indigenous Australians in the ACT in relation to plants.

Similar deficiencies are also found in other State's and Territory's legislation. One of the objectives of the National Strategy for the Conservation of Australia's Biological Diversity is to 'recognise and ensure the continuity of the contribution of the ethnobiological knowledge of Australia's indigenous peoples to the conservation of Australia's biological diversity'. The June 2001 Review of the Strategy found that this objective had not been achieved., despite some advances in recent years. The Review referred to various Commonwealth and State programs that involved indigenous Australians in land management and cultural heritage activities, but noted that 'there is still a need to ensure that ethnobiological knowledge is preserved within indigenous communities ... There is a need to respect indigenous peoples' knowledge as an expression of a way of life and cultural identity as well as a tool for biodiversity conservation'.<sup>20</sup> The importance of these issues has also been recognised in the *National Objectives and Targets for Biodiversity Conservation 2001-2005*<sup>21</sup> which commits signatory jurisdictions to targets and provides performance information in relation to the maintenance and recording of ethnobiological knowledge.

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<sup>20</sup> Australian and New Zealand Environment and Conservation Council, *Review of the National Strategy for the Conservation of Australia's Biological Diversity*, June 2001, pp.28-30 at p.28.

<sup>21</sup> *National Objectives and Targets for Biodiversity Conservation 2001-2005*, Environment Australia, Canberra, 2001, pp.24-25. These objectives have been agreed to by the Commonwealth, NSW, WA, ACT, SA, and Victoria.

The EDO also submits that the penalties in the Nature Conservation Act are inadequate. For example, the main offences in the Nature Conservation Act relating to the clearing of native timber without a licence, or causing damage in a reserved or wilderness area, currently carry maximum penalties of only \$5,000 for individuals and \$25,000 for corporations (sections 43, 59 and 80B). These are clearly inadequate to deal with significant instance of unauthorised clearing of native vegetation. Since these penalties are inadequate there is insufficient deterrence to commit offences of the Act which in turn means potential damage to the environment and a weakening of the right to a protected, safe and healthy environment.

#### *Commissioner for the Environment Act 1993 (ACT)*

If the Committee recommends that human rights protected in an ACT Bill of Rights should be enforceable, the human right to a healthy and satisfactory environment should be recognised. A right of enforcement in ACT Courts by complainants or an ACT Human Rights Commissioner, should be extended also to the ACT Commissioner for the Environment. Amendments to the *Commissioner for the Environment Act 1993 (ACT)* would be required.

The EDO requests that the Committee recommends to the ACT Government that the *Nature Conservation Act 1980 (ACT)* be amended to better recognise and protect the environment-related human rights of indigenous Australians and local stakeholders in the A.C.T.

The Committee should also consider recommending that the ACT Government create a right of enforcement of environment-related human rights in ACT Courts by complainants, an ACT Human Rights Commissioner, and the ACT Commissioner for the Environment.

#### **FUTURE A.C.T. LEGISLATION**

The A.C.T. has some of the well-established checks and balances that aim to ensure that human rights are protected, and not eroded, by legislation. For example, the A.C.T. Legislative Assembly Standing Committee on Legal Affairs performs the duties of a Scrutiny of Bills and Subordinate Legislation Committee. Its terms of reference are at [Attachment A](#). The Committee also examines matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, governance and industrial relations, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services.

The EDO considers it important that legislation in the A.C.T. is of the highest possible standard and complies with fundamental human rights principles, including those concerned with the environment. The EDO supports the suggestions made in the Committee's Issues Paper that a Bill of Rights could provide for pre-enactment scrutiny of legislation for consistency with the Bill of Rights by a body appointed for the task, which would report to the Assembly; or a requirement that the Minister presenting a Bill to the Legislative Assembly, or the Attorney-General, provide a certificate with each Bill attesting to its compliance with the Bill of Rights.

The EDO suggests that the Committee consider recommending that the *Legislation Act 2001 (ACT)* be amended to require Parliamentary Counsel in the A.C.T. Public Service to draft legislation so as to be consistent with specified human rights or ESD principles which should be specified in that Act. Any Bill being presented to the Legislative Assembly should be required to have circulated prior to resumption of second reading debate, a statement or certificate specifying the extent to which the legislation complies with prescribed fundamental legislative principles.

An example of this type of legislation is the Queensland *Legislative Standards Act 1992* (Qld). The Act establishes the Office of the Queensland Parliamentary Counsel and

prescribes its functions. These include drafting all Government Bills, Private Members' Bills on request, amendments, subordinate legislation and other instruments. The Office must, in relation to the legislation it drafts, provide advice to Ministers and government entities on alternative ways of achieving policy objectives, and the application of fundamental legislative principles.

Section 4 of the Queensland Act defines 'fundamental legislative principles' as the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. The principles require that legislation has sufficient regard to the rights and liberties of individuals, and the institution of Parliament. The Act states that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

- (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
- (b) is consistent with principles of natural justice; and
- (c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
- (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
- (e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
- (f) provides appropriate protection against self-incrimination; and
- (g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
- (h) does not confer immunity from proceeding or prosecution without adequate justification; and
- (i) provides for the compulsory acquisition of property only with fair compensation; and
- (j) has sufficient regard to Aboriginal tradition and Island custom; and
- (k) is unambiguous and drafted in a sufficiently clear and precise way.

Ministers are required to circulate explanatory notes for non-exempt Bills and subordinate legislation before resumption of second reading debate on those Bills. The Act provides that one of the prescribed matters that must be addressed in the explanatory notes is a brief assessment of the consistency of the Bill with fundamental legislative principles. If the Bill is inconsistent with fundamental legislative principles, the reasons for the inconsistency must be provided. The consultation that was carried out in relation to the Bill must also be briefly explained.

The EDO is of the view that the *Legislation Act 2001 (ACT)* should be amended to prescribe similar functions for Parliamentary Counsel in the A.C.T. Public Service. However the definition of 'fundamental legislative principles' should be amended to more comprehensively specify the human rights and environmental criteria by which legislation should be judged to be of the highest standard. A useful compilation of environment-related human rights is found in the Draft Declaration of Human Rights and the Environment at [Attachment B](#). This would need to be adapted and summarised so that it is more suitable for conditions in the A.C.T.

As a second option, the EDO suggests that the principles of ecologically sustainable development could be considered suitable for inclusion alongside prescribed human rights principles in a definition of 'fundamental legislative principles' in an amended Legislation Act, since these were endorsed by the Council of Australian Governments in December 1992. These principle comprise:

- (a) as core objectives:

- (i) to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations;
  - (ii) to provide for equity within and between generations;
  - (iii) to protect biological diversity and maintain essential ecological processes and life-support systems;
- (b) and the following guiding principles:
- (i) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equity considerations;
  - (ii) if 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;
  - (iii) the global dimension of environmental impacts of actions and policy should be recognised and considered;
  - (iv) the need to develop a strong, growing and diversified economy that can enhance the capacity for environmental protection should be recognised;
  - (v) the need to maintain and enhance international competitiveness in an environmentally sound manner should be recognised;
  - (vi) cost-effective and flexible measures should be adopted; and
  - (vii) decisions and actions should provide for broad community involvement on issues which affect the community.

These principles are more general and weaker than contemporary international human rights standards concerned with ecologically sustainable development. However they do protect the rights of future generations as well as those of current generations. They are likely to be more readily acceptable to the A.C.T. Government than a modified version of the Draft Declaration on Human Rights and the Environment.

The EDO recommends that the terms of reference of the Standing Committee on Legal Affairs in the A.C.T. Legislative Assembly be amended to better specify human rights, including human rights in relation to the environment or, alternatively, the principles of ecologically sustainable development.

The EDO suggests that the Committee consider recommending that the *Legislation Act 2001 (ACT)* be amended to require Parliamentary Counsel in the A.C.T. Public Service to draft legislation so as to be consistent with specified human rights or principles of ecologically sustainable development which should be specified in that Act. Any Bill being presented to the Legislative Assembly should be required to have circulated prior to resumption of second reading debate, a statement or certificate specifying the extent to which the legislation complies with prescribed fundamental legislative principles.

**Attachment A**

**TERMS OF REFERENCE OF THE A.C.T. STANDING COMMITTEE ON LEGAL AFFAIRS**

- (1) The Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:
- (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law):
    - (i) is in accord with the general objects of the Act under which it is made;
    - (ii) unduly trespasses on rights previously established by law;
    - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
    - (iv) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;
  - (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
  - (c) consider whether the clauses of bills introduced into the Assembly:
    - (i) unduly trespass on personal rights and liberties;
    - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
    - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
    - (iv) inappropriately delegate legislative powers; or
    - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
  - (d) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

## **Attachment B**

### **DRAFT DECLARATION OF HUMAN RIGHTS AND THE ENVIRONMENT**

#### Preamble

Guided by the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Vienna Declaration and Program of Action of the World Conference of Human Rights, and other relevant international human rights instruments,

Guided also by the Stockholm Declaration of the United Nations Conference on the Human Environment, the World Charter for Nature, the Rio Declaration on Environment and Development, Agenda 21: Programme of Action for Sustainable Development, and other relevant instruments of international environmental law,

Guided also by the Declaration on the Right to Development, which recognizes that the right to development is an essential human right and that the human person is the central subject of development,

Guided further by fundamental principles of international humanitarian law,

Reaffirming the universality, indivisibility and interdependence of all human rights,

Recognizing that sustainable development links the right to development and the right to a secure, healthy and ecologically sound environment,

Recalling the right of peoples to self-determination by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Deeply concerned by the severe human rights consequences of environmental harm caused by poverty, structural adjustment and debt programmes and by international trade and intellectual property regimes,

Convinced that the potential irreversibility of environmental harm gives rise to special responsibility to prevent such harm,

Concerned that human rights violations lead to environmental degradation and that environmental degradation leads to human rights violations,

#### **THE FOLLOWING PRINCIPLES ARE DECLARED:**

##### Part I

1. Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.
2. All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.
3. All persons shall be free from any form of discrimination in regard to actions and decisions that affect the environment.
4. All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.

##### Part II

5. All persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries.

6. All persons have the right to protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems.

7. All persons have the right to the highest attainable standard of health free from environmental harm.

8. All persons have the right to safe and healthy food and water adequate to their well-being.

9. All persons have the right to a safe and healthy working environment.

10. All persons have the right to adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment.

11. All persons have the right not to be evicted from their homes or land for the purpose of, or as a consequence of, decisions or actions affecting the environment, except in emergencies or due to a compelling purpose benefiting society as a whole and not attainable by other means. All persons have the right to participate effectively in decisions and to negotiate concerning their eviction and the right, if evicted, to timely and adequate restitution, compensation and/or appropriate and sufficient accommodation or land.

12. All persons have the right to timely assistance in the event of natural or technological or other human-caused catastrophes.

13. Everyone has the right to benefit equitably from the conservation and sustainable use of nature and natural resources for cultural, ecological, educational, health, livelihood, recreational, spiritual or other purposes. This includes ecologically sound access to nature.

Everyone has the right to preservation of unique sites, consistent with the fundamental rights of persons or groups living in the area.

14. Indigenous peoples have the right to control their lands, territories and natural resources and to maintain their traditional way of life. This includes the right to security in the enjoyment of their means of subsistence.

Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources.

### Part III

15. All persons have the right to information concerning the environment. This includes information, howsoever compiled, on actions and courses of conduct that may affect the environment and information necessary to enable effective public participation in environmental decision-making. The information shall be timely, clear, understandable and available without undue financial burden to the applicant.

16. All persons have the right to hold and express opinions and to disseminate ideas and information regarding the environment.

17. All persons have the right to environmental and human rights education.

18. All persons have the right to active, free, and meaningful participation in planning and decision-making activities and processes that may have an impact on the environment and development. This includes the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions.

19. All persons have the right to associate freely and peacefully with others for purposes of protecting the environment or the rights of persons affected by environmental harm.

20. All persons have the right to effective remedies and redress in administrative or judicial proceedings for environmental harm or the threat of such harm.

#### Part IV

21. All persons, individually and in association with others, have a duty to protect and preserve the environment.

22. All States shall respect and ensure the right to a secure, healthy and ecologically sound environment. Accordingly, they shall adopt the administrative, legislative and other measures necessary to effectively implement the rights in this Declaration.

These measures shall aim at the prevention of environmental harm, at the provision of adequate remedies, and at the sustainable use of natural resources and shall include, inter alia,

- collection and dissemination of information concerning the environment;
- prior assessment and control, licensing, regulation or prohibition of activities and substances potentially harmful to the environment;
- public participation in environmental decision-making;
- effective administrative and judicial remedies and redress for environmental
- harm and the threat of such harm;
- monitoring, management and equitable sharing of natural resources;
- measures to reduce wasteful processes of production and patterns of consumption; and
- measures aimed at ensuring that transnational corporations, wherever they operate, carry out their duties of environmental protection, sustainable development and respect for human rights; and measures aimed at ensuring that the international organizations and agencies to which they belong observe the rights and duties in this Declaration.

23. States and all other parties shall avoid using the environment as a means of war or inflicting significant, long-term or widespread harm on the environment, and shall respect international law providing protection for the environment in times of armed conflict and cooperate in its further development.

24. All international organizations and agencies shall observe the rights and duties in this Declaration.

#### Part V

25. In implementing the rights and duties in this Declaration, special attention shall be given to vulnerable persons and groups.

26. The rights in this Declaration may be subject only to restrictions provided by law and which are necessary to protect public order, health and the fundamental rights and freedoms of others.

27. All persons are entitled to a social and international order in which the rights in this Declaration can be fully realized.

