Biodiversity Council

1 March 2024

Department for Environment and Water
GPO BOX 1047
Adelaide SA 5001
ATTN: Biodiversity Coordination Unit

By email: biodiversity@sa.gov.au

Re: Developing a Biodiversity Act for South Australia

Thank you for the opportunity to provide comment on the Developing a Biodiversity Act for South Australia Discussion Paper (the **Discussion Paper**).

The Biodiversity Council is a collection of experts, including Indigenous knowledge holders, who have united to advocate for biodiversity and Country. We are a trusted expert voice fostering public, policy, and industry recognition of the biodiversity crisis, the importance of biodiversity for wellbeing and prosperity, and positive opportunities and solutions to address these challenges.

We applaud the State government's commitment to a Biodiversity Act. The Discussion Paper provides a credible high-level overview of the state of play with South Australia's biodiversity and what needs to happen. We agree that South Australia's biodiversity is in precipitous decline. This point has been made many times, backed by robust evidence. For example, the 2020 Threatened Bird Index shows that between 1985 and 2020, South Australia's Threatened birds declined by over 90% on average, the worst of any Australian State or Territory.[1]

The Biodiversity Council's submission is a high-level response to the topics set out in the Discussion Paper. For more detailed submissions on legislative proposals, our experts would be pleased to continue to work with the Government to deliver best-practice biodiversity conservation laws in the State. The Biodiversity Council has prepared a report on the 10 essential elements needed to deliver 'Nature Positive' national laws.[2] Many of those essential elements apply to South Australia's biodiversity law proposals and we highlight below the most relevant elements to any new South Australian biodiversity law below.

[1] https://tsx.org.au/tsx2023/?type=all&tgroup=Birds&group=All&subgroup=All&state=South%20Australia&statusauth=BirdActionPlan&status=NT_VU_EN_CR&management=All&refyear=1985

[2] See here: https://biodiversitycouncil.org.au/

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Executive summary

In summary, in addition to the proposals in the Discussion Paper, we submit that for any new biodiversity law for South Australia to be effective, the following are required:

1. **Culturally Significant Entities:** Include legal mechanisms for Indigenous peoples and Traditional Ecological Knowledge to recognise and care for Culturally Significant Entities.
2. **Offsets:** Develop a 'matters that are not able to be offset' list under the Biodiversity Act.
3. **Contemporary environmental goals and principles:** The Act should consider aligning itself to clearly defined Nature Positive by 2030 goals. We also recommend moving away from including Ecologically Sustainable Development principles within the Act, and instead include contemporary rules-based principles that relate to conservation, restoration, enhancement, precaution and prevention (i.e. the precautionary principle), Indigenous stewardship and Traditional Ecological Knowledge, innovation and adaptation.
4. **New government investments in management and recovery** are vital and **government investment must leverage additional funding.**
5. **Clear and mandatory obligations:** Any new Act must include clear and mandatory processes (with timelines) and obligations on how threats to biodiversity will be identified and lists managed. Not doing so, will likely result in an Act that is not adequately implemented.
6. **Better account for data deficient and poorly represented species**
7. **Landscape-scale conservation and ecological restoration** should become a central focus of the new Biodiversity Act. These are essential elements of success for biodiversity and are missing from the Discussion Paper.
8. **A new statutory trust for private land:** Protect important habitats and ecosystems with the assistance of a new statutory trust for private land conservation and restoration that is focused on broadening participation across landowners and facilitating opportunities for Caring for Country by Indigenous Australians.
9. **Public sector accountability:** Include a provision that ensures that all public authorities must act in accordance with the provisions and plans made under the Biodiversity Act (comparable to the Flora and Fauna Guarantee Act in Victoria).

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Topic 1, Biodiversity and First Nations people

We applaud the Discussion Paper's commitment to upholding Australia's international commitments including UNDRIP and the Nagoya protocol. This is an opportunity for SA to lead the way for Australian States in the recognition of the rights of Indigenous Australians to Care for Country as an expression of self-determination. This should be reflected in a new Act by seeking Traditional Ecological Knowledge and sharing decision-making powers with Traditional custodians at all levels.

Specifically, we encourage the new legislation to recognise and provide a mechanism to care for Culturally Significant Entities. Traditional Custodians have a complex relationship with Country that extends through Lore, to kinship (spiritually and physically) with plants, animals, water, and ecological communities, creating obligations to follow Lore through reciprocal care. Traditional Ecological Knowledge is lost when a species disappears. The active participation of Indigenous peoples and incorporation of their knowledge and Culturally Significant Entities along with the elevation of cultural priorities for Country, needs to be embedded in all policy development, government acts, and decision-making processes.

Topic 2, Avoiding Impacts

We agree with the proposals to avoid impacts and the role of a legally enforceable and transparent application of the mitigation hierarchy to achieve this. Offsetting schemes have been repeatedly shown to fail, because these schemes do not result in no net loss of biodiversity. The rollout of essential renewable infrastructure is only going to increase these challenges.

The Biodiversity Council suggests that a list of ***matters that are not able to be offset***, could be developed under the Biodiversity Act, to guide decisions that are made under the *Native Vegetation Act 1991*. It is not otherwise clear how the Biodiversity Act is intended to operate alongside the *Native Vegetation Act 1991* but we refer to our '10 essential elements for nature-positive laws' for our recommendations regarding any proposed offset scheme.

Topic 3, Transparent decision-making

We agree with the proposals to ensure an open and transparent biodiversity law. We submit that in many cases, Ecologically Sustainable Development (ESD) principles are not applicable inside a regulatory framework. We encourage the South Australian government to instead consider adopting the following contemporary goals and directing principles:

- '**Nature-Positive by 2030'** as an overarching goal for the new Act, to align with new global goals for nature and the Commonwealth government's Nature Positive commitments.
- Principles **of conservation, restoration, enhancement**

- **Precautionary and prevention principle**
- **Innovation and adaptation**
- **Indigenous stewardship and Traditional Ecological Knowledge principles**

To be considered 'directing principles' they need to be clearly defined and it needs to be clearly articulated how they will apply to implementation of the regulatory framework. For example, Nature Positive should clearly state that a decision under the Biodiversity Act is only nature positive when it brings measurable gains for nature beyond any loss. Under the the precautionary principle, if the decision maker is uncertain as to the consequences of a decision that may degrade biodiversity, due to lack of data or scientific understanding, they should err on the side of precaution to protect the biodiversity value concerned, because the loss may turn out to be significant or the biodiversity value essential and/or irreplaceable. For the incorporation of principles relating to Indigenous Stewardship and Ecological Knowledge, our experts would be pleased to work further with you on how these could be drafted within the proposed legislation. Please contact Jack Pascoe (details below) in the first instance to discuss this.

Topic 4 & 5, Threats to biodiversity and assessing the risks of extinction

We agree that threats to biodiversity should be identified and controlled through legislative processes and with proposals to assess the risks of extinction. Any regulatory framework addressing threats and listing threatened species and ecological communities, must include clear and mandatory processes (with timelines) and obligations on how those threats will be identified and lists managed in accordance with the Common Assessment Methodology.[3]

A significant challenge for the State, and for Australia, is how to effectively conserve data-deficient taxa. Currently, there are no invertebrates listed under the SA National Parks and Wildlife Act, which is not a reflection of threat status or imperilment. To prevent extinctions, eligible invertebrate species with sufficient data must be urgently listed in South Australia.

The experience in Victoria under the *Flora and Fauna Guarantee Act 1998* is that without mandatory legislative obligations, the Act does not get enforced and action plans for listed species are not developed or implemented.[4] Further, the experience in NSW has been that while there have been best-practice legislative requirements for listing and use of an independent scientific committee, there has not been adequate public funding to ensure that lists remain up to date.[5]

[3] https://www.dcceew.gov.au/environment/biodiversity/threatened/cam
[4] https://www.audit.vic.gov.au/sites/default/files/flora-fauna-full-report.pdf
[5] See the Independent Review of the *Biodiversity Conservation Act 2016*: Final Report (**Henry Review 2023**) https://www.parliament.nsw.gov.au/lc/tabledpapers/Pages/tabled-paper-details.aspx?pk=186428&houseCode=lc

Finally, species can be saved if money is invested. Numerous studies have shown that the recovery of populations and ecosystems is possible but expensive. There have been spectacular successes. However, the investment required to reverse the decline in South Australian biodiversity is about ten times the current investment in the environment.

While increased public spending on biodiversity is essential, that must be backed by co-investment by philanthropy, the community and eNGOs, and industry. Partnerships take time, include trust building, and involve devolution of power. For example, most of South Australia's threatened plants (about half the State's known threatened species) could be quickly secured by engagement with small community groups and empowerment.

We need more innovative and – in some cases experimental - interventions. We cannot continue to observe extinctions without actions. In response to habitat loss, invasives, and climate change many species need to be secured in locations outside their natural distribution and with intensive management.

Topic 6, Biodiversity planning and reporting

Effective state planning is going to be a key element to success and planning based on biodiversity considerations should be facilitated by any new Biodiversity Act. We agree that the Act should mandate the creation of a State biodiversity plan or strategy with regular reviews and updates specified in the plan and publicly reported at regular intervals. These plans need to be nature positive and facilitate the recovery of all threatened species.

Landscape-scale conservation and ecological restoration should become a central focus of the new Biodiversity Act, with threatened species protections operating as a safety net for listed threatened species and communities. The imperative of environmental management and planning at the landscape scale is now widely recognised as essential to viable and effective biodiversity conservation. Such plans can then be used to help guide essential renewable infrastructure and other developments by clearly identifying hotspots for biodiversity and where development cannot be allowed, and areas where it can be facilitated. Robust legislative frameworks are needed to underpin effective landscape scale planning and restoration and this should be a key focus of any new Biodiversity Act for South Australia. Good state planning saves money, time, and the environment.

The Biodiversity Act and its subsequent planning process for South Australia can be used to support and complement landscape plans made under the *Landscape South Australia Act 2019*.

Reporting on biodiversity recovery requires more partnerships with not-for-profits and leveraging citizen scientists, the state has no hope of doing this alone and it must adopt a more welcoming partnership model.

Topic 7, Benefits of Information

We agree with the proposals to develop BioData SA for better evidence-based decision-making. This requires major and ongoing investments in both comprehensive environmental data and supporting systems, including easy Internet-based access to this data and adequate funding for any new scientific committee. Continuous review of the state of the environment in South Australia should be based on continuous natural capital accounting. For example - knowing how much of every vegetation type is extant and protected is essential to delivering 30 by 2030.

Topic 8, Achieving 30 by 2030

We similarly agree with the proposals to broaden participation in privately protected areas through incentives. We support the Australian Land and Conservation Alliance's proposals to establish an independent statutory Trust in South Australia within the Biodiversity Act to facilitate conservation covenants in South Australia. Trusted models exist in NSW (The Biodiversity Conservation Trust) and Victoria (Trust for Nature).

In addition to providing an opportunity to broaden participation across sectors (eNGOs, individual private landowners, and the agricultural sector) contemporary legislation would allow the South Australian government to establish a private land conservation model that also meets the needs of Indigenous custodians and create opportunities to increase participation of Indigenous Australians in contributing to the Privately Protected Area estate in South Australia, which can complement the Commonwealth's Indigenous Protected Areas program.

An independent statutory Trust for private land conservation in South Australia under the Biodiversity Act, with the right legal tools, can also be used to support restoration efforts – see for example Victoria's Bush Bank Program[6] - and provide an opportunity to establish Privately Protected Areas that have the legislative backing to exclude extractive activities, like Special Wildlife Reserves in Queensland.[7] They can provide the legal certainty of protection that can justify the necessary leveraged investment in management and recovery, which are referred to above under Headings 4&5.

[6] https://www.environment.vic.gov.au/grants/bushbank-private-land-restoration-and-protection
[7] https://alca.org.au/alca-policy-note-enhanced-protection-conservation-covenants/

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State investment in habitat restoration and protection should focus on the most threatened ecosystems and unusual environmental types and climate change refugia, many of which do, or will, harbour threatened invertebrates, fungi and microbes. Measures that conserve intact and healthy ecosystems allow for the protection of a broad range of species, including those whose threatened status is unknown due to data deficiencies.

Delivering 30 by 2030 is also not just about protecting 30% of the state, it is about protecting and managing well, 30% of every kind of habitat/ecosystem. This will require huge investment in restoration and management by the Commonwealth, State, private, philanthropic and non-government organisations..

Topic 9 & 10, Duty of care and enforcement

In relation to the proposed duty of care, while we agree in principle, our experience of how this operates across other pieces of legislation at State and Federal levels is that it has not been that successful in achieving change in practices at any meaningful scale to protect biodiversity conservation.

As an alternative approach, we suggest that any duty of care is most relevant and impactful for regulatory decision-makers. This is because many laws that impact biodiversity but which are not designed to protect biodiversity - like land use planning laws and water laws - will continue to adversely affect the biodiversity that the Biodiversity Act is intended to protect unless specifically addressed in any new Act. Another way to address this is to include within the legislation a legal requirement for all public authorities to comply with the Biodiversity Act and its instruments. This is similar to section 4B of the F*lora and Fauna Guarantee Act* (Vic) and may help to streamline approaches across sectors and ensure that the Biodiversity Act is tackling key threats.

Yours sincerely,

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