

STATE ABORIGINAL HERITAGE COMMITTEE

28 February 2025

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Department for Environment and Water

By email only: [REDACTED]

cc: biodiversityact@sa.gov.au

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Re: Biodiversity Bill

The State Aboriginal Heritage Committee (Committee) appreciates the opportunity to provide a submission on the Biodiversity Bill 2025 (Bill).

The Committee is grateful for the extension provided to forward the submission that follows, as the Committee met to consider the matter on Thursday 20 February 2025.

The Committee's submission is in the form of responses to the survey questions published in the *South Australia's first Biodiversity Bill Explanatory Guide*.

Kind regards

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Chairperson

State Aboriginal Heritage Committee

OVERVIEW

The Committee is of the view that overall the Bill is well intentioned and respectfully acknowledges, to the extent possible, the care, concern and regard that Aboriginal people have for Country in South Australia.

Questionnaire – Biodiversity Bill SA

1. Do you support the definition of 'plant' to include fungi and algae to allow for their protection under the Act?

Yes

2. Do you support adopting the definition for 'native plant' from the *National Parks and Wildlife Act 1972* (NPW Act) meaning any plant indigenous to Australia can be protected?

The Committee supports this definition.

Members are mindful however that a plant in its wrong place may be considered a weed and that the use of the definition to provide protection must therefore be applied in context on a case by case basis.

The Committee also notes that the Bill appears to be skewed towards land-based conservation and protection.

While the Committee is aware that marine habitats may be protected, particularly under the *Marine Parks Act 2007* (SA), such parks tend to be relatively large areas of ocean or coastal waters or sea bed and not smaller ecosystems or habitats that may hold cultural significance for Aboriginal people, for instance mangrove swamps, sea grass beds, ancient fish traps. While a fish trap will likely be afforded protection under the *Aboriginal Heritage Act 1988* (SA), any habitat or ecosystem that it may now support will not be.

The Committee seeks to understand if the definition will extend to native plants that may have been subject to modification such as through genetic intervention, to improve drought hardiness or other attributes.

3. Do you support the proposed objects of the Biodiversity Act?

The Committee appreciates the intention of the Bill to generally:

- enhance protections for biodiversity
- scope in respectfully the knowledge of Aboriginal people to inform those protections
- increase penalties to deter activities and practices that adversely impact biodiversity and ecosystems
- acknowledge Aboriginal traditional practices

Terminology

Members queried the use of the term "First Nations" generally. The Bill concerns Aboriginal Country, species (flora and fauna) and habitats that are of significance to Aboriginal people, and the knowledge that derives from that cultural significance.

There are no other "First Nations" of Australia involved.

"First Nations" has been used in federal contexts since 2022 when the then federal Minister for Aboriginal Affairs, the Hon. Linda Burney MP, selected it as the preferred term to be used to encompass both Aboriginal and Torres Strait Islander peoples.

There is the "First Nations Voice to Parliament" in South Australia. This is because candidacy is open to both Aboriginal and Torres Strait Islander people (ref. [Nominations - SA FIRST NATIONS VOICE TO PARLIAMENT ELECTION](#)).

So, where the context requires, the Committee is not concerned about the use of "First Nations". However, within the context of the Biodiversity Bill, the Committee considers the term "Aboriginal" to be appropriate.

At point 2, the Committee proposes that alongside resilience to "impacts of climate change", resilience to impacts of flood, fire and drought also be included. While these events may be exacerbated by climate change, they have occurred in the natural cycle in South Australia for millennia and represent ongoing threats.

4. Do you support the proposed guiding principles of the Biodiversity Act?

The Committee supports the guiding principles and the intention to reverse biodiversity loss and support the environment, even in the context of economic development.

The Committee appreciates the commitment to respectful engagement with Traditional Owners though what this entails will be more meaningful where it is spelled out.

At point 4, the Committee seeks to understand who DEW views as the 'knowledge holders' and how it intends to access Aboriginal knowledge. Will DEW rely on its current partnerships or does it have the capacity to extend its reach more broadly into Aboriginal communities to seek out knowledge from people it is yet to become acquainted with.

The Committee appreciates that *those administering the Act must...*:

- *seek to apply First Nations' knowledge where possible, and with the full and informed consent of the knowledge holders.*

The Committee also seeks that those administering the Act fully acknowledge Indigenous Cultural Intellectual Property (ICIP) in the knowledge that may be shared.

5. Do you support what constitutes 'harm' and what is considered 'reasonable measures' for the purposes of the general biodiversity duty?

The Committee generally supports the parameters proposed.

However, under the determination of what constitutes reasonable prevention or minimisation measures, the Committee is concerned about the inclusion of:

- the availability, suitability, and practicability, including cost, of measures to prevent or minimise harm or the risk of harm.

If the Bill seeks to prosecute that impacts to the environment and biodiversity should be an early consideration of activities on Country, then the Committee believes that providing any person or entity with the option to argue that it is or was too costly to mitigate or prevent harm

compromises the intentions of the Bill. If there was a cost assessment before an activity was undertaken of what would be needed to prevent or mitigate impacts, then the activity should either not have been undertaken, or not undertaken in its location.

6. Do you support the governance framework for the Act, including the roles and reporting structure of the committees proposed to be established?

The Committee appreciates the governance framework, comprised of the Biodiversity Council (BC), the Scientific Committee (SC), the Native Plants Clearance Assessment Committee (NPCAC) and the First Nations Expert Biodiversity committee (FNEBC), headed by the responsible minister.

The Committee notes that membership of the BC must include two members of the FNEBC, one of each gender. The Committee appreciates this acknowledgement of cultural practices but must caution that gender representation is unlikely to guarantee the disclosure of culturally sensitive information that is gender specific.

The membership of the SC and the NPCAC must include "a First Nations person" who may, but need not, be a member of the FNEBC."

This will ensure a broadening of input from the Aboriginal community. However, how does DEW intend to manage the circumstance where the advice from the individual may be at variance from the expert advice of the FNEBC.

The Committee also noted with some concern the potential for the Minister to approve the delegation of any of the functions of the Council or any of the Committees.

The Council, with the permission of the Minister, may establish committees under section 26 and the Minister may establish any committees or advisory bodies they deem fit. As such, the Committee does not believe that the delegation provision is intended to address any lack of resources being available to the Council or the committees. The Committee would appreciate understanding what circumstances the delegation provision is intended to address.

It would appear that the drafters are mindful that the delegation provision introduces the risk of conflicts of interest, as sections 34(4) and (6) specifically address requirements where conflicts may arise.

7. Do you support committees being appointed based on their skills and expertise?

The Committee supports this provision.

As all committees are intended to be appointed on the basis of expertise, the Committees seeks to understand why the *First Nations Expert Biodiversity Committee* is singled out as requiring "Expert" in its title while all other committees do not.

8. Do you support the establishment of a Biodiversity Administration Fund as a means of providing transparency on which funds can be used for the administration of the Act?

The Committee supports the establishment of a fund dedicated to the administration of the intended act.

The questionnaire notes that this will provide transparency. Is it intended that expenditure of the fund be reported so interested parties may be able to understand if expenditure is being directed towards priority areas and initiatives.

9. Do you support the 'regulated activities' and 'unregulated activities' approach to native plants?

The Committee supports this provision.

10. Do you support the development of a guideline which provides proponents with advice on how to apply the mitigation hierarchy? (

The Committee supports the mitigation hierarchy being couched within a guideline and that, Before granting consent for a person to clear native plants, the NPCAC must ensure that the hierarchy has been applied.

11. Do you support the new measure aimed at protecting planted native plants more than 20 years old, excluding those in people's gardens or commercial forests?

The Committee supports this provision.

12. Do you support the ability for the NPCAC to request further information and allow clearance applications to be resubmitted in favour of a more formal review process?

Under sections 48 and 86 of the Bill that relate to clearance applications, there does not appear to be a reference to the proposition put in this question.

As the Committee is consulted on authorisation matters under the *Aboriginal Heritage Act 1988* (SA) before providing advice to the Minister for Aboriginal Affairs, the Committee is aware that the finalisation of applications may be an iterative process until the application includes all the information that the decision maker requires.

However, where an application has been assessed as including all relevant information required by the decision maker, and has been rejected, at some point there must be a circuit breaker where 'no means no'.

13. Do you support the 'regulated activities' and 'unregulated activities' approach to protecting and managing native wildlife?

The Committee supports the view that "all biodiversity is intrinsically valuable."

14. Do you support introducing targeted controls for managing impact causing species in favour of an 'unprotected' list of species?

The Committee understands that this maintains the status quo and makes no comment.

15. Do you support determining trafficable quantities of species with higher penalties?

The Committee agrees with this provision.

16. Do you support the concept of listing threatened ecological communities (similar to the process used for threatened species)?

The Committee appreciates the adoption of this concept in line with other jurisdictions.

17. Do you support enabling a head power to list other ecological entities in the future, based on criteria to be prescribed in regulation?

The Committee supports this provision and looks forward to the drafting of the regulations to understand the provision.

18. Do you support relying on the existing offences for plants and animals, instead of creating a new offence for threatened ecological communities or other listed ecological entities?

The Committee supports enhanced penalties for their potential deterrent effect.

19. Do you support the ability to apply a 'provisional listing' of species and ecological communities where appropriate?

This is a pre-emptive mechanism that the Committee supports.

20. Do you support the ability to declare critical habitat to provide increased protections for threatened species, ecological communities, and other listed ecological entities?

Section 82 of the Bill provides that, once a species, ecological community or other ecological entity is listed, the minister must decide if a critical habitat should be declared if it contributes significantly to the conservation of a threatened species, ecological community or other listed ecological entity.

The minister acts on the advice of the Scientific Committee.

The Committee notes that the list of "ecological entities" does not specifically reference Culturally Significant Biodiversity Entities. Is it intended that these be included in "other listed ecological entities"?

The Committee seeks that the advice of Aboriginal people also be sought, whether this is through the FNEBC or directly into the communities that have an interest in the relevant area.

Aboriginal people may hold knowledge about the interplay of natural elements that inform the habitat beyond those held by the scientific community, particularly as they relate to cultural values of water and totemic species.

21. Do you support the ability to develop action plans for the protection and recovery of a threatened species, ecological community or listed ecological entity?

The Committee supports and notes that a "plan can incorporate plans from other jurisdictions"

The Committee hopes that this reflects that the protection of threatened species, ecological communities and culturally significant biodiversity entities does not begin and end at state and territory borders. In particular, the Committee has in mind the vital ecosystems of the Great Artesian Basin, the Cooper Basin and the Murray-Darling Basin and that both flora and fauna from far and wide rely on the health of such systems.

22. Do you support renaming Heritage Agreements to 'Biodiversity Agreements' to better reflect their role?

The Committee agrees with this proposal.

23. Do you support the introduction of new types of protected areas for private land, including the proposed Conservation Agreements?

The Committee supports this proposal.

24. Do you support enforceable undertakings as a method to manage breaches of the Act?

Section 113 that introduces the provision of enforceable voluntary undertakings uses the term "contravention" rather than "breach" in reference to the Act. Within the recitals, the terms are equal in meaning.

The section does not provide for the types of breaches where this provision may apply.

Where someone breaches the Act, and the breach constitutes a criminal offence, it is the view of the Committee that the offence should be prosecuted.

Please see comment under 27.

The Committee is aware that enforcement requires resources and diligence. The monitoring of an undertaking would extend that resource and diligence commitment overtime and may prove onerous to the extent that monitoring lapses.

It may become the responsibility of concerned community members, who may be Aboriginal people to report contravention of an undertaking. This can have negative impacts on the wellbeing of any 'whistle-blower'.

25. Do you support the proposal to introduce wider standing for people to make an application to the court for civil enforcement of a breach of the Act?

The Committee supports this provision though, with respect to Aboriginal people, the Committee seeks that supports may be offered for legal advice etc. where warranted, to assist them in making their application and understanding / undertaking legal processes.

26. Do you support the concept of 'no development' orders?

The Committee supports this provision, though it notes that any orders may only be issued following the unlawful clearance of native vegetation from an area.

The Committee views the proposed amendment to the *Planning Development and Infrastructure Act 2016* (SA) as critical here, in that the proposed Biodiversity Act would be given special legislative status, requiring that the responsible minister consult with the Biodiversity Minister prior to approving developments, such as Impact Assessed Developments, which are subject to environmental approvals.

27. Do you support the option of civil penalties for breaches of the Act?

The Committee expressed concern about the provision under section 122, which may be seen as allowing someone convicted of breaching the intended act to "buy their way out of a conviction".

The Committee seeks to understand the limits of application for this provision. Is it intended to apply to lesser breaches only; hapless and/or first time offenders only, or, cynically, those that have financial means, influence, or both?

The Committee's believes that a criminal act should attract the aligned penalty, unless it can be demonstrated there is a public benefit to the approach that the Bill proposes.

28. Do you support the penalties for criminal offences proposed under the Act?

The Committee supports enhanced penalties to a point in that they may prove to have a deterrent effect.

However, penalties must also go hand in hand with the classification of any offence.

The Committee noted in the *DEW Biodiversity Act Explanatory Guide* that "[t]he evidentiary and defence provisions are largely carried over from the NV Act and NPW Act."

Section 134 provides that "All offences under this Act, other than summary offences, are classified as minor indictable offences."

The Committee reads this to mean that the standard required for a successful prosecution under the intended act remains high.

29. Do you support the permit provisions proposed in the Act?

The Committee appreciates the acknowledgement of Aboriginal customary practices under the Bill, providing that Aboriginal people do not require a permit to undertake certain activities where those activities are undertaken according to cultural tradition.

30. Do you support the provisions that set the scope of the State Biodiversity Plan?

The Committee supports the scope of the State Biodiversity Plan (SBP), not least because it is intended to:

- define measurable targets and set expectations for monitoring and evaluating the state and condition of biodiversity.

Given that any number of risks to the environment and biodiversity may be encountered within short periods of time, the Committee would seek that the SBP be reported on more frequently than every five years.

It may be that environmental regions within the state, or certain biodiversity priorities may be carved out from the whole and reported on more frequently.

31. Do you support the recognition of culturally significant biodiversity entities?

The Committee supports legislation that recognises, values and respects Aboriginal cultural knowledge as it relates to Country, the sea and the animals/fish and flora.

There are ecological communities right across the state that are of cultural significance to Aboriginal people. Cases in point are our inland river systems; our network of salt lakes and our mound springs.

The Committee must remark that the term "culturally significant biodiversity entity" is cumbersome and will likely not resonate with Aboriginal people.

The use of such a term highlights the importance of language in engendering collective understanding.

The Committee recommends that the terminology be reviewed.

32. Do you support decision makers taking the State Biodiversity Plan into account?

The Committee supports this provision.

33. Do you support the proposal to establish a Biodiversity Register?

The Committee supports an open register provided that confidential information, such as may be provided by Aboriginal people, is respected and reserved.

34. Do you support the framework that the Bill proposes for the regular review of the Act?

The Committee supports the review regime, though it would hope that the review provisions would allow for stakeholder commentary on the operation and efficacy of the legislation.

35. Do you support moving the clearance exclusions into a schedule to the Act?

The Committee supports the simplification of legislation wherever appropriate.

36. Do you agree with the changes to the unregulated activities in Schedule 2?

The Committee agrees with this provision.

37. Do you support updating the existing 'principles of native vegetation clearance' to 'principles of preservation of native plants' to align with provisions in the Biodiversity Act related to threatened species, ecological communities and listed ecological entities?

The Committee agrees with this provision.

38. Do you support the amendments proposed to the *National Parks and Wildlife Act 1972*?

The Committee supports these amendments.

39. Do you support the amendments proposed to other legislation?

The Committee supports the proposed amendments to other legislation. Comments on the proposed special legislative scheme under the PDI Act are provided above in context.