



**environmental defender's office
new south wales**

Submission on A new Direction for Local Government Position Paper

9th March 2007

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- the importance of public participation in environmental decision making in achieving environmental protection
- the importance of fostering close links with the community
- that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform
- the importance of indigenous involvement in protection of the environment.

Submitted to:

Deputy Director General
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A New Direction for Local Government- A Position Paper

The Environmental Defender's Office (EDO) welcomes the opportunity to provide comment on the Department of Local Government's Position Paper: A New Direction for Local Government ('Position Paper'), October 2006. The EDO is a community legal centre that specialises in public interest environmental law. Its functions include legal advice and representation, law reform and policy work, scientific advice and community legal education.

The Position Paper outlines 7 elements for a new direction. These relate to: good governance, representative democracy and community support, sound policy, sufficient resources, meaningful planning, connectedness, and strong leadership. These elements have relevance to the work EDO does on environmental and planning issues with local communities in NSW.

The EDO maintains a strong commitment to:

- transparency and accountability in governance;
- promoting public participation in local government activities, in particular relating to environmental and planning issues; and
- promoting the substantive incorporation of Ecologically Sustainable Development (ESD) principles into every aspect of government decision-making.

This submission provides comments on the compatibility of Department of Local Government's approach with these principles. The EDO believes that to realise the goal of "sustainable communities," an open system of local government, that encourages and embraces community participation is crucial.

Furthermore, every decision of local government should demonstrate environmentally sustainable outcomes and a real consideration of economic, social and environmental issues.

Our specific comments relate to:

1. Ecologically Sustainable Development (ESD)

2. Good Governance

2.1 Enforcement of the law

2.2 Awareness of responsibilities

2.3 Access to information

3. Representative democracy and community support

4. Meaningful planning and reporting

1. Ecologically Sustainable Development (ESD)

A key concern of the EDO is that the Position Paper does not accurately reflect obligations to implement the principles of ecologically sustainable development.

The EDO welcomes the Discussion Paper's statement that the aim of local government is to create sustainable communities. However, the EDO submits that local government should be fundamentally guided by principles of ESD in achieving this goal. This is a requirement of international, federal and NSW law.

The generally accepted definition of ESD is:

development that meets the needs of the present without compromising the ability of future generations to meet their own needs. **[1]**

The World Summit for Sustainable Development **[2]** has affirmed that the three pillars of sustainable development are economic development, social development and environmental protection. Australia has accepted ESD through the *National Strategy for Ecologically Sustainable Development 1992*. As a

result, NSW duly incorporated ESD principles into legislation through the *Protection of the Environment Administration Act 1991*. [3] Local Councils are bound by ESD principles through the *Local Government Act 1993*.

Section 7(e) of the *Local Government Act 1993* states that one of the purposes of the Act is to require councils, councillors and council employees to have regard to the principles of ecologically sustainable development in carrying out their responsibilities. Furthermore, section 8 states that part of a Council's charter is:

to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development.

ESD should therefore be at the forefront of decision-making and planning for local government. Notwithstanding this fact, ESD is not mentioned anywhere in the Position Paper. The alternative term "sustainable communities" is used. The EDO submits that ESD should form the backbone of the new vision for local government.

ESD calls for the integration of all three elements- environment, economy and social- into all government decision-making structures. Despite this, the Position Paper indicates that a sustainable community has *four* aspects; social cohesion, a functional economy, a robust environment and sound infrastructure. This demonstrates a misunderstanding of ESD principles. ESD only has *three* branches; economic, environment and social considerations. 'Sound infrastructure' falls within the social and economic realms. Hence, these considerations appear to be given a double weighting in the Position Paper. This is inconsistent with the requirements of ESD, which are to ensure the equitable integration of all three constituent aspects. The environment is not afforded this extra consideration. This should be clarified and the Department of Local Government should reinforce a commitment to ESD - as commonly defined - and emphasise to councils that the achievement of ESD at a local level is their overarching goal.

2. Good Governance

The EDO supports the Department's contention that good governance encapsulates transparency and accountability. These are the essential hallmarks of a democratic society and they help to instil public confidence in the system. However, this principled recognition needs to translate into tangible outcomes and procedures. The EDO identifies three areas where governance could be improved:

- enforcement of the law;
- awareness of responsibilities; and
- access to information.

2.1. Enforcement of the law

One of the most common complaints received by the EDO on our legal advice line is the lack of enforcement action taken by councils in relation to breaches of development conditions, pollution incidents and breaches of the *Environment Planning and Assessment Act 1979*. Clients are often forced to take action themselves, which involves the use of considerable financial resources and time.

The NSW Ombudsman has identified common enforcement complaints against councils. These are:

- failing to record complaints about unlawful activity;
- delaying or not investigating complaints against unlawful activity;
- failing to take appropriate enforcement action despite clear evidence of unlawful activity;
- not informing complainants of the outcome of investigations and the reasons for decisions on enforcement action; and
- not responding consistently to similar situations. [4]

Any decision to proceed with enforcement action is obviously discretionary. However, the Department of Local Government should set clear guidelines for councils to follow that detail the circumstances where it is appropriate, or indeed necessary, to exercise their enforcement powers.

Under section 6(2) of the *Protection of the Environment Operations Act 1997*, local councils are the appropriate regulatory authority for pollution in relation to non-scheduled activities. Notwithstanding this, the EDO has experience with local councils claiming they have no jurisdiction over pollution offences and that the Environment Protection Authority or DEC is the only appropriate regulatory body. The EDO submits that breaches of development conditions that lead to environmental degradation, or pollution into the air, water or soil, should be rigorously enforced by councils. This is in keeping with the quest for "sustainable communities" and also with the accountability aspect of good governance. Councils need to be seen to be enforcing the law in their local area and indeed they are elected to do so.

The EDO has consistently referred community members to the Department of Local Government and/or the Ombudsman in relation to failures by various councils to take action against persons who breach the law or engage in environmentally-damaging activities. It is therefore surprising that enforcement is not mentioned in the position paper as an area in need of improvement. The EDO submits that the Ombudsman's *Enforcement Guidelines for Councils 2002* should be applied by all councils to ensure that there is substantial compliance with the law and remediation of environmentally deleterious activities.

2.2. Awareness of responsibilities

The EDO has fielded numerous complaints relating to councillors and Council staff who misunderstand or are unaware of their responsibilities. The EDO is therefore supportive of leadership training for councillors, mayors and general managers to assist them in clarifying their roles (as proposed in the Position paper pages 15 and 24). This will not only improve compliance with the *Local Government Act*, but lead to better governance and open decision-making.

2.3. Access to information

The EDO and its clients have often had difficulty accessing information from Councils, notwithstanding the legal obligations contained in the *Local Government Act 1993* and the *Freedom of Information Act 1989*. Furthermore, there are instances of councils charging exorbitant fees for the copying of documents, which essentially makes them inaccessible. Many councils perceive requests for information from the community as an unnecessary administrative burden or a time intensive exercise rather than a legal obligation. This thwarts attempts by the community to participate in an open system of local government. Further, in this information age it is important that council information is interactive and internet accessible. A common problem encountered by the EDO and its clients is an inability to access council information, LEPs and zoning maps on the internet to determine the zoning and regulations that are applicable to a parcel of land. This leads to considerable delay and community dissatisfaction. The Department of Local Government should accessibility, openness and compliance with the law relating to access to information.

Even putting aside the legal obligations, the EDO's view is that providing quick and easy access to environmental information has many advantages for councils. It makes it easier for the public to participate in administrative processes, it helps promote more rational, informed decision-making and it fosters transparent and accountable decision-making. [5] This issue is an important component of reforming local government services.

3. Representative democracy and community support

The EDO welcomes the Department of Local Government's recognition that community engagement is a major area for improvement for local government. The Department has recognised that there is a consistent theme of councils having a patchy understanding of community engagement. Community members seeking advice from the EDO have highlighted this as an issue and a central source of community dissatisfaction. Indeed, EDO is concerned by recent trends seeming to signal a move away from an environment where communities can play an active role in environmental assessment and in local government generally. As Judges of the Land and Environment Court and others have long noted, public participation is central to proper and effective environmental assessment and sound environmental outcomes. In short, it is well-established that public participation has two fundamental benefits:

- it ensures the "buy-in" of local communities.
- it promotes better decision-making, with local communities best placed to provide accurate information on the proposal. [6]

For an organisation charged with acting in the public interest, community participation is therefore paramount.

There must also be recognition that public participation assumes a variety of forms. It can occur through education, information dissemination, advisory or review boards, public advocacy, public hearings and submissions. [7] Councils should be compelled to provide as many avenues for community input as is practicable. Furthermore, there are many known benefits for council in encouraging community participation. Public participation assists councils in understanding and identifying public interest concerns when formulating policy or assessing developments. There is also a view that greater input may help councils better integrate social, environmental and economic concerns in their decisions as required by ESD. [8] The Position Paper states that the Department of Local Government is in the process of developing a toolkit for councils to assist them in engaging with the community. These guidelines should ensure that participation is genuine, comprehensive, timely, and includes capacity building initiatives to assist all members of the community to engage effectively.

Finally, the EDO is aware that the Department of Local Government is conducting several regional, government and industry workshops to discuss the key issues in the Position Paper. However, we were informed by the Department that there are to be no community workshops. This is disappointing considering

the Department of Local Government's ostensible commitment to representative democracy and community support. The EDO believes that the community, as the most important stakeholder, needs to be involved in this strategic planning process and it has the ability to provide useful guidance to the Department in its quest to achieve "sustainable communities." Furthermore, this exclusion of the community conflicts with the Department's professed adherence to principles of accountability and transparency.

4. Meaningful strategic planning and reporting

The EDO welcomes the Department's proposal to introduce mandatory requirements on councils for a long-term strategic plan. Community Strategic Plans outlining desired social, economic, environmental and governance outcomes are also supported consistent with a commitment to implementing ESD and effective community participation. However, these new requirements for strategic planning should be combined with amendments to more effectively and comprehensively report of performance and outcomes of planning initiatives. Annual Reports are the primary references tools available to the community to examine councils' performance for each year. The EDO submits that there should be mandatory Triple Bottom Line (TBL) reporting in annual reports of Councils. Put simply, the concept of TBL relates to the publication of economic, environmental and social information in an integrated manner to reflect the activities of organisations across these three branches of ESD. This is in keeping with a transparent and open local government system and also consistent with the requirements of ESD. This need to account for a "triple bottom line" has been affirmed in the *United Nations Framework Convention on Climate Change* and adopted by Australia in the National Strategy for Ecologically Sustainable Development 1992.

TBL enables the community to examine the effectiveness of council programs and its general performance in realising its goals in these three areas. Group 100, an association of Australia's senior finance executives from the nation's business enterprises, sets out the key qualities and characteristics of effective TBL reporting. [9] These are:

- *Full disclosure* - information should provide an open explanation of specific actions undertaken and performance outcomes;
- *Reliability* - information should be accurate and represent a true reflection of the activities of councils;
- *Usefulness* - the information should be relevant to the community;
- *Consistency of presentation* - there should be consistency of presentation of data and information;
- *Reproducible* - councils must ensure they have the capacity to reproduce data and information in future reporting periods; and
- *Auditability* - all statements and data within the report need to be readily verifiable.

The EDO supports these elements of TBL reporting and submits that the Department of Local Government should introduce mandatory TBL reporting that encapsulates these qualities.

In summary, the Position Paper sets out some promising initiatives and represents a paradigm shift towards a more sustainable, transparent and accountable local government system for NSW. However, there is scope for improvement in relation to community engagement, understanding of responsibilities, greater enforcement of the law, open access to council information and Triple Bottom Line reporting.

Finally, the strategic planning process by the Department of Local Government needs to set down prescriptive requirements for councils that will assist in achieving an accessible, robust and collaborative local government system. Principles of ESD need to inform this process and all council decisions to ensure that "sustainable communities" are realised.

The EDO is happy to participate in future strategic processes regarding the future of local government.

Yours faithfully,
Environmental Defender's Office

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Policy Director

References

1. World Commission on Environment and Development, *Our Common Future* (1987) at 8.2002.
2. Section 6(2): "Ecologically Sustainable Development requires the effective integration of economic and *environmental* considerations in decision-making processes."
3. NSW Ombudsman, *Enforcement Guidelines for Councils* (June 2002) at iii.
4. JR Robinson *et al*, "Public access to environmental information: a means to what end?" (1996) 8(1) *Journal of Environmental Law* at 19.
5. See previous EDO submission on the *Environmental Planning and Assessment (Infrastructure and Other Planning Reform) Bill 2005* found at <http://www.edo.org.au/edonsw/site/policy/epandarefrombill050713.php> (13 February 2007).
6. B. J. Richardson and J. Razzaque, "Public Participation in Environmental Decision-Making" In Richardson and Wood (eds) *Environmental Law for Sustainability* (2006) at 165.
7. *Ibid* at 166.
8. Group 100, *Sustainability: A guide to Triple Bottom Line Reporting*, (2003) at 19.

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Warning: include() [function.include]: Failed opening 'http://www.edo.org.au/edonsw/site/policy/sub_bottom.shtml' for inclusion (include_path='.:usr/lib/php:/usr/local/lib/php') in /home/e.doorg/public_html/edonsw/site/policy/new_direction070309.php on line 159