

28 February 2024

Biodiversity Coordination Unit
Department for Environment and Water
GPO Box 1047
ADELAIDE SA 5001



By email: biodiversityact@sa.gov.au

Dear Biodiversity Coordination Unit

South Australia's Draft Biodiversity Bill

1. I refer to the consultation advertised on YourSAy in relation to the above draft Bill.
2. As the consultation noted, the South Australian Government intends to introduce a Biodiversity Act which would provide, among other things, a consistent framework for the assessment and recognition of threatened native species and ecological communities, increased penalties and enforcement tools, as well as the imposition of a general biodiversity duty.
3. From the outset, the Society notes the important perspective of the legal profession on the reforms proposed, particularly those with practising experience in planning and environmental work. To that end, a response was provided to the Society's Planning, Environment and Local Government Committee by one of its Members which offered observations in relation to the draft Bill from this perspective. A copy of that submission is **enclosed**.
4. Notwithstanding that the additional timeframe for a response provided by the Department is appreciated, the Society notes concern at a four week consultation timeframe for a Bill with such far reaching and consequential implications. The reforms are complex and should be subject to a longer period of consultation, particularly with sectors who stand to be most affected by the proposed reforms.
5. The Society's Animal Law Committee informed the below responses to various survey questions.

Do you support the proposed objects of the Biodiversity Act?

6. The Society's Animal Law Committee noted general support for the proposed objects set out in the Bill, which promotes conservation efforts as a shared responsibility supported by individual accountability. This focus should promote long-term recovery, cultural respect and health of the South Australian ecosystem and the animals living within it.

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

7. The Animal Law Committee indicated general support for the guiding principles in the draft Bill as they promote innovation, collaboration, accountability and evidence-based decision-making.

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

8. The general biodiversity duty not only prohibits any activity that causes harm to biodiversity but also activities that have the *potential* to harm biodiversity. This prohibition is sufficiently tapered with the

understanding that entities must take all reasonable and practicable measures to prevent or minimise any resulting harm. The Animal Law Committee notes general support for the duty.

9. Proposed section 11(2) provides a useful list of a measures to be considered when determining if an entity undertook reasonable measures to prevent harm.
10. The definition of harm at proposed section 11(6) is beneficial as it includes both direct and indirect impacts on biodiversity which the explanatory guide outlines could include such impacts as the death of native species or a decline of species' resilience.
11. The definition of harm also allows for any matters that are prescribed by regulations or biodiversity policies. Whilst a breach of the duty itself does not constitute an offence under the Bill, a breach would allow the department to issue orders to remedy such harm. It is likely that disagreements will occur around whether activities caused direct or indirect adverse impacts or whether these activities could be considered trivial. To better clarify these matters, the Society notes consideration should be given to preparing effective regulations and policies within a short timeframe of the Biodiversity Bill coming into law. Ideally, those regulations would be subject to broad consultation with stakeholders.
12. The Explanatory Guide states that the general biodiversity duty promotes gradual, cooperative application of these duties through working with industries and businesses to adapt to the new duty and regulatory environment (e.g. agricultural practices that follow best practices for insecticide application could be deemed compliant even if harming animals or the environment they live in). Whilst a cooperative approach is understandable, biodiversity policies and regulations should be developed quickly to guide and monitor compliance with this duty. Consideration should also be given to recognising practices that meet or exceed standards and fostering innovation within industries.

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

13. The Committee noted some concern with proposed Schedule 4(b)(ii) which states that the killing of a dingo is an unregulated activity "*if the dingo is causing, or is likely to cause, damage to stock*". This would seem to be at odds with the objects of the Bill such as the object to "*protect, restore and enhance biodiversity*". The Committee noted the breadth of proposed Schedule 4(b) and that it does not appear to require evince to be offered that dingoes are causing widespread damage to stock and is not accompanied by a mechanism to investigate or monitor compliance. Similar, key terms such as "*damage*" and "*stock*" remain undefined.
14. The Committee is also concerned about the provision in proposed section 67 which gives the Minister the power to declare that certain protected animals may be taken. The proposed legislation does not require any particular investigations be made by the Minister prior to making such a declaration, nor does it provide avenues for appeal of any such declaration. The declaration is to be made on the basis of the Minister's satisfaction that "*the taking of the species at levels that could reasonably be expected as a result of the declaration would not reasonably cause the species to be considered for assessment as a threatened species...*"
15. Members of the Committee queried the consistency of conferring considerable power on the Minister to make such determinations with the object of the Bill, being to protect and enhance biodiversity.

Do you support the approach of determining trafficable quantities of species with higher penalties?

16. The Committee is supportive of new penalties for possessing or controlling a trafficable quantity of protected animals to tackle serious and organised wildlife crime. We understand that the definition of "*trafficable quantities*" will be provided for in regulations and that such quantities may differ

between species. The Committee encourages a reasonable figure to be set in the regulations that is commensurate to the penalty.

17. Future, the Committee is supportive of extending the current offence for destroying, damaging, or disturbing wombat burrows (s68AA of the *National Parks and Wildlife Act 1972* (SA)) ("the National Parks and Wildlife Act") to other types of declared habitat. However, the Committee is concerned that the current ability in the National Parks and Wildlife Act for a landholder to destroy wombat burrows remains unchanged. Currently, a landowner outside a protected zone may destroy a burrow if the habitat is 'likely' to cause damage to crops, stock, machinery or infrastructure or "may constitute a safety risk or hazard to people". It is the Committee's view that the bar is too low for the destruction of a native animal's habitat, especially when taking into account the objects and principles of the Biodiversity Bill.

Do you support provisions for enforceable undertakings as a method to manage breaches of the Act?

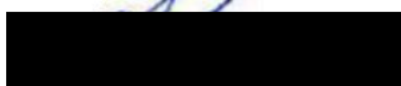
18. The Committee welcomes the increases in penalties for breaches. Further, the introduction of civil penalties and enforceable undertakings are useful tools to assist with the more efficient and flexible approaches to ensuring compliance. Due to the lower thresholds for civil penalties and ability to negotiate enforceable undertakings, they can lead to faster and more cost-effective resolutions. Enforceable undertakings can also encourage more voluntary compliance as alleged breaches can be addressed in an agreed rather than directed manner.
19. However, if overused, particularly for enforceable undertakings, these enforcement powers could be perceived as a softer approach and therefore lack the ability to deter breaches. As these powers do not lead to as serious penalties e.g. a conviction, a fine or agreement could be seen as the "*cost of doing business*" for some organisations. Enforceable undertakings, due to their flexibility, could also result in the Act being applied inconsistently. The Committee recommends that the types of prosecutable matters being diverted to enforceable undertakings be reviewed regularly to highlight any themes that need to be addressed (such as particular industries being regular offenders).

Miscellaneous comments

20. The Committee supports the broad definition of "*animal*" under proposed section 3(1), however queried why the definition of "*protected animal*" specifically excludes fish, amphibians, and invertebrates (unless they are a threatened species). The Explanatory Guide to the Bill (at page 18) states "*All native animals will be protected under the Biodiversity Act. This provision recognises that all biodiversity is intrinsically valuable.*" The specific exclusion of native fish, amphibians and invertebrates seems at odds with the purpose of the Bill. It is not readily apparent from the Bill or the Explanatory Guide why these groups of animals are specifically excluded from protections provided to other native animals.

Should you have any queries, please do not hesitate to contact me.

Yours sincerely



Encl: Response provided to Planning, Environment and Local Government Committee re *South Australia's Biodiversity Bill*.