



## **VELSN *Flora and Fauna Guarantee Act 1988 (Vic)* Submission: Improvements to Critical Habitat Determination and Endangered Species Conservation**

### **I INTRODUCTION**

The Victorian Environmental Law Students Network (VELSN) is an unincorporated association of law students interested in the fields of environmental law and regulation.

As a small body of limited resources we have decided to target our submission to the Review of the *Flora and Fauna Guarantee Act 1988 (Vic)* specifically around Part 4.4 of the Consultation Paper, and the associated recommendations concerning critical habitat. There are two reasons we have chosen this as our focus.

Firstly, while setting up a good framework for making critical habitat determinations, the potential improvements to critical habitat determination listed in the Consultation Paper are at a basic level. We wished to highlight extra information and procedures that should be included so Victoria's critical habitat determination system is robust and effective. Our recommendations are based on other jurisdictions and at the Commonwealth level in Australia.

Secondly, as young Victorians we are deeply concerned about the state of the environment in Victoria. The loss of habitat of species that are vulnerable or threatened is a grave state of affairs which we would see reversed. We are encouraged that the Victorian Government is addressing the current inadequacies of the *Flora and Fauna Guarantee Act 1988 (Vic)* with this review and wished to make a submission to show our support for strong environmental laws.

Thank you for considering our submission which was written by the VELSN committee and our general members.

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President

Victorian Environmental Law Student Network

## II SUMMARY OF RECOMMENDATIONS

The table below summarises our suggestions to the recommendations published in Table 14, page 57 of the Consultation Paper, as they refer to Critical Habitat.

<b>Consultation Paper Table 14 (p57) ‘Potential Improvement’</b>	<b>VELSN Comments</b>
<p>Proposal 1: Provide criteria to define critical habitat (these would be prescribed in Regulations made under the Act). Consider broadening the concept of critical habitat to include areas important for maintaining ecological processes.</p>	<p>Support in principle.</p> <p>Further recommendations:</p> <p>1.1 Require the determination of critical habitat to be a mandatory (non-discretionary) following species listing.</p> <p>1.2 Require the determination to include not just areas important for maintaining ecological processes, but for the repopulation of the species to an extent at which they would no longer classify as endangered.</p> <p>1.3 Set a minimum time-frame for the determination of critical habitat.</p> <p>1.4 Specify that only those considerations relevant to the preservation and repopulation of the species may be considered in making a critical habitat determination, excluding economic considerations as not relevant factors to making a determination.</p>
<p>Proposal 2: Require the Secretary to establish a program to identify and map proposed critical habitat areas across the state on public and private land.</p>	<p>Support in principle.</p> <p>Further recommendations:</p> <p>2.1 Information needs to be available to the public regarding activities on public land, and on private land by consultation</p>

<p>Proposal 3: Modify the regulatory controls for critical habitat to require a permit for activities that may damage the habitat. Investigate replacing Interim Conservation Orders with alternative compliance mechanisms.</p>	<p>Support in principle.</p> <p>Further recommendations: 3.1 Offences regarding Critical Habitat</p>
<p>Proposal 4: Require the Secretary to take all reasonable steps to enter into voluntary management agreements with owners</p>	<p>Support in principle.</p> <p>Further Recommendations: 4.1 Notes on the Voluntary Requirements and Compensation of Private Landowners</p>

### III RESEARCH IN SUPPORT OF RECOMMENDATIONS

#### *A Recommendations regarding Proposal 1*

##### **1.1 Require the determination of critical habitat to be a mandatory (non-discretionary) following species listing.**

One of the main issues surrounding implementation of the *Flora and Fauna Guarantee Act 1988* (Vic) has been the fact that much of the powers within the Act are discretionary.<sup>1</sup> In other jurisdictions which use critical habitat determinations as part of their conservation strategies listing is a mandatory requirement. In the European Habitats Directive, once a site has been deemed of community importance it must be registered as a conservation zone as soon as possible, with a maximum time limit of six years.<sup>2</sup> Under the *Endangered Species Act 1973* (US) the secretary is required to designate critical habitat for species that are assessed to be critically endangered.<sup>3</sup> The secretary also has the power to alter this determination.<sup>4</sup> The determination must be made on the basis of the best scientific information available.<sup>5</sup>

##### **1.2 Require the determination to include not just areas important for maintaining ecological processes, but for the repopulation of the species to an extent at which they would no longer classify as endangered.**

This is a strategy that is currently being employed under the *Environment Protection Biodiversity Conservation Act 1999* (Cth). The example that we have chosen is the conservation of the Southern Bell Frog, *Litoria raniformis*, in Victoria. In the National Plan for the Southern Bell Frog's conservation, one main objective is to reduce the threat of its extinction to a lower category as determined by IUCN criteria.<sup>6</sup> One of its main threatening processes is habitat loss, as much of its range is subject to various agricultural, industrial and urban developments.<sup>7</sup> As such, one of the specific objectives of strategies to improve viability of Southern Bell Frog populations is to "secure extant populations of Southern Bell Frogs, particularly those occurring in known breeding habitats, and improve their viability through increases in size and / or area of occurrence."<sup>8</sup>

In Victoria, this has been achieved by putting aside areas for current population nodes of Southern Bell Frogs, and also through securing habitat nearby that may provide for future

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<sup>1</sup> 'Fixing Victoria's broken nature laws: A reform proposal for the Flora and Fauna Guarantee Act' (Research Report, Environmental Justice Australia, August 2016) 7.

<sup>2</sup> *Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora* [1992] OJ L 206/7, art 1(k) & 4(4) ('EU Habitats Directive').

<sup>3</sup> *Endangered Species Act*, 16 USC s4(a)(3)(A) (1973) ('Endangered Species Act')

<sup>4</sup> *Ibid* s4(a)(3)(B)

<sup>5</sup> *Ibid* s4(b)(2)

<sup>6</sup> 'National Recovery Plan for the Southern Bell Frog *Litoria raniformis*' (Research Report, Nick Clemann and Graeme R. Gillespie, January 2012) 13 ('National Recovery Plan').

<sup>7</sup> *Ibid* 8.

<sup>8</sup> *Ibid* 13.

population nodes. This is part of the Sub-regional Strategy for the Southern Bell Frog, which is required to meet requirements under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).<sup>9</sup> The plan has three phases: to secure the habitat of threatened populations, then to enhance the existing habitat and finally create habitat in the form of waterbodies and terrestrial habitat around waterbodies that allow the frogs to move between sites.<sup>10</sup> Numerous scientific studies and surveys have been done to assess the current range of the Southern Bell Frog, and areas where there are current and potentially habitats for the species have been identified in Victoria in areas such as Kororoit Creek, Skeleton Creek, Merri Creek.<sup>11</sup>

What this brief case study shows is that this strategy has been used before in Australia and it is possible to implement it. There is no reason why such a requirement could not be included in the reformed *Flora and Fauna Guarantee Act 1988* (Vic).

### **1.3. Set a minimum time-frame for the determination of critical habitat.**

The *Flora and Fauna Guarantee Act 1988* (Vic) currently contains no time frame in which critical habitat for endangered species must be designated.<sup>12</sup> However, other jurisdictions do have requirements for minimum time frames for designating critical habitat. In the *Species at Risk Act 2002* (CA) once a critical habitat action plan or recovery strategy is included in the public registry, the relevant minister has 180 days to ensure the area is protected by state legislation.<sup>13</sup> In the United States the secretary must publish a finding into each submission made within 12 months of receiving a petition and must make this information available to the public using the Federal Register.<sup>14</sup> In Europe's Habitats Directive, the maximum time period in which to make a determination is six years, however it contains a requirement for determination to occur as soon as possible.<sup>15</sup>

### **1.4. Specify that only those considerations relevant to the preservation and repopulation of the species may be considered in making a critical habitat determination, excluding economic considerations as not relevant factors to making a determination.**

It is not appropriate for the *Flora and Fauna Guarantee Act 1988* (Vic) to be used as a tool to foster short-term economic development. To include economic factors as considerations in such decisions is contrary to the current act's purpose, to protect Victoria's Flora and Fauna through a range of management and conservation protocols.<sup>16</sup> The consultation paper put forward by

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<sup>9</sup> 'Sub-regional Growling Grass Frog *Litoria raniformis* Conservation Strategy within the Revised Urban Growth Boundary and Associated 28 Precincts: Technical Background and Guidelines' (Research Report, Ecology and Heritage Partners Pty Ltd, November 2011) 10.

<sup>10</sup> Ibid 7 & 8.

<sup>11</sup> Ibid 6.

<sup>12</sup> *Flora and Fauna Guarantee Act 1988* (Vic) s20.

<sup>13</sup> *Species at Risk Act*, S.C., 2002, c 29, s57.

<sup>14</sup> Above n 3, 'Endangered Species Act' s4(a)(3)(B).

<sup>15</sup> Above n2, 'EU Habitats Directive', art 4(4).

<sup>16</sup> *Flora and Fauna Guarantee Act 1988* (Vic).

the government notes that Victoria's biodiversity is in decline.<sup>17</sup> As can be seen with the Southern Bell Frog, often economic and development considerations have caused restrictions to the range of native Australian species.<sup>18</sup> It is imperative that instead of being considered as a zero-sum game, economic and environmental solutions are found together. This can be done by first assessing the requirements of endangered species, and then tailoring economic considerations around such requirements. This is already being done with the Southern Bell Frog, where Melbourne's Growth Corridors are being adapted to suit human and frog population needs.<sup>19</sup> There appears to be no reason why such strategies could not be implemented in Victoria.

## **B Recommendations regarding Proposal 2**

### **2.1 Information needs to be available in print and online for the public regarding conservation of public land. In relation to private landowners, this information should be available after consultation.**

The VELSN considers that having regulatory processes available to the public will increase public involvement in conservation and ensure robust adherence to critical habitat determinations. The VELSN notes that the Consultation Paper suggests 'key decisions made under the Act (are) to be made publicly available online.'<sup>20</sup> This includes critical habitat declarations.<sup>21</sup> We support this in principle and think that it is a positive step to take.

However, the content of the information to be published online is not clear from the Consultation paper. As such, we wanted to highlight the requirements in other jurisdictions to publish such information. The European Council publishes interactive maps of conservation zones across Europe.<sup>22</sup> The United States legislation requires the Secretary to publish each of its findings on determination of endangered species in the Federal Register.<sup>23</sup> This should include data on which the regulation is based and how this relates to the regulation, a description and evaluation of public or private activities on the land, and the Secretary's opinion on how any modifications should affect the designation.<sup>24</sup>

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<sup>17</sup> 'Review of the Flora and Fauna Guarantee Act 1988 Consultation Paper' (Consultation Paper, Department of Environment, Land, Water and Planning, January 2017) 13.

<sup>18</sup> Above n, 'National Recovery Plan', 8.

<sup>19</sup> Geoffrey Heard and Michael McCarthy, 'Metapopulation viability of the Growling Grass Frog in Melbourne's urban growth areas.' (Research Report, School of Botany University of Melbourne, July 2012) ii; Daniel Gilmore and James Shepherd 'Review of habitat corridors for Growling Grass Frog *Litoria raniformis* within Melbourne's Urban Growth Areas.' (Research Report, Biosis Research, 18 June 2012) 1 & 2.

<sup>20</sup> Above n 16, 'Consultation Paper' 65.

<sup>21</sup> Ibid.

<sup>22</sup> *European Commission Environment Division*, Natura 2000 data and maps (10 June 2016) European Commission <[http://ec.europa.eu/environment/nature/natura2000/data/index\\_en.htm](http://ec.europa.eu/environment/nature/natura2000/data/index_en.htm)>

<sup>23</sup> Above n 3, 'Endangered Species Act' s4(b)(3)(A).

<sup>24</sup> Ibid. s4(b)(8).

### **C Recommendations regarding Proposal 3**

The VELSN fully supports the potential improvements noted regarding compliance and enforcement in the Consultation Paper.<sup>25</sup> We think that this is an excellent step toward encouraging compliance with environmental laws.

#### **3.1 Offences relating to Critical Habitat**

We wanted to note that there should be penalties for the removal of vegetation or damage to critical habitats for endangered species. These should also exist in an aggravated form if an individual or corporation continues to damage an area of habitat once they have received notice that they should desist from their activities.

### **D Recommendations regarding Proposal 4**

#### **4.1 Notes on the Voluntary Requirements and Compensation of Private Landowners**

The VELSN wish to note that discretionary and voluntary aspects of the *Flora and Fauna Guarantee Act 1988* (Vic) in the past have not worked effectively. We acknowledge the balance between the rights of private land owners and the public interest can be a difficult one. However, solutions are available as can be seen in other environmental management processes. In relation to private land owners who own property containing critical habitat zones, it is possible that this habitat could be compulsorily acquired if it is considered to be highly valuable to a species. The landowner could be compensated for this property. The process is noted in the document 'Land protection under the Biodiversity Conservation Strategy' as part of the Melbourne Strategic Assessment.<sup>26</sup>

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<sup>25</sup> Above n 16, 'Consultation Paper' 63.

<sup>26</sup> Department of Environment and Primary Industries, 'Land protection under the Biodiversity Conservation Strategy Melbourne Strategic Assessment' (Research Report, Victorian Government, May 2014) 4.