

**REVIEW OF THE ROLE OF THE COMMISSIONER**

**FOR THE ENVIRONMENT**

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## **1. Current Situation**

The Commissioner for the Environment Act 1993 created the Commissioner and defines the current functions:

- investigates complaints regarding the management of the environment by the Territory or a Territory authority,
- conduct such investigations as may be directed by the Minister for the Environment,
- conduct on his or her own motion, investigations into the actions of an agency where those actions would have a substantial impact on the environment, and
- prepare the State of the Environment report.

Presently, the Office of the Commissioner for the Environment (OCE) has a part time Commissioner (2 days/week) and two full time permanent staff and a budget of \$435k.

The OCE has the ability to establish an expert reference group to assist in the preparation of the State of the Environment Report and to provide advice, but has only been used for advice on the State of the Environment Report.

The OCE is supported administratively through Territory and Municipal Services.

Since the 1993 legislation a number of changes in legislation, administrative arrangements, structure and institutional arrangements have been enacted within the ACT Public Service. These changes, along with increased pressures associated with a number of Territory and national environmental challenges and the increased expectations of the general public make it timely to review the roles and functions of the OCE to capitalize on synergies and avoid duplication and or overlap with other agencies.

## **2. Approach to the Review of the Role of the Commissioner**

There have been several reviews of the OCE in the past. A review of these reports and previous advice to the Minister provided insight into issues that have been discussed at various levels of government.

A review of relevant legislation including the ACT Commissioner for the Environment 1991, The Nature Conservation Act, Planning and Land Act, Land Act Fisheries Act, Tree Protection Act, Environment Protection Act, the National Environment Protection Council Act, the Victoria Commissioner for Environment Sustainability Act 2003, the Canadian Auditor General's Act 1995, the Ontario Environment Bill of Rights 1993 and the New Zealand Environment Act 1986.

This review highlighted a number of characteristics common to the Commissioners from the Australian Capital Territory, the Canadian federal government, the Province of Ontario and New Zealand. These are:

- the independence of the Commissioners is embedded in legislation;
- Commissioners operate independently of government agencies and departments;

- Commissioners assess the implementation of government policy by ensuring that government departments fulfill their responsibilities in relation to the environment and ecologically sustainable development;
- Commissioners ensure that residents concerns about the environment are addressed;
- Commissioners report annually to Parliament (or equivalent) on environment and ecologically sustainable development matters. Their annual reports consider the adequacy of the decision-making of government departments in relation to environmental matters and identify emerging issues and problems;
- Commissioners conduct investigations into environmental and ecologically sustainable development matters and make recommendations to Parliament (or equivalent) on how these may be addressed. Investigations are sometimes limited by resource constraints; and
- Commissioners require sound communication systems to ensure all sectors are involved in investigations and understand the role of the Commissioner and the Office.

The above characteristics are essential to ensure that the Commissioner is able to effectively discharge the functions of the Office.

As well, a number of interviews and discussions were held with state and territory senior executives and senior staff in the ACT, Queensland and Victorian governments. Discussions were also held with the Chief Executive Officers for Territory and Municipal Services and the Chief Minister's Department and the ACT Auditor General. Dr. Morgan Williams, the previous Commissioner for New Zealand and Dr. Ian McPhail, the Commissioner for Victoria were both generous with their time while in Canberra and provided advice and insights into this review. The manager of the recently completed Australian State of the Environment 2006 and Dr. Russell Rheickle, a member of the reference group for this report were also generous with their time in providing advice and lessons learned. The ACT Conservation Council was also consulted as part of this review.

### **3. Future Role**

A presentation outlining options for an expanded role for the OCE was made to the Minister for the Environment, Water and Climate Change on July 11, 2007. These options included:

- Continuance of the current statutory responsibilities
- Across government sustainability audit and reporting
- Establishment of an expert reference group
- A role in reporting and auditing of catchment management in the ACT
- Some of the roles of the Conservator for Flora and Fauna
- Increased Advocacy role
- Provision of expert advice to the Minister and or Agencies

The Minister agreed in principle to these options and directed the Commissioner and the Executive Director of Environment and Recreation to prepare advice that defined the future roles of the OCE and the Agency.

The Chief Minister announced a new role for the Commissioner for the Environment with the launch of Weathering the Change on July 27, 2007. This role involves the audit and reporting of across government performance in meeting targets identified as part of individual agency sustainability frameworks. Sustainability frameworks are further discussed in Section 5.

**Conclusion: The Commissioner for the Environment should now incorporate duties relating to sustainability and will be referred to as the Commissioner for the Environment and Sustainability (OCES).**

## **4. Advocacy**

Advocacy as presented in this report is defined as “the act of pleading or arguing in favour of something, such as a cause, idea, or policy; active support; maybe in relation to a contentious issue; or speaking, acting or writing with minimal conflict of interest in order to promote, protect and defend the environment of the ACT.”

A key function of the OCE is to take actions to ensure the ACT Government follows a holistic approach to environmental management and makes progress towards improving ecologically sustainable practices. There is no other independent structure to champion the objective of long-term conservation of the ACT’s natural capital or to provide a vehicle for people with grievances to submit complaints about the management of the environment/sustainability by Territory agencies.

Advocacy services of OCE as classified below are fundamental to the functioning of Office. Resourcing the Office for these functions is addressed in section 9.

- drawing on relevant findings of OCE statutory and other reports,
- providing advice to the Minister through regular meetings and written submissions,
- providing advice to Government agencies on relevant matters under development or review, through meetings, participation in workshops and/or written submissions, and
- participation in relevant inquiries, including those of the Legislative Assembly

Advice to the Government/Minister is currently provided for under current legislation in the form of Minister directed investigations or Commissioner initiated investigations. To date these functions have only rarely been fulfilled in a large part due to the low profile of the OCE within the ACT Government and a lack of public awareness and engagement.

For the OCE to better fulfil these functions, actions need to be taken to enhance community awareness of the availability of an environmental “ombudsman” in the ACT. Under existing legislation, all complaints or concerns about aspects of environmental management by a Territory agency require a level of investigation to ascertain whether a formal investigation is required.

Increasingly over the past years, the OCE has sought to resolve issues at this stage without intensive investigation and resource consumption. This approach facilitates resolution and can be seen as an advocacy or facilitative role for the Commissioner.

Increased awareness of the role of the OCE can be achieved through improved links with the community, business and other organisations concerned about the environment. This would include raising the profile of the Office through speaking at community, business and other organisation meetings, functions, etc. Increased engagement with the media; community and business organisations would provide an opportunity for the OCE to communicate about the improved state of the natural environment, as well as highlight areas for improvement that may require the involvement of the community and business.

The Office needs to increase liaison with ACT Government agencies, including promotion and engagement with ACT Government agencies. This will lead to better incorporation of the Government's direction relating to environmental management and lead to better support and input in to the State of the Environment Report.

There is scope for increased interaction/liaison with Territory agencies, particularly in relation to findings and recommendations in State of the Environment and other reports prepared by the Commissioner. Such liaison would be designed to lead to better integration of findings into agency environmental goals, objectives and day-to-day decisions.

**Conclusion: There is a requirement to incorporate these enhanced functions of advocacy into the roles and responsibilities of the Office of the Commissioner of Environment and Sustainability. This may require legislative amendment.**

## **5. Sustainability Frameworks**

Each agency would develop an action plan/sustainability framework that would clearly define what and how they will contribute to the environmental sustainability of the ACT. It is incumbent upon government to demonstrate leadership in this area in order to move the general population and business along the same path. This framework would include those indicators as described in Weathering the Change Action Plan as well as other indicators yet to be determined. A basic framework being developed as a minimum and then built on for each agency depending on the nature of the business. This would be done in conjunction with the agency, the centre of expertise within TAMS and the OCE. This would provide for an effective way to ensure all parties are aware of what exactly is being measured and what information requirements need to be built into the organization in order to streamline the audit/measuring process.

The targets will be jointly determined; however a reasonable benchmark need be determined in order to ensure the bar is not too low. The audit and reporting process would not be punitive in nature but set up to ensure a reasonable approach to meeting objectives and allowing for the learning curve. This is not to say there would not be a compliance mechanism introduced at some point to be determined.

Accountability for achieving targets should be considered for each agency head as part of their accountability agreement/performance pay.

The Victoria model has used Cabinet Direction to achieve this mechanism while another option is in legislation.

The centre of expertise identified above would provide national/international best practises, assistance in developing frameworks, ensuring the bar is raised sufficiently over time. It is crucial that this group is the knowledgeable client and not delivering for agencies, the ownership of this must be with the agency.

**Conclusion: Implementation of sustainability frameworks requires a whole of government approach. Each agency should be required to prepare a framework document outlining how they will contribute to whole of government direction regarding environment and sustainability.**

## **6. Catchment Management**

Currently, catchment management activities are coordinated and or implemented within TAMS by Environment and Recreation. ACTEW is implementing restoration initiatives through a deed of agreement with Environment and Recreation in the Lower Cotter River according to operational plans approved by the EPA, ESA, ACTEW and Environment and Recreation.

The Minister for the Environment in May 2006 has identified the development of Strategic Management Plans for drinking water catchments as a priority. To date, the Strategic Plan for the Lower Cotter Catchment has been prepared and work continues on the Googong Catchment. As options for future water supply for the ACT progress, it is likely that additional plans will be required.

Regardless of the governance model adopted for Catchment Management in the ACT there is a role to ensure independent auditing and reporting on activities within the ACT drinking water catchments.

The OCE is uniquely situated to advise the Minister on the adequacy of Strategic Drinking Water Catchment Plans and associated Operational Plans, as well as review and report on agencies' performance as defined in these plans. The OCE may also be directed to facilitate, audit and report on other activities as designated by the Minister.

The OCE would engage the science and academic community, through the expert reference group, in determining the adequacy of the Strategic Management Plans and or the Operational Plans as well as providing advice, auditing and reporting of agency performance against agreed directions.

**Conclusion: Further work is required to define the oversight/review role of the Commissioner for the Environment and Sustainability. This work should ensure that the Commissioner has a role in reporting on the adequacy of and agency performance against Strategic and Operational Plans for drinking water catchments.**

## 7. CONSERVATOR

This review also examined the potential for the OCE to incorporate some functions currently performed by the Conservator. The Conservator of Flora and Fauna is established by the Nature Conservation Act 1980 as a public servant position. It is currently assigned to the Executive Director, Environment and Recreation (TAMS).

The Conservator is cited 188 times in five pieces of legislation (2003) as a regulatory, advisory, consultative or policy development authority. Many of the decisions made by the Conservator are reviewable, typically by the Administrative Appeals Tribunal or by the Assembly if they are Disallowable Instruments.

The detailed roles are outlined in [Attachment B](#).

Generally the Conservator has four primary roles.

**Authorising activities** in relation to development approvals and management of public and leasehold land in relation to conserving native plants and animals and protecting the urban forest –prescribed criteria guide some of these decisions eg. licence applications.

Day to day administration of controlled activities is a routine departmental function under appropriately delegated authority with, in some cases, prescribed criteria guiding relevant decisions/directions. Authority should remain with the agency responsible for the activity.

**Providing advice** as part of the land use planning and development and approvals process. The actual roles/functions which are performed by the Conservator are broader than the title suggests - e.g. its role in authorising activities related to land use, the provision of statutory advice to other agencies, typically the ACT Planning Authority, draws on expert knowledge provided by departmental officers and/or specialist advisors appointed for the purpose and typically is guided by relevant government policy (that may be set out in statutory documents). Advice is required on variations to the Territory Plan and development proposals for public land in particular. This is a routine and important consultative function that should remain with the agency.

### **Developing nature conservation policy and strategic management plans.**

The Conservator has a number of statutory requirements to prepare policy (e.g. action plans for threatened species, management plans for public land, nature conservation strategy). In most cases they require ministerial endorsement and consequently represent government policy. Most are also disallowable by the Assembly. While it is not unknown for policy to be developed outside government, however, it must then be formally embraced by government. Notwithstanding, non-government sources (special interest groups, advisory committees etc.) are an important source of advice as part of the policy development process. Having a policy development role assigned to the OCE that is an independent body would present potential conflicts of interest and detract from the credibility of the Office. However, the OCE could still play a role in determining direction, reviewing and advising the Minister and or the agency on the

adequacy of the policy in terms of meeting the agreed or accepted environmental outcomes. This would clearly require a need to put in place a rigorous mechanism to declare a conflict of interest should a complaint and or investigation be initiated associated with anything with which the OCE was directly involved.

In considering a potential future role for the Commissioner for the Environment in relation to the functions of the Conservator, the following are important considerations.

The role of the Commissioner as an independent auditor/ombudsman should be protected. The office would be exposed to a conflict of interest if it were required to make policy or operational decisions (that properly rest with or within government) and also be charged with investigating or evaluating policy or operational decisions. These may have the potential to occur where the Commissioner has both Commissioner and Conservator functions. It would be advisable that a precautionary process for dealing with the potential for a conflict of interest (perceived or real) be adopted.

There may well be a place for the Commissioner to monitor, assess and report on implementation of policy or operational decisions taken by government or within government. This should not extend to a duplication of functions already undertaken by the AAT (review of a decision taken by the Conservator in response to a complaint, with authority to remake a decision).

**Conclusion: The review of the Nature Conservation Act 1980 is very likely to impact upon the current role of the Conservator. Since the enactment of this legislation there has been numerous other legislation put in place that clearly makes this review timely. The initial stage is expected to commence in September 2007 and include a desk top review of current world best practice in legislative framework for nature conservation and a full review of each Australian jurisdiction's nature conservation. In light of this review it is recommended to move slowly and or defer any further discussion of the assignment of responsibilities of the Conservator to the OCE until there is a better understanding as to the direction this review is taking.**

## **8. Reference Group**

The Reference Group should be established to provide expert advice to the Commissioner. There are two options for how this group could function. The first simply being a list of individuals, preselected and approached as to their willingness to provide advice to the Commissioner on a number of topics relating to the responsibilities of the OCE and or as requested by the Minister or Agency on an as needed basis. This means it is not a standing body but is task focussed and assembled with particular skills basis on the topic at hand. The other option is a small multi-disciplinary group that would be a standing body and would have two functions. One would be to provide strategic advice on environmental sustainability issues facing the ACT and the other function would be to fulfil the role of an expert reference group on an as required basis. This may involve a member of the group chairing a subgroup depending on the expertise required.



Either of these options provides for the Minister and or Agencies when seeking independent advice to do this through the OCE. This has a number of positive outcomes in that the advice is arms length and independent. As well the OCE would have responsibility to manage the reference group.

The management of a reference group such as this must not be taken lightly. Clear terms of reference and persistent leadership by the Commissioner will be required in order to ensure the reference group stays on topic as well as ensuring this group is challenged and is seen to be providing advice that is useful and practical in its application and supports the OCE and does not act as an independent body. The Commission would also ensure that the task oriented group is disbanded as the advice is completed.

A draft Terms of Reference is provided in [Attachment A](#)

**Conclusion: Take steps to ensure that the OCES has adequate resourcing to enable the establishment of a task focussed reference groups.**

## **9. Resource Requirements of the Office of the Commissioner for the Environment and Sustainability**

This section outlines the resources for the OCE are intended to meet the statutory requirements as well as to fulfil the expanded role of the OCE.

This proposal allows for the roles and responsibilities of the OCE to be carried out in an appropriate manner and still allow for a core level of discretionary requirements associated with the uncertainties of Minister directed or Commissioner initiated investigations. Work associated with complaints over this core level, due to number or complexity, would need to be resources separately with the agreement by the Minister for Ministerial directed investigations.

Staffing and resources of the OCE will be spread over 2 years. In the first year a full time Commissioner and the SOG C would join the office of the SOG B and ASO6, bringing the office to a total of 4 FTEs. As roles and responsibilities are clearly defined and gradually implemented, the PO positions would be fully staffed in the second year.

Full time employees should be chosen for their understanding of; interrelationships between various aspects of the environment; natural processes and concepts of environmental sustainability; ACT legislation and legislative processes; fundamentals of audit and reporting; written and oral communication skills.

The .5 PO position will be for developmental/training. This position would be staffed in the OCE and would be fully funded with another agency or non government organization providing the additional funding to provide opportunity for across government understanding, continuous learning, specialized expertise when required, agency employee development, assist in the preparation of the State of the Environment Report.

## Proposed Budget at the end of two years

Position	Level	Salary/Allowances
FTE Commissioner	SES 2.4	\$200,000
FTE Manager of OCE	SO B	125,000
1 FTE	SO C	102,000
2 FTE	PO 2	170,000
.5 FTE	PO 2	43,000
1 FTE	ASO 6	85,000
<b>Total Salary</b>		<b><u>725,000</u></b>
IT		47,000
Administration (rent, utilities, publishing)		110,000
Training/personal development		50,000
Reporting and investigations (SoE, catchment, auditing, reporting)		115,000
Reference groups		50,000
<b>Total Operating resources</b>		<b><u>372,000</u></b>
<b>Total Resource Envelope</b>		<b><u>\$1,097,000</u></b>

## 10. Implementation Considerations

The proposed changes to the role and functions of the Commissioner for Environment identified in this review would require amendments to the Commissioner for the Environment Act 1993. This would require a full Cabinet approval. The amendments would also have to be made in accordance with the requirements of the Human Rights Act.2004

Other legislation likely to be impacted and requiring consequential amendments could include the

Nature Conservation Act 1980;

The Tree Protection Act 2005;

Environment Protection Act 1997 and;

Yet to be in force Planning and Development Legislation 2007.

If the review of the Nature Conservation Act were to recommend that certain functions currently sitting with the Conservator (of Flora and Fauna) have the scope to sit more appropriately within the functions of the Commissioner (e.g. giving direction or reviewing longer term strategic planning initiatives mandated currently under the Nature Conservation Act 1980, such as for management plans etc,) then clear direction and appropriate drafting instructions would be required for both pieces of legislation. If recommendations are adopted to change the role of the Commissioner of the Environment to include certain powers previously held by the Conservator, then it is advisable that appropriate time be given to conduct an in depth review of the relevant provisions required for the consequential amendments and how such changes could or may affect the integrity of the acts.

Such changes have the potential to become a major task in terms of legislative process, given the required consultation within government and the tendency for JACS to maybe see this as an opportunity for a full-scale review of all relevant legislation.

In addition any legislative amendments need to assess the expanded role of the Commissioner for the Environment and Sustainability. Specifically, how to incorporate the name change to the Commissioner of the Environment and Sustainability and how best to ensure that advocacy role are reflected in the statutory accountabilities of the Commissioner.

Cabinet direction would be required to ensure whole of government approach is adopted to the development of agency specific sustainability frameworks. It is anticipated that an overall cabinet submission would be required which would encompass legislative drafting instructions as discussed above ,as well as resourcing requirements. Ministerial direction would be required for catchment management responsibilities, which could be immediately implemented. Since the OCE now has the ability to establish reference groups only budgetary approval is required to move forward.

## **Attachment A**

# **Draft Terms of Reference for Expert Reference Group**

### **Introduction**

The OCE will establish an expert reference group primarily to advise the Commissioner in respect to the performance of the functions outlined in the Commissioner for the Environment Act 1993. The Minister for the Environment will approve the establishment of this group on an as needs basis as defined by the OCE.

### **Functions**

The Reference Group's principal role will be to provide advice on the implementation of the legislation and in the performance of the specific functions of the Commissioner, which are to:

- prepare the report on the State of the Environment (SoE) of the ACT;
- conduct annual strategic audits of, and prepare reports on, the implementation of environmental management by Agencies and public authorities;
- advise the Minister in relation to any matter relating to ecologically sustainable development referred to the Commissioner by the Minister.
- report on and audit agency performance in catchment management and the development of catchment management strategic plans as well any other concern identified by the Minister

### **Accountabilities**

The OCE Reference Group is subject to the general direction of the Commissioner and must provide its recommendations and advice to the Commissioner.

The *Commissioner for the Environment Act 1993* does not place any specific obligations on members of the Reference Group. Members are subject to obligations under common law for any actions they may take during the course of their work as part of the Reference Group.

### **Membership**

#### **Chairperson**

The Chairperson/s for the Reference Group is to be decided by the Group at its first meeting.

#### **Members**

Membership will be defined by the OCE and not necessarily based on individual expertise.

#### **Term of Appointment**

The term for new members is for twelve (12) months. The term of reappointment will be up to 24 months.

#### **Expenses**

Travelling and personal expenses of the members will be paid at rates that apply for employees of the Department of Territory and Municipal Services.

### **Resignation from Office**

A member may resign from office in writing addressed to the Commissioner.

### **Removal from Office**

The Commissioner without cause or notice may remove a member from office at any time.

### **Vacancies**

The office of a member becomes vacant if:

- a member resigns;
- a member is removed from office;
- a member dies or in the opinion of the Commissioner becomes incapable of performing his/her duties;
- a member becomes a bankrupt or a person disqualified from acting as a director or acting in the management of a company;
- a member fails to attend 3 consecutive meetings without the permission of the Chairperson; or
- a member fails to attend 75% of meetings over any given 12 month period without the permission of the Chairperson.

Upon a vacancy occurring in the office of a member the vacancy may be filled in accordance with the Terms of Reference.

### **Meeting procedure**

Meetings may be conducted in a manner determined by the Chairperson/s subject to these Terms of Reference.

The quorum of a meeting shall be a majority of the members appointed for the time being.

Minutes must be kept of every meeting and circulated for comment before being formally adopted at the next meeting.

Minutes must be provided to all members within 28 days of being adopted.

### **Government observer**

Territory Departmental Representatives of the following Departments may attend meetings:

- Territory and Municipal Services
- Chief Minister's Department
- Others as required according to agenda items

Departmental representatives have observer status and may participate in discussions at the invitation of the Chairperson/s or presiding member.

### **Time commitment**

Members should anticipate meetings will occur quarterly and will be of two hours duration. Members should also anticipate participating in sub-group meetings and may attend specific sessions invited to by the Commissioner.

Members are expected to attend a minimum of 75% of meetings.

### **Confidentiality**

The deliberations must be treated confidentially in order to provide a forum for frank and fearless advice and debate.

A member must not discuss any deliberations or circulate any meeting agendas, minutes, papers or other materials publicly without the consent of the Commissioner.

### **Conflict of interest**

A member who has a direct or pecuniary interest in a matter being discussed at a meeting must declare the nature of the interest as soon as possible after becoming aware of the interest.

The Chairperson/s or member presiding at a meeting at which a declaration of an interest is made shall cause the declaration to be recorded in the minutes of the meeting.

A member who has made a declaration of an interest may not take part in any discussion of the matter to which the declaration relates unless the Chairperson/s or member presiding directs otherwise.

A member who has made a declaration of an interest must not vote on the matter to which the declaration relates.

### **Support**

The Office of the Commissioner for the Environment will provide executive and Secretariat support.

## Attachment B

### Roles of Conservator of Flora & Fauna

<p><i>Under Nature Conservation Act:</i></p> <ul style="list-style-type: none"><li>• Prepare draft Nature Conservation Strategy</li><li>• Prepare and declare Action Plans</li><li>• Control activities in reserved areas</li><li>• Enter into management agreements with agencies for public land management</li><li>• Issue directions to lessees</li><li>• Decide licence applications in relation to activities affecting plants and animals (in accordance with prescribed criteria)</li><li>• Declare:<ul style="list-style-type: none"><li>➤ Special Protection Status spp</li><li>➤ Exempt spp</li><li>➤ Protected spp</li><li>➤ Prohibited organisms</li><li>➤ Controlled organisms</li></ul></li></ul>
<p><i>Under Land (Planning and Environment) Act</i></p> <ul style="list-style-type: none"><li>• Prepare draft plans of management for Public Land</li><li>• Recommend (to the Executive) leases on Public Land</li><li>• Recommend (to the Executive) a licence to occupy unleased Public Land</li><li>• Recommend to the Planning Authority variations to reserved areas</li><li>• Comment on development applications for leases on Public Land.</li><li>• Comment on draft variations to the Territory Plan</li><li>• Comment on Development Applications involving significant trees</li><li>• Comment on orders in relation to pest plants and animals</li><li>• Sit as ex officio member of the Heritage Council</li></ul>
<p><i>Under Fisheries Act</i></p> <ul style="list-style-type: none"><li>• Decide licence applications</li><li>• Prepare a fisheries management plan for the ACT</li><li>• Enforce fishing laws</li></ul>
<p><i>Under Tree Protection (Interim Scheme) Act</i></p> <ul style="list-style-type: none"><li>• Decide applications to conduct tree damaging activities</li></ul>
<p><i>Under Domestic Animals Act</i></p> <ul style="list-style-type: none"><li>• Advice regarding a permit to take a dog into a prohibited area</li></ul>