



Environmental Defender's Office ACT Inc.



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

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The Secretary
Standing Committee on Climate Change, Environment and Water
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

By email: committees@parliament.act.gov.au

Dear Ms Morrison

The Environmental Defender's Office (ACT) (EDO) welcomes the opportunity to comment on the Committee's inquiry into the ecological carrying capacity of the ACT and region.

The EDO is a non-profit, community legal centre specialising in public interest environmental law. Our office is one of nine independently constituted and managed Environmental Defender's Offices in each State and Territory of Australia. We provide legal representation and advice, take an active role in environmental law reform and policy formulation and offer education programs designed to facilitate public participation in environmental decision-making.

The Office advises regularly on planning matters within the ACT and their impact on the environment. It is clear that many of the environmental and planning challenges which the ACT and region currently face, such as urban infill development and increasing greenhouse emissions, stem from, amongst other factors, a growing population. The EDO is of the view that it is very timely to hold an inquiry into the ecological carrying capacity of the ACT and region. The EDO notes the importance of determining the ACT's ecological carrying capacity and sees it as paramount in informing future directions in ecologically sustainable development.

The EDO has concentrated its comments on the legal framework which could support integrating considerations relating to the ecological carrying capacity of the ACT and region and broader sustainability considerations into government decision making.

Our recommendations are as follows:

Recommendations:

Recommendation One:

Consideration of the environmental impacts as well as the ecological carrying capacity of the ACT and region and broader sustainability objectives should underpin government decision making on all major policies, programs and developments.

Recommendation Two:

Environmental research and data collection should be undertaken as early as possible in regard to major policy, programs and developments so that environmental impacts are considered at the same time and as fully as social and economic impacts.

Recommendation Three:

Clear and concise definitions should be developed by the Committee in regards to various sustainability terminology and methodologies.

Recommendation Four:

The ecological footprint tool, if used in the ACT, should be seen as only one of other necessary indicators of the sustainability of the ACT and its region.

Recommendation Five:

A standard definition of sustainability and sustainability principles should be included in all relevant ACT legislation.

Recommendation Six:

As a matter of priority the Minister for Planning be required to develop Building Sustainability Guidelines as required under the Building Act.

Recommendation Seven:

A legislative framework to guide sustainability decision-making and reporting in the ACT should be adopted which ensures that decision-makers must take sustainability principles into account when making decisions.

Recommendation Eight:

Ongoing and regular sustainability reporting should be undertaken as an independent and legislative function by either a newly created Commissioner for Sustainability or by the existing Commissioner for [Sustainability] and the Environment.

Recommendation Nine:

The Chief Minister's Annual Report Directions should require agencies to report on delivery of Government strategic objectives. For example on delivery on the seven themes of the Canberra Plan and other key Government strategies such as Weathering the Change.

These recommendations are discussed in more detail below.

Need for a Sustainability Framework

The EDO recommends that the ecological carrying capacity of the ACT and a sustainability framework should underpin government policy and decision making. Environment issues should be a mainstream factor in decision-making rather than only considered at the end of decision-making processes. The consequence of the latter is decision-makers are inevitably faced with often undesirable policy responses to mitigate or 'offset' negative environmental impacts, rather than integrated decision-making at an early stage.

A sustainability approach recognizes the need for integration between economic, social and environmental objectives. Achievements in one area can be at the expense or benefit of other areas while ultimately the goal is to achieve delivery in all three areas for the current population as well as future generations. A sustainability approach fits with the historical use of the ecological footprint methodology in the ACT.

The first ecological footprint analysis was prepared in 2004 for the then Office of Sustainability, ACT Government, as part of the Government's **Measuring Our Progress** report. The other component of **Measuring Our Progress** included a report outlining 29 headline indicators and 50 supporting indicators.¹ These indicators covered environment, social and economic themes.

The second ACT ecological footprint was again commissioned by the ACT Government however was provided to the independent Commissioner for Sustainability and the Environment for inclusion in the 2007

¹ Office of Sustainability **Measuring Our Progress: Canberra's Journey to Sustainability** Volumes 1-3 ACT Government 2004

State of the Environment Report. It should be noted to date use of the Ecological Footprint methodology in the ACT has always been linked to broader sustainability indicators and reporting – that is including economic, social as well as environmental indicators.

Recommendation One:

Consideration of the environmental impacts as well as the ecological carrying capacity of the ACT and region and broader sustainability objectives should underpin government decision making on all major policies, programs and developments.

Recommendation Two:

Environmental research and data collection should be undertaken as early as possible in regard to major policy, programs and developments so that environmental impacts are considered at the same time and as fully as social and economic impacts.

This rest of this submission is framed around a broader sustainability agenda while looking specifically at issues relating to the carrying capacity / ecological footprint of the ACT.

Ecological Footprint / Carrying Capacity / Sustainability Terminology

The EDO notes the importance of having clear, concise and consistent definitions of key sustainability terms and methodology. For instance, as noted in the Committee's discussion paper, 'ecological footprint' and 'carrying capacity' are different concepts. Yet they are often used interchangeably. It is important to note that the ecological footprint is a retrospective analysis on past performance whereas carrying capacity can have a predictive, forward looking consideration of potential impacts.

Likewise there is a significant difference between sustainability [TBL] assessment and sustainability [TBL] reporting yet the two terms are often used as being the same. Sustainability (TBL) assessment seeks to identify economic, social, environmental impacts and to address these in an integrated way prior to a program roll-out or physical development or policy approach to give policy makers key information to assess proposals. It should provide decision-makers with an analysis of the combined impacts. It is about assessing forward impacts. Sustainability (TBL) Reporting provides data on past actions – i.e. backward looking. Both are necessary and both can play a role in not only assessing potential impacts however also in assessing actual impacts.

Other considerations in use of ecological footprint tools are:

- they only focus on the environmental dimension. A broader sustainability focus requires consideration of social and economic impacts as well. Progress in limiting the size of the ecological footprint may be at the expense of other community goals such as social wellbeing, democracy and distribution of wealth.
- the ecological footprint is a consumption modelling tool based on formulas on resource use and their 'footprint' drawn from standard national data (in this case Australian Bureau of Statistics data notably the Household Expenditure Survey). As such it does not reflect local environmental quality. So for instance it does not tell us much about the standard of our drinking water, air quality or local biodiversity impacts.
- likewise it does not give feedback on local consumption choices even though environmental impacts do arise from different consumption choices – i.e.
 - local increases in Greenpower may not be reflected in the ecological footprint
 - increases in purchase of certain foods produced locally
 - local increases in use of recycled or plantation timbers as opposed to use of rainforest or native timbers.
- generally positive impacts (decreases) on the ecological footprint generally only show up as consumption decreases.
- there are a range of other environmental resource use impact tools available such as:
 - LEED for Neighborhood Development Rating System (rates environmental impacts of new building developments)

- Ecosystem assessment
- Strategic environmental assessment
- Dematerialism analysis.

Three key aspects of any sustainability tools and reporting tools or indicators are that:

- the same tools are used by Government agencies consistently;
- the agreed tools are commonly understood by local decision-makers, and
- they are actively used to guide policy making and decision making such that broader sustainability objectives are achieved.

Recommendation Three:

Clear and concise definitions should be developed by the Committee in regards to various sustainability terminology and methodologies.

Recommendation Four:

The ecological footprint tool, if used in the ACT, should be seen as only one of other necessary indicators of the sustainability of the ACT and its region.

Definition of Sustainability

The EDO recommends that one clear definition of sustainability and sustainability principles be adopted in the ACT and incorporated as appropriate into relevant ACT legislation. A consistent definition linked to appropriate sustainability tools and reporting indicators would be a vital start in ensuring ACT decision-makers and the community are all working towards the same goal.

Sustainability means different things to different people and can be defined in many different ways. The most common definition is that of the 1987 Brundtland Report which states that Sustainable Development requires us to:

to meet the needs of the present without compromising the ability of future generations to meet their own needs.²

The Australian National Strategy for Ecologically Sustainable Development agreed to in 1992 by all Australian Governments states:

ESD is development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.³

Another interesting sustainability definition arose at the 1996 United Nations Conference on Human Settlements (Habitat II or the Istanbul Declaration). It stated a commitment in regard to the goal of sustainable human settlements:

by developing societies that will make efficient use of resources within the carrying capacity of ecosystems and take into account the precautionary principle approach, and by providing all people, in particular those belonging to vulnerable and disadvantaged groups, with equal opportunities (...), thereby contributing to the achievement of national sustainable development goals.⁴

There is no one correct definition of sustainability. The concept recognises that environmental protection, economic development and quality of life are interrelated. Sustainability requires a balancing of these issues to ensure that humans can live sustainably.

² Brundtland Commission ***Our Common Future*** Oxford University Press Report 1987

³ Council of Australian Governments ***National Strategy for Ecologically Sustainable Development*** 1992

⁴ United Nations Conference on Human Settlements (Habitat II) ***Istanbul Declaration on Human Settlements*** 1996, <http://ww2.unhabitat.org/declarations/istanbul.asp>

The term 'sustainable development' has been criticised for lacking clarity and certainty.⁵ It was also seen by many as a contradiction or as having a bias towards economic development.

Accepted principles of sustainability include intergenerational equity, the polluter pays principle, the precautionary approach, biodiversity conservation and improved valuation, pricing and incentive mechanisms.

Within the ACT principles of sustainable development are included in various ways within some ACT statutes. The standard definition of ESD in ACT legislation is:

- ecologically sustainable development is to be taken to require the effective integration of economic and environmental considerations in decision-making processes and to be achievable through implementation of the following principles:*
- (a) the precautionary principle, namely, that if there is a threat of serious or irreversible environmental damage, a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;*
 - (b) the inter-generational equity principle, namely, that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;*
 - (c) conservation of biological diversity and ecological integrity;*
 - (d) improved valuation and pricing of environmental resources.*

Generally however there is no mandatory requirement that government agencies and statutory authorities consider the principles of sustainable development when making decisions. Some key examples of the use of sustainability in ACT statutes are:

- the *Planning and Development Act 2007* – Section 49 requires that the Territory Plan give effect to its objects in a way that gives effect to sustainability principles, although no sustainability principles are defined. Section 6 also states that the object of the Act 'is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT...'
- the *Building Act 2004* – Section 143 requires that the Minister must make guidelines for sustainable building practices. Section 30 requires that building approval must not be given if to do so would be, amongst other things, inconsistent with the sustainability guidelines. However there are currently no such guidelines in place.
- the *Environment Protection Act 1997* – Section 2 sets out the objects of the Act to include the promotion of ecologically sustainable development.
- the *Environment Protection Act 1997* – Section 158A requires that the Chief Executive of ACT government agencies to report on how the agency in its actions and administration accorded with the principles of ecologically sustainable development and any outputs which contributed to ecologically sustainable development.
- the *Financial Management Act 2003* – Section 11(4) requires that the annual ACT budget be prepared and take into account the object of ecologically sustainable development.

It is interesting to note the recently passed *Climate Change and Greenhouse Gas Reduction Act 2010* did not include the standard sustainability definition. However Part 3, Section 14[2(a)] requires the Minister in the exercise of his functions to the greatest extent practicable apply the inter-generational equity principle. This requirement was put forward as an amendment by the Greens and supported by the Government.⁶

Recommendation Five:

A standard definition of sustainability and sustainability principles should be included in all relevant ACT legislation.

⁵ G Bates, *Environmental law in Australia* 5th Ed., 2002 page 121

⁶ ACT Legislative Assembly *Hansard* 26 October 2010 page 4999

Recommendation Six:

As a matter of priority the Minister for Planning be required to develop Building Sustainability Guidelines as required under the Building Act.

Legislative Framework for Sustainability in the ACT

The EDO recommends a single Sustainability Act which requires all government agencies and authorities to consider sustainability principles when making decisions.

The EDO recognises that the concept of sustainability is broad and it is difficult to be sufficiently prescriptive to mandate and regulate action to such a degree as to guarantee success. However there are a range of legislative amendments which could be made to improve sustainability in the ACT. The EDO strongly supports, and has consistently advocated for, the adoption of sustainability measures generally through a whole of government approach and the creation of legislation regulating all government action.⁷

Overarching principles or statements in the objects of legislation are themselves largely ineffective in achieving the goal of ESD unless they are recognised through legislative implementation, and by appropriate administrative and judicial structures. Without a legal framework, it is too easy for lip service to be paid to ESD while a 'business as usual' approach is taken. Indeed, Agenda 21 notes that laws and regulations in each country are the most important instruments for transforming environment and development policies into action.

Whilst sustainability objectives can potentially be achieved within the existing legislative framework, the EDO is of the view that there needs to be amendments to include a clear and binding mechanism to ensure sustainable outcomes. In addition institutional change is required to ensure that the broad principles of sustainability are given meaningful consideration and not glossed over or ignored.

Given the general and aspirational nature of sustainability principles it is essential that they be accompanied with specific, measurable goals and policy outcomes. The principles should be factored into each stage of any decision-making process. Adherence to the principles should be a binding requirement. The EDO recommends that decision-makers must take these principles into account when making decisions – that is application of sustainability principles is a mandatory legal requirement for decision-makers.

In our view the following legislative and administrative reforms are essential for principles for sustainability to have appropriate and practical effect within the ACT:

- incorporation of ESD and its component principles into both the objects and machinery provisions of relevant legislation and as mandatory considerations for decision makers
- accountability for pursuing sustainable outcomes. For example, legislated obligations for reasons to be given, accounting for how the decision fares against the principles comprising sustainability
- rights for public participation in decisions and access to information
- access to appropriate avenues of appeal and independent review
- open standing provisions and opportunities for third party merits appeals
- enforcement and compliance mechanisms in legislation and sufficient resourcing for departments to monitor and enforce compliance
- robust and participatory environmental impact assessment legislation, which includes mandatory triggers for assessment
- requirements in legislation for monitoring sustainability outcomes
- legislated incentive mechanisms, for the creation of positive obligations for environmental protection.

Recommendation Six:

A legislative framework to guide sustainability decision-making and reporting in the ACT should be adopted which ensures that decision-makers must take sustainability principles into account when making decisions.

⁷See in particular EDO's submission on options for sustainability legislation at <http://www.edo.org.au/edoact/>

Sustainability Reporting

The EDO supports a legislative framework for sustainability reporting in the ACT either through broader sustainability legislation or through amendments to existing legislation (i.e. *Commissioner for the Environment Act 1993*). Sustainability reporting needs to be undertaken independently and within a legislative framework for four key reasons:

- a legislative framework would ensure some level of permanency for sustainability reporting. Administrative structures will of necessity change over time to reflect differing government arrangements, however, a key feature of sustainability processes is a commitment to permanent process and legislation is one way of indicating that.
- legislation would clearly set out the powers and responsibilities of the relevant Office and decision-makers.
- legislative power would require other Departments or Administrative Units to comply and provide inputs and that might facilitate a key sustainability principle – integrated decision-making.
- a sustainability framework needs to have a solid basis over time and within institutions. The framework needs to develop without the buffeting of politics.

The ACT has a Commissioner for [Sustainability and] the Environment with legislative responsibility to, amongst other things, prepare a state of the environment report every four years. The last three State of the Environment reports have included a chapter on “progress towards sustainability”.

The Commissioner for the Environment’s legislative function is already endorsed by a broad definition of the environment. It might therefore be appropriate for the responsibility for sustainability reporting to be part of the brief of the Commissioner for [Sustainability and] the Environment. It also represents the historic progress from sustainability being driven by environment protection concerns to the convergence of ecological, economic and social sustainability – with each seen as mutually supportive.

However, the recent review of the ACT State of The Environment Report clearly states that the purpose of the report and the choice of the indicators is to reflect “environmental sustainability”.

The alternative could be an independent Commissioner for Sustainability who prepares an integrated report drawing on the State of the Environment report, reporting against the economic plan and the Social plan and other reporting requirements as appropriate.

Recommendation Seven:

Ongoing and regular sustainability reporting should be undertaken as an independent and legislative function by either a newly created Commissioner for Sustainability or by the existing Commissioner for [Sustainability] and the Environment.

A key issue with sustainability reporting is its role in assisting democratic institutions to apply sustainability principles in planning and decision-making. Therefore sustainability indicators do not stand alone; rather, they must be part of an ongoing process of planning, management, action and learning.

Therefore future sustainability reports should include a chapter on “governance towards sustainability” as a way of maintaining critical thought to that issue. Sustainability reporting in itself can be a valuable tool in helping to “operationalise sustainability” so that it becomes regular and routine rather than novel and uncertain. Therefore the EDO supports the use of standard corporate documents and reporting instruments, such as Corporate plans, Annual reports and Budget papers to incorporate and reflect sustainability goals and considerations.

As mentioned earlier the *Environment Protection Act 1997* – Section 158A requires the Chief Executive of ACT government agencies to report on how the agency in its actions and administration accorded with the principles of ecologically sustainable development and any outputs which contributed to ecologically sustainable development. In 2005 the Auditor-General after a performance audit of agency ecologically sustainable development reporting stated: “The majority of information in agencies’ annual reports did not

provide a useful indication of agency progress against the ESD requirements. 92% of agencies did not report indicators or changes to indicators in annual reports. There was little evidence that decision-making processes take into account ESD principles. In almost 70% of agencies reviewed, ESD information was not a regular feature of reports to agency's senior management."⁸

Since then there have been substantial improvement and greater consistency in the way agencies report on their environmental resource use – i.e. the greenhouse gas emissions, water use and waste generation from their operations. Largely in part to more specific requirements set-out in the Chief Minister's Annual Report Directions. However there has been less guidance for agencies on reporting how their outputs contribute to ESD and / or assist delivery of the Government's strategic objectives.

The new *Climate Change and Greenhouse Gas Reduction Act 2010* – Section 25 requires agencies to include in their Annual Report details of any policies and programs implemented by the agency to address meeting the greenhouse gas reduction targets. This is a welcome requirement on one level however it is also potentially unwieldy if reporting on key Government strategies needs to be a legislative requirement in a broad range of legislation. Likewise not all of the Government's strategic objectives are enshrined in legislation.

On this basis the EDO recommends that the Chief Minister's Annual Report Directions, a legislative requirement for agency reporting, should include a requirement to specifically report on how their agency is delivering on each to the seven themes of the Canberra Plan and other key Government strategies such as Weathering the Change and specific greenhouse gas reduction targets.

Recommendation Eight:

The Chief Minister's Annual Report Directions should require agencies to report on delivery of Government strategic objectives. For example on delivery on the seven themes of the Canberra Plan and other key Government strategies such as Weathering the Change.

If you wish to discuss this submission further please do not hesitate to contact myself on 0419 266 110 or Kirsten Miller on 6243 3460.

Yours sincerely

Clare Henderson
EDO Advisor

⁸ ACT Auditor-General's Office *Performance Audit Report Reporting on Ecologically Sustainable Development* July 2005