Humane Society International Ltd
ABN 63 510 927 032

PO Box 439, Avalon NSW 2107, Australia
Telephone +61 2 9973 1728
Facsimile +61 2 9973 1729
Email admin@hsi.org.au

www.hsi.org.au

Submission in response to the Developing a Biodiversity Act for South Australia Discussion Paper

1 March 2024

About HSI
Humane Society International (HSI) is the world's largest animal protection organisation and HSI Australia established our office in 1994. We work to create a humane and sustainable world for animals advocating across wildlife conservation and animal welfare policy areas. HSI Australia also coordinates a network of private wildlife sanctuaries called the Wildlife Land Trust, which includes 51 properties in South Australia.

Our vision is for a world where people treat animals and nature with respect and compassion.

Submitted to:
Biodiversity Coordination Unit
Department for Environment and Water
GPO Box 1047
Adelaide SA 5001
By email: biodiversityact@sa.gov.au

For further information on this submission, please contact:

Meg Lamb
Animal Protection Campaigner – Law & Policy
[redacted]

HSI Australia welcomes the opportunity to comment on the *Developing a Biodiversity Act for South Australia Discussion Paper* (**Discussion Paper**). We commend the South Australian Government for committing to develop a new, stand-alone Biodiversity Act (**Act**). This commitment provides an important opportunity to modernise and strengthen the laws aimed at conserving the State's biodiversity, reverse current trends of decline, and restore species populations and ecosystems.

Overarching comments

Strengthening the Act

HSI Australia broadly supports the implementation of the opportunities identified in the Discussion Paper. However, we are concerned that if the Act is developed in accordance with the Discussion Paper, it will simply bring South Australian law in line with other jurisdictions' existing biodiversity laws which also require updating, and that, as a result, it will fail to meaningfully *protect*, *restore*, and *improve* natural ecosystems to reverse the trajectory of decline. If it is to reach its aspiration of demonstrating best practice biodiversity management, we believe the South Australian Government needs to be more ambitious in its vision for, and design of, the Act.

In this regard, we note the Discussion Paper foreshadows a reliance on the principles of Ecologically Sustainable Development (**ESD**). While we believe ESD is generally a good foundation, and we support the Act incorporating a clear definition of ESD, and ensuring a process is created so that the application of ESD principles is required in any decision-making making process, we believe the Act must provide a modernised definition and framework for ESD, one that is underpinned by, and consistent with, the emerging concept of "nature positive".

As the Final Report of the *Independent Review of the Biodiversity Conservation Act 2016 (NSW)* notes:[1]

> *[G]lobal ambition has moved beyond biodiversity conservation to a 'nature positive' framing that emphasises the need to repair past damage and to take urgent action to halt and reverse biodiversity loss, putting nature on a path to recovery, so that thriving ecosystems can support future generations.*
>
> *The Second Reading Speech that accompanied the [Biodiversity Conservation] Act's presentation to the Parliament outlined the broad policy challenge in terms of a need to balance economic, social and environmental considerations. This ecologically sustainable development framing was commonplace at the time.*
>
> *In the past few years, a consensus has emerged that this balancing act gives insufficient weight to the interests of future generations. The present generation is the principal beneficiary of government efforts to promote economic activity and address obvious social issues, whereas the burden of any consequential environmental damage, especially that which is irreversible, such as species loss, is overwhelmingly borne by future generations. Future generations are also those forced to bear the negative economic and social consequences of long-term environmental degradation.*

[1] *Independent Review of the Biodiversity Conservation Act 2016– Final Report*, August 2023, available at https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf at p. 4

> *Nature positive framing seeks to redress this imbalance. The Review Panel supports a nature positive framing of the Act, noting that this requires giving primacy to biodiversity considerations in a manner not previously contemplated.*

The Final Report goes on to explain what is meant by "nature positive":[2]

> *… Nature positive means our environment is being repaired and regenerated. This contrasts with traditional sustainability approaches, which have sought to minimise negative impacts by slowing or stabilising the rate of biodiversity loss. For centuries, economic development has largely ignored the inescapable primacy of the environment. Ultimately, this has damaged both the environment and development. A nature positive approach recognises nature as essential for human well-being and economic development.*

While these observations were, of course, made in the context of the review of biodiversity legislation in New South Wales, we believe they are equally relevant to the South Australian context. Indeed, at a national level, the Commonwealth Government is proposing to frame the new national environmental laws around the concept of "nature positive" (although it is still not exactly clear how that framing will be developed in practice).

To achieve meaningful protection, restoration, and improvement of South Australia's biodiversity, the South Australian Government should commit to "nature positive" and ensure that the Act achieves "nature positive" outcomes. In doing so, it is imperative that the use of this term does not result in the decline of individual components of the environment in favour of some form of "overall gain"; measurable improvements must be delivered for each and every impacted entity.

The principles of ESD should be modernised and strengthened so that they are underpinned by, and consistent with, the concept of "nature positive". At a minimum, any definition of ESD should include the following well-recognised ESD principles:[3]

- *Prevention of harm:* taking preventative actions against likely harm to the environment and human health;

- *Precautionary principle:* taking precautionary actions against harm that would be serious or irreversible, but where scientific uncertainty remains about that harm; and engaging transparently with the risks of potential alternatives;

- *Inter-generational equity:* the present generation have an obligation to ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations;

- *Biodiversity principle:* ensuring that biodiversity and ecological integrity are a fundamental consideration in decision-making, including by preventing, avoiding and minimising

---

[2] *Independent Review of the Biodiversity Conservation Act 2016– Final Report*, August 2023, available at https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf at p. 15.

[3] Developed from Australian Panel of Experts of Environmental Law, The Foundations of Environmental Law: Goals, Objects, Principles and Norms (Technical Paper 1, April 2017). See also APEEL, Blueprint for the Next Generation of Australian Environmental Law (2017).

actions that contribute to the risk of extinction;

- *Environmental values principle:* ensuring that the true value of environmental assets is accounted for in decision-making – including intrinsic values, cultural values and the value of present and future ecosystem services provided to humans by nature; and

- *Polluter pays principle:* that those responsible for generating waste or causing environmental degradation bear the costs of safely removing or disposing of that waste, or repairing that degradation.

An effective ESD framework cannot be used simply as a "balance" or "trade off" exercise. It must recognise the inherent interconnection between long-term environmental health and socio-economic outcomes. If ESD is to be genuinely realised, decision makers should aspire to make it the ultimate outcome rather than viewing it as a mere checkpoint in the decision-making process. The Act should therefore require decision-makers to not only consider ESD in any decision-making process, but to make decisions that are consistent with ESD, including consideration and application of the precautionary principle.

The objects of the Act should also align with the concept of "nature positive" and should also be consistent with a number of global ambitions that have been made in response to the biodiversity extinction crisis, including the Kunming-Montreal Global Biodiversity Framework, the Glasgow Leaders' Declaration on Forests and Land Use, and the Leaders' Pledge for Nature.

Interaction with other laws

It is generally unclear from the Discussion Paper how the Act will interact with existing legislation that seeks to conserve, or regulate actions that may impact on, biodiversity, including for example *National Parks and Wildlife Act 1972* (**NPW Act**), *Native Vegetation Act 1991* and *Planning, Development and Infrastructure Act 2016*, and/or whether the Act will replace some or all of the current framework. Whatever ultimately happens, we consider that whole of government action is required to achieve nature positive outcomes, and that it is imperative that biodiversity conservation is integrated in all decision-making processes across government. This is especially important to ensure that any protection afforded by the Act is not undermined by other regulatory frameworks. In this way, we consider it is imperative that the Act have primacy over competing pieces of legislation.

Funding

It is also unclear how the implementation of the Act would be resourced. A significant increase in state government investment will be needed to achieve change for South Australia's biodiversity.

The rest of this submission will briefly address the following topics in the Discussion Paper:

- Goals for a Biodiversity Act;
- Topic 2 – Avoiding impacts;
- Topic 4 – Threats to biodiversity;
- Topic 5 – Assessing the risk of extinction;
- Topic 10 – Consequences of doing the wrong thing.

In addition, we also make some comments on the licensed killing of native wildlife and the definition of 'protected animal' under the NPW Act.

Goals for a Biodiversity Act

As proposed, the goals of the Act do not aim to enhance or improve the condition biodiversity, do not explicitly aim to prevent further extinctions, and do not specifically aim to identify or protect habitat for threatened or culturally important species.

The goals should be strengthened to ensure the Act achieves these important outcomes.

Topic 2 – Avoiding impacts

In relation to this topic, we make the following observations:

- The Act should identify areas where development cannot occur i.e., "no-go" areas. These areas should be mapped on a spatial tool, which is available and accessible to the public.

- There should be a mechanism in the Act which provides for the automatic refusal of activities that will have unacceptable impacts on biodiversity.

- The Act should include critical habitat mechanisms to ensure impacts are avoided in areas of critical habitat. Critical habitat should be defined, identified across the state where possible and where not, clearly described so it can be identified during project specific investigations, and protected.

- The Discussion Paper does not explain how the Act will interact with the State's existing offsets framework. In developing the Act, the South Australian Government should examine and strictly limit how biodiversity offsets are used, with strengthened regulation. South Australia must ensure its framework aligns with the principle of offsets as a last resort. There must also be places where offsets are off-limits (e.g., areas of high conservation value including critical habitats for threatened species and ecological communities). Offsets cannot make unacceptable impacts acceptable or be used to override protections for no-go areas. Ultimately, we do not support offsets forming a major part of a conservation management regime. However, if an offsets framework is to be included in the Act, or the Act will talk to the offsets framework in the *Native Vegetation Act 1991*, the framework must conform to best practice principles.[4]

- We support formalising the mitigation hierarchy in legislation. It should be a mandatory pre-condition for development before any offsetting option is considered. It must be properly implemented and enforced, and offsets should only be permitted where it is clear that their implementation is feasible and there is a high degree of certainty that they will deliver the claimed environmental gains.

[4] For more information on these principles see https://hsi.org.au/blog/nature-laws-explainer-what-are-biodiversity-offsets-part-1/

Topic 4 – Threats to biodiversity

In relation to this topic, we make the following observations:

- it is critical for the Act to respond to climate change. Consideration of climate change should be embedded in the Act, including by incorporating climate change mitigation goals in the objects, making it a mandatory consideration in any decision-making process and recognising the need to support and enhance biodiversity resilience in a changing climate.

- the Act should set out a process for the comprehensive listing of key threatening processes (**KTPs**), including overarching processes such as habitat loss and invasive species, and more specific threats within each KTP such as land clearing and invasive ants. There should be a clear consideration of emerging threats to ensure new threats are addressed quickly and efficiently. The Act and broader regulatory framework should ensure that KTPs are taken into consideration in all decision-making processes.

- the Act should also respond to major events such as bushfires and floods. The Act should include provisional listing powers for threatened species to be rapidly listed on a provisional basis following a major event that results in, or is likely to result in, a material change in conservation status or viability of a species. The Act could also require a review of threatened species lists following a major event to determine whether any changes are required and/or whether any rules relating to the protection of threatened species should be reviewed and, where relevant, revised accordingly. We note that these mechanisms would first require the South Australian Government to overhaul the process for identifying and listing South Australian species and ecological communities as threatened.

Topic 5 – Assessing the risk of extinction

In relation to this topic, we make the following observations:

- As noted above, the South Australian Government needs to overhaul the process for identifying and listing South Australian species and ecological communities as threatened. The listing process, currently in the NPW Act, is long out of date. The Act should require the creation of a formal listing, assessment and review process that establishes clear pathways for nomination, consultation and review. The Act should also establish a scientific committee to guide listing, assessment and review of extinction risk.

- The Act should also enable the efficient listing of species identified as threatened at the federal level. We understand that South Australia has not updated it laws consistent with the Common Assessment Method (**CAM**) for the listing of threatened species and ecological communities, and that South Australia is the only State or Territory Government in Australia that has not signed the Intergovernmental Memorandum of Understanding agreeing on the CAM for the listing of threatened species and ecological communities. Adopting the CAM would bring South Australia in line with other Australian jurisdictions and provide the logical starting point for these current reforms.

- The Act should include provisions with obligations for recovery planning and transparency and accountability in reporting on recovery objectives and outcomes.

- As noted above, the Act should include a mechanism to respond to major events.

Topic 10 - Consequences of doing the wrong thing

In relation to this topic, we make the following observations:

- We support the introduction of stronger penalties and a wider range of civil enforcement options. We also recommend the Act includes 'proceeds of crime' provisions.

- We encourage the South Australian Government to include "open standing" provisions for both judicial review and civil enforcement, which allow any person to seek judicial review of a decision made under the Act, or for any person to remedy or restrain a breach of the Act. The Act should also include third party appeal (i.e., merits review) provisions. These are key accountability mechanisms and must be readily available.

- Compliance and enforcement mechanisms should be strengthened across all frameworks that regulate activities that impact on biodiversity, not just the Act.

The licensed killing of native wildlife

As noted above, it is not clear how the Act will interact with existing legislation such as the NPW Act. The Discussion Paper does not address the killing of protected animals under permits issued pursuant to section 53(c) and (d) of the NPW Act. These provisions allow the Minister for Environment to grant a permit to permit the destruction of native animals that are causing, or are likely to cause, damage to the environment or to crops, stock, or other property, or for any other purpose the Minister considers proper and not inconsistent with the objectives of the NPW Act.

It is unclear whether this system will be retained in the NPW Act or incorporated in the Act. HSI Australia suggests that these reforms are an opportunity to incorporate that system within a holistic biodiversity framework and, importantly, to modernise it.

HSI Australia supports wildlife coexistence and urges the South Australian Government to reconsider its approach to managing perceived conflicts between private landholders and native animals. However, we recognise that permits to destroy wildlife (**PDW**) (as they are known under the NPW Act) are likely to continue to be granted in the short term. If the system of killing native wildlife is to continue, we consider the licencing provisions should be incorporated in the Act (and removed from the NPW Act). Either way, we consider this reform process presents a perfect opportunity to strengthen the framework to ensure a more robust, transparent, and accountable system that priorities co-existence, tolerance, and non-lethal strategies.

In this regard, we suggest the relevant provisions are re-drafted to:

- amend the definition of 'protected animal' to remove any reference to "unprotected species" and revoke any species' listing as "unprotected";

- prohibit the grant of a PDW to take 'endangered', 'vulnerable' and 'rare' species.

- prohibit the use of poison like 1080 (and the Minister authorising the use of poison) and the use of other substances (e.g., carbon dioxide) to kill any wildlife.

- prescribe additional criteria (i.e., mandatory relevant considerations) that the Minister must take into account when considering whether to grant a PDW. The Minister should be required to consider whether the applicant has exhausted non-lethal management methods before applying for a PDW to kill native animals, and precluded from granting a PDW if the applicant has not demonstrated that they have exhausted non-lethal methods. The Minister should also be required to consider any likely ecological impacts.

- introduce a minimum damage threshold that must be reached in order that the Minister may grant a PDW.

- require a person to pass a shooter proficiency test if they are intending to kill native animals by using a firearm.

- introduce comprehensive compliance and enforcement tools for the departmental officers.

- introduce third party appeal and civil enforcement rights so that any person may challenge the grant of a PDW, or remedy or restrain a breach of the NPW Act.

We also recommend the Act (or the NPW Act) recognises animal sentience.

Definition of protected animal

At present, a 'protected animal' is defined in the NPW Act to mean:

> *(a) any mammal, bird or reptile indigenous to Australia; or*
> *(b) any migratory mammal, bird or reptile that periodically or occasionally migrates to, and lives in, Australia; or*
> *(c) any animal of a species referred to in Schedule 7, 8 or 9; or*
> *(d) any animal of a species declared by regulation to be a species of protected animals,*
>
> *but does not include animals of the species referred to in Schedule 10 or any animals declared by regulation to be unprotected*

As per Schedule 10, the following species are listed as "unprotected":

- budgerygahs;
- red wattlebirds;
- grey-backed silvereyes;
- Australian ravens;
- galahs;
- little corellas;
- little crows;
- little ravens; and
- dingoes.

The consequence of being "unprotected" is that a person does not require a permit to harm or kill those species.

We consider it is highly inappropriate to exclude native species from protection. Whether or not the conservation of native animals is incorporated in the Act, or remains in the NPW Act, we consider this reform process provides an important opportunity to revoke the listing of any "unprotected" species. As a consequence, it will be necessary for any negative impacts on these species to be assessed and, if appropriate, licenced under the NPW Act or the Act.

We also strongly submit that dingoes should be de-identified as pests in the designated areas.[5] It is highly inappropriate that the South Australian Government recognises the dingo for its important ecological and cultural role in some areas of the state, but treats it as a pest in others. Dingoes should be recognised as a native animal across the board and protected accordingly.

[5] See section 192 of the *Landscape South Australia Act 2019*, clauses 24 and 25 of the *Landscape South Australia Regulations 2020*. Also, *South Australian Government Gazette* No. 57 (26 August 2021), pp 3334 and 3336 available at: https://www.governmentgazette.sa.gov.au/2021/August/2021_057.pdf