

# A proposal for the establishment of a National Environment Commission

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The Environment Defenders Office (Victoria) Ltd ('EDO') is a Community Legal Centre specialising in public interest environment law. We support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice.

In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working collectively to protect Australia's environment through public interest planning and environmental law.

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## Summary

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Public confidence in environmental decision-making and the administration of Australia's environmental laws is low. The recent push to remove the Commonwealth from national environmental protection has also raised significant concerns about the lack of leadership by the Commonwealth and the inability of State governments to protect nationally significant environment matters. Australia needs an independent national environmental watchdog – a National Environment Commission – to ensure strong and effective protections are in place across Australia to defend Australia's unique environment.

The National Environment Commission should have powers to:

- audit and report on whether the Commonwealth is meeting the objectives of Federal environmental law;
- audit and report on whether States are meeting environmental standards under Federal environmental law;
- develop a national strategic environmental planning and management framework in consultation with States and Territories;
- identify strategic priorities and policy goals for national environmental protection and biodiversity conservation;
- forecast the impact of current activities on future environmental protection efforts and the ongoing sustainability of resource use;
- investigate community concerns about any matter which may have a significant impact on the environment; and
- report on the effectiveness of natural resource management across Australia

A National Environment Commission with these powers would provide national leadership; improve environmental decision-making; and improve the accountability of both the Commonwealth Government and State Governments operating under Federal environmental law. It would bring together environmental management across jurisdictions and sectors to create a unified national approach to environmental protection.

# 1 Introduction

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The purpose of this paper is to highlight the critical need for an independent body that has oversight of nationally important environmental issues.

Public confidence in environmental decision-making and the administration of Australia's environmental laws is low. Concerns include transparency, accountability and the quality and independence of decision-making. The recent push to remove the Commonwealth from national environmental protection has also raised significant concerns about the lack of leadership by the Commonwealth and the inability of State governments to protect nationally significant environment matters. On a broader scale, environmental decision-making has little regard for the impact of current development on the future of Australia's natural environment and resources, and on future generations. These factors have highlighted the need to re-think national environmental governance.<sup>1</sup>

The independent review of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 (**EPBC Act**) conducted by Dr. Allan Hawke in 2009 (**the Hawke review**) called for the establishment of a National Environment Commission. The Hawke review concluded that the establishment of an independent advisory and review body would help to ensure the rigour, transparency and accountability of decision-making and more robust administration of Commonwealth environmental laws. More recently, the establishment of an independent environment body has been called for by the Environment and Communications Legislation Senate Committee<sup>2</sup>, the Wentworth Group of Concerned Scientists<sup>3</sup> and an alliance of 39 environmental groups that make up the Places You Love Alliance.

There are a number of different models and functions such a body could have that would achieve different purposes and plug different gaps in national environmental governance. We do not seek to advocate for a definitive model in this paper. Rather we set out the most pressing weaknesses and gaps in national environmental governance and leadership, and give an example of one model of a National Environment Commission that would address those problems.

The model outlined in this paper is for a National Environment Commission that provides independent oversight and agenda setting for nationally significant environmental issues. Its functions are aimed at:

- providing more certainty and less duplication in decision-making;
- ensuring that consistent, strong national environmental standards are applied across all States;
- providing robust auditing and reporting of environmental outcomes under the EPBC Act;
- providing greater Commonwealth leadership by identifying problems in national environmental governance and recommending long term whole-of-federation governance solutions;
- overseeing both the Commonwealth and the States when they are carrying out functions under the EPBC Act;
- providing independent inquiry and reporting on matters of significant environmental concern within the community.

We note that not all concerns to do with the EPBC Act can be solved through a National Environment Commission. Some issues are better addressed by strengthening Commonwealth powers under the EPBC Act and improving administration of the EPBC Act by the Commonwealth Environment Department.

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<sup>1</sup> See for example, Australian Conservation Foundation (2009) *Submission to the Independent Review into the Environment Protection and Biodiversity Conservation Act 1999*; Department of the Environment, Heritage and the Arts, *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009 (Hawke Review), p. 329. <http://www.environment.gov.au/epbc/review/publications/final-report.html>; Wentworth Group of Concerned Scientists, *Statement on Changes to Commonwealth Powers to Protect Australia's Environment*, September 2012 <http://www.wentworthgroup.org/blueprints/changes-to-commonwealth-powers-to-protect-australia-s-environment>

<sup>2</sup> Environment and Communications Legislation Senate Committee, March 2013 Report p28, <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=ec\\_ctte/completed\\_inquiries/2010-13/epbc\\_federal\\_powers/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/completed_inquiries/2010-13/epbc_federal_powers/report/index.htm)>

<sup>3</sup> See *Statement on Changes to Commonwealth Powers to Protect Australia's Environment*, above n2.

## 2 Why Australia needs a National Environment Commission

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### 2.1 To provide national environmental leadership

A National Environment Commission would provide the critical Commonwealth leadership needed to achieve strong national standards of environmental protection.

As the 2011 State of the Environment Report observed:

The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role.<sup>4</sup>

2013 marks thirty years since the Commonwealth Government established its national leadership on the environment, when it used its powers to prevent the Tasmanian Government from constructing the Franklin Dam and destroying a unique part of Tasmania's wilderness. Fourteen years ago it cemented that leadership when the EPBC Act came into force, giving legal power to the Commonwealth on nationally significant environmental matters. Since that time, national leadership on the environment has been sporadic. Although the Commonwealth has showed strong leadership on some issues, those instances have been outweighed by a lack of leadership in a multitude of areas.

A key example is the Commonwealth transfer of powers back to the States via accreditation of State environmental assessments. The intention under the EPBC Act was that if this did occur the Commonwealth would raise the standard of environmental assessment across the board by requiring States to improve their assessment regimes to a national level. In practice the Commonwealth allowed a significant weakening of national environmental standards by accrediting inadequate State regimes and missed this opportunity to lead national improvements. The proposal by both major parties to hand over Commonwealth environmental approvals to the States poses even greater risks to achieving high national standards.

The State of the Environment Report also observed:

There have been significant advances in many aspects of environmental management over the past decade, but management approaches and responsibilities are often fragmented across Australian, state and territory, and local governments. This can hamper our ability to address the legacies of past pressures like land clearing, ongoing pressures like invasive species and emerging challenges like climate change. National leadership and commitment, together with the cooperation and coordination of all governments and stakeholders, including the Australian community, are important foundations for the future of Australia's environment and heritage.<sup>5</sup>

A National Environment Commission could play a vital role in bringing together environmental management across jurisdictions and sectors by identifying gaps, weaknesses and overlaps in environmental policy and management and making recommendations as to how they can be overcome. This is an essential element that has been lacking in our fragmented Federal system to date, and would assist all levels of government to be better environmental managers.

Another area of leadership that is lacking in Australian policy and decision-making is a proper consideration of the impacts of our actions in the long term – on future generations and on the future of our environment and resources. Despite a commitment to ecologically sustainable development from Federal and State Governments it is rare for long-term environmental effects or impacts on future generations to be determinative in environmental decisions in Australia.<sup>6</sup>

Given the serious and ongoing decline in biodiversity in Australia and the challenges of a federal system of environmental regulation, it is critical that strong Commonwealth leadership is restored to ensure that the environment is responsibly managed and protected and that we give proper consideration to Australia's long-term future. State governments do not have the will or the mandate to protect nationally significant environmental assets.<sup>7</sup> It is critical that the Commonwealth show strong leadership to achieve strong national standards of environmental protection.

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<sup>4</sup> Australia's State of the Environment Report 2011 - Summary, p9.

<sup>5</sup> Australia's State of the Environment Report 2011 - Summary, p2.

<sup>6</sup> The 1990 *Intergovernmental Agreement on the Environment* committed all jurisdictions to implementing ecologically sustainable development into their decision-making however in practice it is largely ignored.

<sup>7</sup> For example the Commonwealth has used the EPBC Act to refuse numerous environmentally unacceptable projects which were supported by State governments: the Mary River dam in QLD; grazing in the Alpine National Park in Vic; residential development in Jarvis Bay in NSW, a coal mine and railway line near Shoalwater Bay in QLD, and the release of water from Lake Crescent in Tasmania.

## 2. 2 To improve environmental decision-making

A National Environment Commission could play a vital role in improving decision-making. Often the last line of defence for the environment is a decision by a Minister whether to allow development or not. Good decision-making is critical to environment protection.

However decision-making under the environmental impact assessment regime in the EPBC Act has attracted criticism as lacking rigour and being subject to too much Ministerial discretion.<sup>8</sup> The Hawke review found that more transparency and accountability is needed of government decisions under the EPBC Act.<sup>9</sup>

There is very little oversight and scrutiny of decisions made under the EPBC Act at an individual or systemic level. Proper independent scrutiny can only happen in two ways – via the Courts when a person makes an application for a merits review or judicial review of a decision; or via an independent audit by a government body with power to do so. Since amendments to the EPBC Act in 2006, merits review of Ministerial decisions made under the EPBC Act is no longer available, and only two judicial review cases are brought on average each year (of 400 decisions made).<sup>10</sup> The Australian National Audit Office (ANAO) has conducted only one audit of the implementation of the EPBC Act, in 2003.<sup>11</sup> The Hawke review provided valuable information on the implementation of the EPBC Act, but it was very broad and will only happen every 10 years.

It is well accepted that legal reviews of decisions can improve decision-making.<sup>12</sup> Similarly, independent review and auditing of decisions at a strategic level can assist in decision-making in two ways:

- the mere knowledge that decisions will be reviewed and scrutinised can improve decision-making by individual decision-makers,<sup>13</sup> and
- audits can provide valuable feedback on how processes and procedures can be improved for the future.

In particular, strategic impact assessment decisions which are incredibly complex and protracted would benefit from independent auditing to ensure they are meeting the requirements and objectives of the EPBC Act.

## 2. 3 To improve the accountability of the Commonwealth Government

A National Environment Commission could assist the Commonwealth Government to meet its legislative, policy and program goals for environmental protection.

Accountability relies on the provision of quality information about government activity. Without adequate review and evaluation, it is difficult to measure and report on progress towards goals and targets and to identify where further action is required.

For example, a major deficiency in the assessment and approvals regime under the EPBC Act is the lack of ongoing post-approval monitoring to ensure that implementation conditions attached to approvals are being complied with and that any changes in the project or the environmental factors are accounted for.<sup>14</sup> The 2003 ANAO report highlighted the significant deficiencies in the Department's monitoring and enforcement regime and made a number of recommendations for improvement; however 10 years later the Department still has not implemented the majority of changes.<sup>15</sup> Without an independent body that continues to highlight such deficiencies and hold government to account, there is little incentive to make these changes.

Another failing of the Commonwealth administration of the EPBC Act is in relation to bilateral assessment agreements.

<sup>8</sup> See for example the Hawke review of the EPBC Act p230.

<sup>9</sup> See for example Hawke review p231.

<sup>10</sup> For judicial review cases see [www.austlii.edu.au](http://www.austlii.edu.au). Number of controlled action and approval decisions made can be found in the SEWPAC annual reports, e.g. 2010-2011 [http://www.environment.gov.au/about/publications/annual-report/10-11/part2\\_outcome1/part29\\_appendices.html#appendix\\_a](http://www.environment.gov.au/about/publications/annual-report/10-11/part2_outcome1/part29_appendices.html#appendix_a)

<sup>11</sup> Australian National Audit Office, *Referrals, Assessment and Approvals under the Environment Protection and Biodiversity Conservation Act 1999* (2003).

<sup>12</sup> See for example comments by the Administrative Review Council to the Hawke review p255.

<sup>13</sup> See comments from Dr Chris McGrath, Hawke review p256, regarding the value of review of decisions.

<sup>14</sup> Under s134(3) of the EPBC Act, the Minister has the discretion to attach conditions requiring periodic environmental audits, environmental monitoring or implementation of a plan for managing the environmental impacts of a proposal.

<sup>15</sup> Australian National Audit Office (2003) *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, p85–99.

Current environmental impact assessment procedures in most States and Territories fall far short of the standards required by the EPBC Act, however the Commonwealth Government has accredited these processes as being adequate in every State and Territory through bilateral assessment agreements.

An independent review body would highlight these administrative failures and make the Government accountable for their improvement and delivery. Public reporting on the Commonwealth's actions in the environment sphere would enhance transparency and accountability.

## 2. 4 To improve the accountability of State Governments when carrying out functions under the EPBC Act

A critical function of a National Environment Commission would be to provide independent audits of State Government functions under the EPBC Act.

State governments have significant responsibilities under the EPBC Act via bilateral assessment agreements which allow a State to conduct an environmental assessment on behalf of the Commonwealth in certain situations; and regional forestry agreements (RFAs) which allow States to carry out forestry operations without the need for a project approval under the EPBC Act.

Currently, there is no real accountability for the States in fulfilling these responsibilities, and no agency capable of holding them to account. A National Environment Commission would be the independent body we need.

The obligation of a State under an assessment bilateral agreement is to assess the impact of a development on nationally significant environmental matters as if it were the Commonwealth, subject to all the requirements under the EPBC Act. However there is no public reporting on whether States are properly implementing EPBC Act requirements when undertaking environmental assessments under bilateral agreements. EDO analysis in each State and Territory has revealed that no State or Territory currently has standards that meet those required under the EPBC Act.<sup>16</sup> Indeed a recent Senate inquiry found that 'there is insufficient monitoring and audit of the implementation of agreements so it is impossible for the Commonwealth to know whether agreements are being complied with'.<sup>17</sup>

If greater reliance is to be placed on bilateral assessment agreements in the future it will be critical to ensure States are properly implementing the requirements of the EPBC Act so that standards are maintained and protection of nationally significant environmental issues is not weakened.

Similarly, review and monitoring of the implementation of RFAs is completely inadequate. The Hawke review found that there has been a complete failure to monitor and review RFA implementation in all States (apart from Tasmania where the minimum statutory requirement of 5 yearly reviews have been conducted).<sup>18</sup> In the EDO's experience, inadequate monitoring regimes means non-compliances often go unreported and are not penalised or rectified. The Hawke review recommended a nationally consistent and independent system of auditing.<sup>19</sup>

The Commonwealth Environment Department is not in a position to conduct an independent assessment of State performance under bilateral agreements or RFAs, as the Department is responsible for negotiating the agreements with each State and working with them to implement them and are therefore cannot provide a genuinely independent review of their effectiveness. An independent body with expertise in the implementation of the EPBC Act is required to conduct these audits.

<sup>16</sup> See EDO submission to the EPBC (Retaining Federal Powers) Bill, January 2013 [www.edo.org.au/policy/ANEDO-Submission-EPBC-Retaining-Federal-Approval-Powers-Bill-2012.pdf](http://www.edo.org.au/policy/ANEDO-Submission-EPBC-Retaining-Federal-Approval-Powers-Bill-2012.pdf)

<sup>17</sup> Professor Lee Godden, *Answers to questions on notice*, 15 February 2013, pp 4–5 in Environment and Communications Legislation Senate Committee, March 2013 Report, p24, < [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=ec\\_ctte/completed\\_inquiries/2010-13/epbc\\_federal\\_powers/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=ec_ctte/completed_inquiries/2010-13/epbc_federal_powers/report/index.htm) >

<sup>18</sup> Hawke Review, p198.

<sup>19</sup> Hawke Review, p198.

### 3 The Hawke Review and other recent developments

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One of the core elements of the package of reforms proposed by the Hawke Review was the creation of a National Environment Commission. The recommendation emerged in response to concern over the quality and independence of decision-making under the EPBC Act.<sup>20</sup>

The review considered three possible models for the role and functions of the Commission that could be adopted.

1. Providing environmental data and information to support advice and decision-making under the EPBC Act.
2. Providing advice to support decision-making under the EPBC Act and for quality assurance.
3. Policy development and the decision-making functions for the environmental impact assessment and approvals processes under the EPBC Act.<sup>21</sup>

The Review concluded that the primary objective of the Commission should be to promote the adoption of environmentally sustainable practices by providing independent scrutiny, reporting and advice. As such, the review recommended a combination of the first and second options as the preferred model for the role and functions of the Commission.

The governance arrangements proposed for the independent National Environment Commission were that the Commissioner would be a statutory office holder, appointed by the Environment Minister under the EPBC Act, supported by deputy Commissioners and serviced by the Government.<sup>22</sup>

The Government in its formal response to the review in August 2011, however, declined to establish a National Environment Commission, noting that it had agreed to other initiatives to increase transparency and accountability. Specifically, the Government noted that broader issues of sustainability could be referred to the Productivity Commission and that the EPBC Act already confers powers on the Minister to convene an inquiry where statutory independence is required.<sup>23</sup>

In October 2012, the Commonwealth Government established the National Sustainability Council as an ‘independent, expert body to provide advice on sustainability issues’. The Government states that the Council’s role is to provide two-yearly reports to the Government on a range of sustainability indicators, highlighting key trends and emerging issues for policy and decision makers at various levels. The Council will also provide interim, targeted advice on sustainability issues at the request of the Commonwealth Environment Minister, and advice on potential improvements to the sustainability indicators over time.<sup>24</sup>

There are a number of problems with the Government’s response to the National Environment Commission proposal:

- The Productivity Commission is primarily concerned with microeconomic reform. Its main function is to ‘hold inquiries and report to the Minister about matters relating to industry, industry development and productivity’.<sup>25</sup> It does not have the expertise or mandate to investigate the broad range of environment issues that an environment commission should investigate.
- The power under s107 of the EPBC Act to convene an inquiry depends on the Government of the day requesting an investigation into its activity – a situation which is unlikely to occur for any issue where the Government may be criticised. This is evidenced by the fact that the power has never been used, although there have been many instances over the last 13 years where an independent inquiry would have been warranted.
- The National Sustainability Council has no legal basis and has a very limited role in comparison with what an

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<sup>20</sup> Hawke Review, p329.

<sup>21</sup> Hawke Review, pp332-333.

<sup>22</sup> Hawke Review, p335.

<sup>23</sup> Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2011, p114.

<sup>24</sup> <http://www.environment.gov.au/sustainability/measuring/>

<sup>25</sup> *Productivity Commission Act 1998* s.6.

environment commission could achieve. Further it is not truly independent of government as it responds to government requests and priorities rather than its own independent priorities.

- None of the alternatives mentioned above come close to covering the scope that a National Environment Commission could achieve.

The establishment of an independent review and inquiry body would constitute a significant means of ensuring the rigour, transparency and accountability of decision-making and more robust administration of Commonwealth environmental laws.

The Environment and Communications Legislation Senate Committee recently recommended that the Commonwealth Government reconsider the appointment of a National Environment Commissioner and the creation of a National Environment Commission.<sup>26</sup>

Many other jurisdictions have established an environment commission or similar, with great success. In particular the New Zealand Environment Commissioner and the Hungarian Commissioner for Future Generations provide excellent examples of what can be achieved through this kind of body. A summary of similar organisations in other jurisdictions is at Appendix 1.

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<sup>26</sup> Environment and Communications Legislation Senate Committee, March 2013 Report p28, <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=ec\\_ctte/completed\\_inquiries/2010-13/epbc\\_federal\\_powers/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/completed_inquiries/2010-13/epbc_federal_powers/report/index.htm)>

## 4 Proposed role and functions of a National Environmental Commissioner

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As noted above, the purpose of this paper is to demonstrate the need for a National Environment Commission rather than advocate for a definitive model. The model below is included as a suggestion of how a Commission could operate to meet the needs set out above, but there are other functions that a Commission could hold that would also provide benefits.

Although a Commission of the type we propose here would have to be properly resourced to meet its core functions, it would also provide many efficiency benefits by ensuring Commonwealth and State processes were effective, that the aims of environmental legislation were being met, that standards are appropriate and being complied with, and that resources are being applied where they are of most environmental benefit.

The core objective of the National Environment Commission should be to ensure the protection of the environment, the conservation of biodiversity, and the principles of ecologically sustainable development by providing independent scrutiny, reporting and advice. Its primary focus should be activities under the EPBC Act, however as a national commission it could also provide a valuable strategic thinking and leadership role across the Commonwealth Government's environmental portfolio. In our view the most critical role for a national commission is to provide an independent review and audit of Commonwealth and State activity under the EPBC Act to ensure the objectives of the Act are being met.

With this in mind and drawing on the experiences in other jurisdictions we see three capacities as being the most beneficial under current governance arrangements:

1. review and audit;
2. future planning and Commonwealth leadership; and
3. investigation and inquiry.

The model we propose is also consistent with the Statement on Changes to Commonwealth Powers to Protect Australia's Environment proposed by the Wentworth Group<sup>27</sup>.

### 4.1 Review, monitoring and auditing activities

Systematic review, monitoring and auditing plays a critical role in good governance by advancing accountability and transparency. These mechanisms provide practical, objective, and rigorous examinations of how environmental decisions, legislation, policies and programs are managed and implemented against their objectives and targets. Three practical benefits from reviews and audits are:

1. the knowledge that decisions are to be reviewed improves individual decision-making;
2. public reporting of reviews and audits holds governments to account; and
3. recommendations flowing from reviews and audits improve future decision-making at a systemic level.

The most critical review and audit functions of a National Environment Commission would be:

- annual audits of State performance under assessment bilateral agreements against the objectives and requirements of the EPBC Act (preferably encompassed under new assessment bilateral standards contained in EPBC regulations);
- annual strategic audits of Commonwealth assessment and approval decisions and procedures against objectives of the EPBC Act (this is a strategic review of decisions, not a review of each individual decision);
- biennial audits of whether accredited plans, policies or programs, strategic impact assessments, recovery plans, etc, are achieving positive environmental outcomes; and
- annual audits of Commonwealth compliance and enforcement activities under the EPBC Act.

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<sup>27</sup> See *Statement on Changes to Commonwealth Powers to Protect Australia's Environment*, above n1.

States could be required to report annually to the National Environment Commission on their implementation of bilateral agreements as a condition of entering into the agreement with the Commonwealth. Non-compliance with the bilateral agreement could result in a requirement for the State to rectify the problem within 12 months, and then a suspension of the bilateral agreement if the State remains non-compliant after that time.

Although the ANAO can conduct audits of the EPBC Act, we think this function is better suited to a dedicated environment commission. As noted above the ANAO has only conducted one audit of the implementation of the EPBC Act, in 2003. The ANAO does not have the capacity to conduct audits at the depth and frequency needed to ensure the implementation of bilateral agreements is being regularly monitored and the EPBC Act is being properly implemented.

## 4.2 Future planning and Commonwealth leadership

In order to ensure a nationally consistent and coherent approach to biodiversity protection, it is important that the Commonwealth Government show greater leadership. Commonwealth leadership could be strengthened through a National Environment Commission that is tasked with:

- developing a national strategic environmental planning and management framework (in consultation with the States and Territories);
- undertaking research to identify strategic priorities and policy goals for national environmental protection and biodiversity conservation; and
- forecasting of the impact of current activities on future environmental protection efforts and the ongoing sustainability of resource use.

It is also critical that where the Commonwealth entrusts the States with responsibilities under the EPBC Act, the States are required to conduct those activities to the standards encompassed in the EPBC Act. Therefore there should be a requirement that:

- the Commonwealth Environment Minister seek advice from the Commission on whether a State or Territory process can be accredited as meeting assessment standards. This includes bilateral assessment agreements and any other accredited processes.

## 4.3 Investigations and inquiries

The investigation of complaints and concerns about environmental management is critical to ensuring the integrity and accountability of our national environmental protection regime. Being responsive to citizens and engaging with their empirical observations increases trust in policy implementation and government accountability. This function has proved to be extremely valuable in New Zealand under their Commissioner.

There is currently no government body in Australia that has the mandate to inquire into and provide independent reporting on issues of community environmental concern.

The Commission's functions should therefore include:

- investigating complaints/concerns about any matter which has or may have a significant impact on the environment. Investigations can be requested by any person, at the direction of the Minister, or on its own motion. The Commission would have discretion as to which community investigations warrant its attention;
- inquiring into the effectiveness of natural resource management programs and undertaking assessments of broader environmental policies (as proposed by the Hawke review).

As discussed in Appendix 1, both New Zealand's Parliamentary Commissioner for the Environment and Canada's Environment and Sustainable Development Commissioner have very broad powers to carry out inquiries.<sup>28</sup> The

<sup>28</sup> The New Zealand *Environment Act 1986* confers power on the NZ Parliamentary Commissioner to investigate 'any matter in respect of which, in the Commissioner's opinion, the environment may be or had been adversely affected' ... and 'if requested by the House of Representatives, inquiring on matters that have a significant environmental impact.' Under Canada's *Auditor-General Act 1985*, the Canadian Environment and Sustainable Development Commissioner has a mandate to 'make any examinations and inquiries that the Commissioner considers necessary...'

ACT's Commissioner for Sustainability and Environment also has significant investigative powers, as does Hungary's Commissioner for Future Generations.

As in these jurisdictions, it would be desirable for the Commissioner to have broad discretion to undertake investigations and inquiries on issues that it considered necessary.

#### 4.4 Functions not suited to a National Environment Commission

Our focus is on a National Environment Commission that can provide independent scrutiny of the performance and effectiveness of activities under the EPBC Act, with a view to improving Commonwealth and State implementation of the EPBC Act. There are a number of tasks that are incompatible with this role, as they would compromise the independence of the Commission. In our view the Commission should not have any involvement in policy development or advice to the Minister on individual assessment decisions, or compliance and enforcement of individual projects, as this would reduce the independence and objectivity of the Commission and result in a conflict of interest when providing audit and review functions.

Further there are roles which, although they do not conflict with the review and audit functions of the Commission, may weaken the focus of the Commissioner and are better suited to the Commonwealth Environment Department. For example, it is clear that assessment decisions under the EPBC Act would benefit from access to better expert scientific advice. However this function would be better served by improving the Department's processes for accessing scientific advice from experts rather than housing a multitude of experts within a Commission.

## 5 Governance arrangements for a National Environment Commission

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The National Environment Commission should be created under legislation. Its role and functions should be clearly set out in the EPBC Act.

If a separate body is to be a strong mechanism of checks and balances, such a body should be independent from the Environment Minister and the Government. Independence and the perception of independence are essential to the credibility of such an institution tasked with an oversight role.

Independence can be achieved through the creation of an independent statutory authority (as recommended by the Hawke review) or by designating the Commissioner an independent officer of the Australian Parliament. (The Federal Auditor-General is an example of a position that is an officer of the Parliament)<sup>29</sup>.

Some benefits of designating the Commissioner an officer of parliament rather than appointing a statutory officer accountable to the executive are:

- securing greater independence and impartiality both symbolically and by detaching funding arrangements from the Government;
- establishing funding arrangements for the Commissioner's office that are overseen by a parliamentary committee of the legislative;
- strengthening links between the Commissioner's office and members of the Legislative Assembly and Senate;
- creating the potential to call upon the assistance of Parliament in placing pressure on agencies and Ministers to give effect to recommendations.

As discussed below, both New Zealand and Canada have independent Environment/Sustainability Commissioners in place who are answerable to their respective Parliaments<sup>30</sup> while Hungary and Israel's Commissioners for Future Generations are also Parliamentary officers.

### Your views

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What do you think of the idea of a National Environment Commission? Does Australia need one? What would be its most important functions? We're keen to hear your views. Email us at [edovic@edo.org.au](mailto:edovic@edo.org.au) and let us know.

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<sup>29</sup> See the *Auditor-General Act 1997* (Cth).

<sup>30</sup> Canada has a Commissioner of the Environment and Sustainable Development. The position is part of the Office of the Auditor-General of Canada. See: [http://www.oag-bvg.gc.ca/internet/English/admin\\_e\\_41.html](http://www.oag-bvg.gc.ca/internet/English/admin_e_41.html) New Zealand has a Parliamentary Commissioner for the Environment. The position is an independent Officer of the New Zealand Parliament. See: <http://www.pce.parliament.nz/about-us/>

# Appendix 1

## Experiences in other jurisdictions

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The following section examines the role and functions of similar environmental oversight bodies in other jurisdictions. These bodies could provide useful insights for developing a model for Australia.

### 1 Sustainability Commissioner

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Building on the Parliamentary Environmental Commissioner model in New Zealand, but with slightly broader mandates, several jurisdictions, including two Australian jurisdictions, have established Sustainability or Sustainable Development Commissioners. In Australia, Victoria has established a Commissioner for Environmental Sustainability and the Australian Capital Territory (ACT) has created a Commissioner for Sustainability and the Environment. Canada's Commissioner of the Environment and Sustainable development provides an example outside Australia.

#### 1.1 Commissioner for Environmental Sustainability, Victoria, Australia

The Victorian Commissioner for Environmental Sustainability is established under the *Commissioner for Environmental Sustainability Act 2003 (Vic)* to advocate, audit and report on environmental sustainability.

The Commissioner's objectives are to report on matters relating to the condition of the Victoria's natural environment; encourage decision-making that facilitates ecologically sustainable development; enhance knowledge and understanding of issues relating to ecologically sustainable development and the environment; and encourage the Victorian and local governments to adopt sound environmental practices and procedures as a basis for Ecologically Sustainable Development<sup>31</sup>.

The Commissioner is responsible for:<sup>32</sup>

- preparing the State of the Environment of Victoria Report;
- conducting annual strategic audits of the implementation of the environmental management systems of Victorian Government agencies and public authorities;
- assessing the effectiveness of public education programs for ecologically sustainable development principles and practices;
- advising the Minister in relation to any matter relating to ecologically sustainable development referred to the Commissioner by the Minister.

The Commissioner's functions are supported by broad powers to do all things necessary or convenient to be done for or in connection with the performance of the Commissioner's functions to enable the Commissioner to achieve the objectives of the Commission, including making requests for assistance and information,<sup>33</sup> establishing Reference Groups<sup>34</sup> and appointing committees.<sup>35</sup>

The Victorian Commissioner's powers seem to largely lie within the realm of environmental auditing and reporting, with some scope for advice on the request of the Minister. While such reporting provides important information,

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<sup>31</sup> *Commissioner for Environmental Sustainability Act 2003 (Vic)*, s7.

<sup>32</sup> *Commissioner for Environmental Sustainability Act 2003 (Vic)*, s8.

<sup>33</sup> s9(2)(a)

<sup>34</sup> s9(2)(b)

<sup>35</sup> s9(2)(c)

data and indicators against which the operation of environmental legislation, policies and programs can be evaluated, without specific powers of review, investigation and recommendation, the Victorian model remains limited in terms of the contribution that it can make to influence environmental improvement and strategic outcomes and to holding the Victorian Government to account.

## 1. 2 Commissioner for Sustainability and Environment, ACT, Australia

The ACT Commissioner for Sustainability and the Environment is an independent statutory position established under the *Commissioner for the Environment and Sustainability Act 1993* (ACT). It was one of the first independent Commissioners for the Environment in the world and the first in Australia.<sup>36</sup> Its vision is to:

assist the community and government to undertake actions in advancing sustainability and environmental security through advocacy, independent scrutiny, reporting and advice.<sup>37</sup>

The ACT Commissioner has the following functions:

- investigating complaints about the management of the environment by the ACT Government or its agencies and issues of ecologically sustainable development in the ACT;<sup>38</sup>
- conducting investigations as directed by the Minister;<sup>39</sup>
- initiating investigations into actions of the ACT Government or its agencies where those actions would have a substantial impact on the Territory's environment;<sup>40</sup>
- producing state of the environment reports for the ACT and the 17 councils in the Australian Capital Region;<sup>41</sup> and
- making recommendations for consideration by the ACT Government and reporting on the outcomes of those recommendations in the Commission's annual report.<sup>42</sup>

The Commissioner can resolve issues through mediation and conflict resolution, and undertakes an advocacy and awareness role on sustainability and environmental issues.<sup>43</sup>

In comparison to the Victorian Commissioner, the ACT Commissioner has broad powers of investigation and recommendation and therefore greater scope to influence decision-making that facilitates ecologically sustainable development and provide greater scrutiny of government decision-making.

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<sup>36</sup> <http://www.environmentcommissioner.act.gov.au/home>

<sup>37</sup> <http://www.environmentcommissioner.act.gov.au/home>

<sup>38</sup> *Commissioner for the Environment and Sustainability Act 1993* (ACT), s12(1)(a).

<sup>39</sup> *Commissioner for the Environment and Sustainability Act 1993* (ACT), s 12(1)(b).

<sup>40</sup> *Commissioner for the Environment and Sustainability Act 1993* (ACT), s 12(1)(c).

<sup>41</sup> *Commissioner for the Environment and Sustainability Act 1993* (ACT), s 19.

<sup>42</sup> *Commissioner for the Environment and Sustainability Act 1993* (ACT), ss 19 and 20.

<sup>43</sup> [http://www.environmentcommissioner.act.gov.au/our\\_office](http://www.environmentcommissioner.act.gov.au/our_office)

## 2 Commissioner for the Environment

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Several jurisdictions have appointed Ombudsmen, sometimes called Commissioners, to provide independent scrutiny, reporting and advice on the quality of environmental management and administration. A well-established example is the New Zealand Parliamentary Commissioner for the Environment.

### 2.1 Parliamentary Commissioner for the Environment, New Zealand

#### 2.1.1 Origins

New Zealand's Parliamentary Commissioner for the Environment was established in 1986.<sup>44</sup> The origins of the Commission lay in the 1980s reform of New Zealand's environmental administration, following the country's first Environmental Performance Review by the Organisation of Economic Co-operation and Development (OECD).<sup>45</sup> The OECD review expressed concerns about the adequacy of New Zealand's environmental administration and management, including the problematic position of New Zealand's original Commission for the Environment, established in 1972 with no legislative basis and with significant potential for conflict. For example, the Commission was expected to advise the Government on environmental policy but also act as auditor and independent critic of the same government's policies and projects.<sup>46</sup>

The resulting policy debate and subsequent passing of New Zealand's *Environment Act 1986* sought to address these concerns by creating two separate agencies: the Ministry for the Environment to provide policy advice to government, and the Parliamentary Commissioner for the Environment to oversee environmental activities from a position of independence from the executive.<sup>47</sup>

The Commission is now independent of the Government, being an officer of the New Zealand Parliament and thus accountable to the national legislature. The Commission was the first office of its kind in the world. The Commissioner is appointed by the Governor-General on the recommendation of the House of Representatives for a five-year term.<sup>48</sup> The current Commissioner, Dr Jan Wright, was appointed in 2007 and has been re-appointed for a second term.

#### 2.1.2 Purpose/role

The Commissioner's purpose is to provide an independent check on the capability of the New Zealand system of environmental management and the performance of public authorities in maintaining and improving the quality of the environment. The Commission's 2012-2015 Statement of Intent records that 'when the role was established, words such as "watchdog", "environmental auditor", "Parliament's person", and "without fear or favour" were used by Members of Parliament in the debate.'<sup>49</sup>

Broadly, the office combines elements of the roles of ombudsman and auditor, and has significant investigative powers. The Commissioner, however, does not have any decision-making powers.

#### 2.1.3 Functions

The Commissioner has wide-ranging functions and powers of review, investigation, recommendation, reporting and encouragement relating to the environment. The Commissioner's functions relate to the following.

##### **Systems of agencies and processes**

With the objective of maintaining and improving the quality of the environment, the Commissioner's function is to review from time to time the system of agencies and processes established by the Government to manage the allocation, use and

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<sup>44</sup> Under the *Environment Act 1986* (New Zealand).

<sup>45</sup> Rabie, Andre, The New Zealand Parliamentary Commissioner for the Environment: a comparative perspective 1999 Acta Juridica 99

<sup>46</sup> <http://www.pce.parliament.nz/about-us/history/>. See also: Rabie, Andre (1999) The New Zealand Parliamentary Commissioner for the Environment: a comparative perspective p99. See also Sharma, P., A productive anomaly: New Zealand's Parliamentary Commissioner for the Environment, p2.

<sup>47</sup> See also: Rabie, Andre (1999) The New Zealand Parliamentary Commissioner for the Environment: a comparative perspective p99. See also Sharma, P., A productive anomaly: New Zealand's Parliamentary Commissioner for the Environment, p2.

<sup>48</sup> The Parliamentary Commissioner for the Environment is one of three independent Officers of the Parliament. The other two are the Office of the Controller and Auditor-General and the Office of the Ombudsman.

<sup>49</sup> Parliamentary Commissioner for the Environment (2012) *Statement of Intent 2012-2015*.

preservation of natural and physical resources, and report the results of such a review to the House of Representatives and to such other bodies or persons as he/she may consider appropriate.<sup>50</sup>

### **Environmental planning and environment**

Where the Commissioner considers it necessary, investigate the effectiveness of environmental planning and management carried out by public authorities and advise them on remedial action which he/she considers desirable.<sup>51</sup>

### **Effects on the Environment**

With respect to effects on the environment, the Commissioner's functions are to:

- investigate any matter where, in the Commissioner's opinion, the environment may be or has been adversely affected, advise on preventative measures or remedial action, and report to the House of Representatives;<sup>52</sup>
- report, on a request from the House or any select committee, on any petition, Bill, or any other matter which may have a significant effect on the environment;<sup>53</sup>
- inquire, on the direction of the House, into any matter that has had or may have a substantial and damaging effect on the environment and report the results of the inquiry to the House;<sup>54</sup> and
- encourage preventative measures and remedial actions to protect the environment.<sup>55</sup>

The reviews and investigations carried out by the Commission originate mainly from the Commissioner's discretion or as a result of citizen or civil association complaints.<sup>56</sup>

### **Collection and dissemination of information**

The Commissioner must undertake and encourage the collection and dissemination of information about the environment.<sup>57</sup>

## **2. 1. 4 Powers**

The Commissioner's functions are supported by far-reaching legislative powers to obtain information,<sup>58</sup> to be heard in proceedings<sup>59</sup> and for privilege from civil or criminal proceedings to be accorded to the Commissioner's activities performed under the Environment Act, unless it is shown that he/she has acted in bad faith.<sup>60</sup>

## **2. 1. 5 Proposed new functions**

There have been proposals for the Commissioner to undertake further responsibilities such as state of the environment reporting at a national level.<sup>61</sup>

There has been some concern, however, that ascribing such a major task as environmental reporting on the Commission could, under limited and diminishing resources, compromise the Commission's ability to conduct major investigations and develop creative responses to significant environmental problems.<sup>62</sup>

Further, there have also been and still are proposals to rename the Commission into the Office for Sustainable Development, as

<sup>50</sup> *Environment Act 1986 (New Zealand)*, Section 16(1)(a).

<sup>51</sup> *Environment Act 1986 (New Zealand)*, Section 16(1)(b).

<sup>52</sup> *Environment Act 1986 (New Zealand)*, Section 16(1)(c).

<sup>53</sup> *Environment Act 1986 (New Zealand)*, Section 16(1)(d).

<sup>54</sup> *Environment Act 1986 (New Zealand)*, Section 16(1)(e).

<sup>55</sup> *Environment Act 1986 (New Zealand)*, Section 16(1)(g).

<sup>56</sup> 2012-2015 Statement of Intent, p1. < <http://www.pce.parliament.nz/publications/all-publications/statement-of-intent-2012-2015/>>

<sup>57</sup> *Environment Act 1986 (New Zealand)*, s16(1)(f).

<sup>58</sup> *Environment Act 1986 (New Zealand)*, s19.

<sup>59</sup> *Environment Act 1986 (New Zealand)*, s21.

<sup>60</sup> *Environment Act 1986 (New Zealand)*, s22A.

<sup>61</sup> 2011-2014 Statement of intent p 1.

<sup>62</sup> Sharma, P., A productive anomaly: New Zealand's Parliamentary Commissioner for the Environment, pp17-18.

the idea of a body that can mainstream sustainability is gaining support.

### 2. 1. 6 Strengths and weaknesses

The main strength of the New Zealand model is that being a parliamentary officer, the Commissioner has a significant degree of independence, which is essential to the credibility of such an agency as the Commission which is charged with scrutinising the activities of the Government.

Another strength of the New Zealand model is the emphasis in the Commission's mandate on the Commissioner's discretion. The mandate provides considerable scope for the Commission to set its own work plan and priorities. For example, under the creating Act, the Commissioner has the power to investigate any matter where in the Commissioner's opinion the environment may be or has been adversely affected.<sup>63</sup> Though this broad discretion gives the Commissioner freedom to choose his/her priorities without interference (thus forming an important part of the Commission's independence) and allows the Commissioner to take a proactive role in maintaining and improving the environment, it is also a weakness as it means that a great deal depends on the capacity and personality of the individual who is appointed to the role.<sup>64</sup> Each of the three Commissioners to date has been very different in their style and focus.<sup>65</sup> The current Commissioner however observes this to be a strong point, allowing 'the role to adjust with the times, and for the emphases to change'.<sup>66</sup>

## 2. 2 Commissioner for Environment and Sustainable Development, Canada

### 2. 2. 1 Origins

The establishment of the Canadian Commissioner for Environment and Sustainable Development was preceded by a coordinated and wide public campaign lead by a coalition of twenty-eight NGOs. The original proposal for an independent Commissioner, as advocated in the coalition's 'Greenprint for Canada' in 1989, focused mainly on environmental protection. The idea was eventually taken up but the mandate was expanded to include a broader remit for sustainable development when the Commissioner's office was established in 1995.<sup>67</sup>

The position of Commissioner for Environment and Sustainable Development is part of the Office of the Auditor-General of Canada.<sup>68</sup> Appointed by the Auditor-General, Canada's Commissioner for Environment and Sustainable Development is an Assistant Auditor-General, who with the support of a group of auditors specialised in environment and sustainable development, is responsible for assisting the Auditor-General in performing the duties of the Auditor-General that relate to the environment and sustainable development.<sup>69</sup>

Broadly, the Commissioner provides the Canadian Parliament with objective, independent analysis and recommendations on the Federal Government's efforts to protect the environment and foster sustainable development.<sup>70</sup>

### 2. 2. 2 Role and functions

The role of the Commissioner under the *Auditor-General Act 1985* is to:<sup>71</sup>

- assist the Auditor-General carry out environmental audit responsibilities;
- monitor and report on the progress of Federal Government departments towards meeting their sustainable development objectives;
- oversee the environmental petitions process (a process by which the people of Canada can bring their concerns about environmental issues to the attention of Federal Ministers and Departments and obtain a formal response); and

<sup>63</sup> *Environment Act 1986 (New Zealand)*, s16(1)(c)(i).

<sup>64</sup> Sharma, p17.

<sup>65</sup> Marieke hilhorst, Voice for the voiceless: PCE celebrates 25 years, April 2011, Public Sector, p18

<sup>66</sup> Marieke hilhorst, Voice for the voiceless: PCE celebrates 25 years, April 2011, Public Sector, p19.

<sup>67</sup> Tim Williams, 'Sustainable Development in the Federal Government: the Commissioner of the Environment and Sustainable Development', 2005 online: Library of Parliament. <<http://www.parl.gc.ca/Content/LOP/researchpublications/prb0512-e.html>>

<sup>68</sup> Office of the Auditor-General of Canada <[http://www.oag-bvg.gc.ca/internet/English/cesd\\_fs\\_e\\_921.html](http://www.oag-bvg.gc.ca/internet/English/cesd_fs_e_921.html)>

<sup>69</sup> *Auditor-General Act, R.S.C. 1985, c.A-17, s.15(1)* (Canada).

<sup>70</sup> Office of the Auditor-General of Canada <[http://www.oag-bvg.gc.ca/internet/English/cesd\\_fs\\_e\\_921.html](http://www.oag-bvg.gc.ca/internet/English/cesd_fs_e_921.html)>

<sup>71</sup> *Auditor-General Act, R.S.C.1985, c.A-17,ss21-23* (Canada).

- report annually to parliament concerning anything the Commissioner considers should be brought to the attention of parliament in relation to environmental and other aspects of sustainable development.

In addition, under the *Federal Sustainable Development Act 2008* and the *Kyoto Protocol Implementation Act 2007*, respectively, the Commissioner has responsibility to review and report on the Federal Government's progress in implementing the Federal Sustainable Development Strategy and its obligations under the Kyoto Protocol.

At an international level, the Commissioner plays an active role in the Working Group on Environmental Auditing by helping to produce guidelines and reports and by helping to develop and implement training for environmental auditors.

A panel of advisers advises the Commissioner on his/her work on behalf of the Auditor-General and on environmental and sustainable development matters.

### 2. 2. 3 Strengths and weaknesses

Though the Commission's actual mandate is not overly broad, it does include sustainable development, as well as environmental protection. Similar to the New Zealand experience, a great deal depends on the individual selected for the position, as the Commissioner has discretion to undertake studies and produce reports on issues that he/she considers necessary. A strong Commissioner has the scope to produce high quality investigations and reports, however as an agent of the Auditor-General, is not free to comment or provide advice on policy.<sup>72</sup>

## 3 Ombudsman/Commissioner for future generations

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An increasing number of jurisdictions around the world are instituting specific national institutions with special mandates to protect the environment for future generations. Guardians or Commissioners for the representation of future generations have been set up in Hungary, Israel, Finland and Switzerland, to name a few.

The important difference between the models discussed in parts 1 and 2 of the appendix and the models discussed in this section is that although the mandate of Guardians/Commissioners for Future Generations does include environmental concerns, they are expressed in terms of protecting future generations, binding the position directly to future generations rather than the secondary or inferential links which are found in the above positions and their mandates. Future generations are at the forefront of the position's mandated powers.

There are many variations of Guardians/Commissioners but they generally share the following characteristics:

- they serve an evaluative and advisory function, reviewing for example, proposed legislation, government policies or projects to make sure they meet the needs of particular groups;
- they often produce reports on their work and sometimes serve as liaisons or mediators between the government and individuals or groups;
- they are, on occasion, given standing to sue; and
- they provide an official and active advocacy role for long-term interests.

### 3. 1 Commissioner for Future Generations (Ombudsman), Hungary

The Hungarian Parliamentary Commissioner for Future Generations was created in 2007, as one of Hungary's four Parliamentary Ombudsman, principally tasked to ensure the protection of the constitutional right to a healthy environment<sup>73</sup> (with the others addressing civil rights, data protection and freedom of information, and the rights of national and ethnic minorities). The Commission was established through a grassroots initiative by a civil society organisation called Vedegylet (Protect the Future) and has attracted a great deal of interest since its establishment, as a progressive innovation for institutional representation of

<sup>72</sup> Tim Williams, 'Sustainable Development in the Federal Government: the Commissioner of the Environment and Sustainable Development', 2005 online: Library of Parliament. <<http://www.parl.gc.ca/Content/LOP/researchpublications/prb0512-e.html>>

<sup>73</sup> Act LIX of 1993 on the parliamentary commissioner for Civil Rights (Ombudsman) Article 27/A <[http://jno.hu/en/?menu=policy&doc=LIX\\_of\\_1993](http://jno.hu/en/?menu=policy&doc=LIX_of_1993)>

the rights of future generations.

However in the interests of ensuring the effective, coherent and most comprehensive protection of fundamental rights, in 2012 Hungary established a new centralised Ombudsman system with the Commissioner for Fundamental Rights replacing the Parliamentary Commissioner for Future Generations, the Parliamentary Commissioner for Civil Rights, and the Parliamentary Commissioner for National and Ethnic Minority Rights.<sup>74</sup>

The mandate of the Commissioner for Fundamental Rights requires the Commissioner, in the course of his/her activities, to pay special attention to the interests of future generations, in particular, the fundamental responsibility of all Hungarians (as stated in the new Basic Law of Hungary) to protect, maintain and preserve natural resources, forests and the reserves of water, biological diversity, as well as cultural assets (all of which form the nation's common heritage) for future generations.<sup>75</sup>

The new Basic Law also contains further foundations for the protection of the right to a healthy environment as contained in the previous law:

(1) Hungary shall recognise and enforce the right of every person to a healthy environment.<sup>76</sup>

Under the new single Ombudsman system the former Parliamentary Commissioner for Future Generations has become the Deputy Commissioner for Fundamental Rights responsible for the protection of the interests of future generations.<sup>77</sup>

The Deputy Commissioner defends the interests of future generations and, as stated in the establishing Act, shall monitor the enforcement of the interests of future generations, and:

- shall regularly inform the Commissioner for Fundamental Rights of the danger of infringement of the rights affecting a larger group or natural persons;
- may propose that the Commissioner for Fundamental Rights institute proceedings
- shall participate in the inquiries of the Commissioner for Fundamental Rights; and
- may propose that the Commissioner for Fundamental Rights turn to the Constitutional Court.<sup>78</sup>

The Deputy Commissioner's role and functions include:

- scrutinising government policy;
- designing government policy, including the National Strategy for Sustainable Development;
- advising on government policy and making policy recommendations;
- undertaking studies or research projects to support decisions and recommendations;
- stakeholder engagement regarding specific problems; and
- capacity building with civil society organisations.

The Deputy Commissioner essentially has the same broad competences of review, investigation, policy advocacy and research as the former Parliamentary Commissioner for Future Generations, though with limited authority and powers as the position is now supervised by the Commissioner for Fundamental Rights.

Unlike the former Parliamentary Commissioner for Future Generations, however, the mandate of the Deputy Commissioner for Fundamental Rights responsible for the protection of the rights of future generations is broader in scope than protection of the environment for future generations to any issue relevant to the interests of future generations.

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<sup>74</sup> Act CXI of 2011 on the Commissioner for Fundamental Rights, section 45(1).

<sup>75</sup> Act CXI of 2011 on the Commissioner for Fundamental Rights, section 1; Basic Law of Hungary, Article P.

<sup>76</sup> Basic Law of Hungary, Article XXI.

<sup>77</sup> Act CXI of 2011 on the Commissioner for Fundamental Rights, section 45(3); Basic Law of Hungary, Article 15.

<sup>78</sup> Act CXI of 2011 on the Commissioner for Fundamental Rights, section 3(1).

### 3.1.1 Strengths and weaknesses

The original Commissioner's mandate was focused on the relationship between the environment and future generations, and thus placed the environment at the forefront of the Commission's work to protect the rights of future generations. Although the mandate of the new Deputy Commissioner for Fundamental Rights is not exclusively focused on the environment (but extends to any matter relevant to future generations) there is still a strong focus on protecting the environment for future generations.

As with the New Zealand Commission, being a Parliamentary body, the commission has a significant degree of independence which is of critical importance to the success of its role.

## 3.2 Commissioner for Future Generations, Israel

In 2001 the Knesset – Israel's Parliament – established a Commission on Future Generations with a Commissioner for Future Generations.

The Israeli Commission for Future Generations was a significant initiative. However, following the end of the first Commissioner's five-year term in 2006 and a change of government, no new Commissioner was appointed. At the end of 2011, the Knesset terminated the Commission in its original design. As with the original Hungarian model, it nevertheless provides an important example in the larger debate regarding protecting the rights of future generations.

In comparison to Hungary's original Commissioner for Future Generations, where the Commissioner's mandate was limited to protection of the environment and cultural heritage, the Israeli Commissioner's mandate was broad in scope, overseeing twelve environmental and social policy areas relevant to future generations including natural resources, education, health, technology, law, development, demography and any other matter of special concern to future generations as determined by the Israeli Constitution, law and Justice Committee. It represented a more holistic protection of living conditions for future generations.

The Commission had the authority to:

- give opinions regarding Bills, secondary legislation and regulations that were of concern to future generations;
- provide Parliament with recommendations on any matter the Commissioner considered to be of importance to the rights of future generations; and
- provide the members of the Parliament with advice on matters that are of special interest regarding the rights of future generations.

The Commission is probably best described as an advisory and consultative body, restricted to the legislative work of the Israeli parliament, with little authority to propose Bills or conduct inquiries. Notwithstanding this primarily consultative and somewhat reactive role, the Israeli Commission for Future Generations can be regarded as a bold first step of jurisdictions which have made the representation of the interests of future generations a priority.