

Independent expert advisory panel to review the *Wildlife Act 1975* (Vic): Dr Deborah Peterson (Chairperson), Associate Professor Ngaio Beausoleil, Dr Jack Pascoe and Emeritus Professor Arie Freiberg AM

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Dear Panel,

Consultation – The Independent Review of Victoria’s *Wildlife Act 1975*

We refer to the Issues Paper published by the Department of Environment, Land, Water and Planning in April 2021.

Thank you for the opportunity to comment on the review of the *Wildlife Act 1975* (Vic) (the Act).

Our names are Dr Jane Kotzmann and Ashleigh Best and we are academic practitioners with an interest in the welfare of animals and expertise across a range of legal areas.

Overview of Submission

We support replacement of the Act with appropriate legislation that better protects and conserves wildlife and their habitat, ensures good animal welfare and recognises animal sentience.

We respond below to select questions from the Issues Paper.

Detailed Submission

Part 1.2: Is the intent of the Act clear?

1.2.1 Are the current purposes of the Act satisfactory? If not, what should the desired outcomes, objectives or purposes of the Act be? How should the objectives and purposes of the Act relate to the desired outcomes? How would they ensure desired outcomes are achieved?

As identified in the Issues Paper, the current purposes of the Act are not satisfactory, both because they are conflicting and because they are not reflective of contemporary community values.

The purposes of the Act should be to protect and conserve wildlife, to ensure good animal welfare and to recognise that animals are sentient.

1.2.3 Are there examples of well designed legislation from other jurisdictions (both in Australia and internationally) with clearly stated objectives and purposes that could inform Victorian law?

Western Australia's *Wildlife Conservation Act 1950* (WA) includes a short title stating as the Act's purpose, '[a]n Act to provide for the conservation and protection of wildlife'. Although we argue for additional purposes, the simplicity of such a purpose avoids the issue of competing objectives and purposes identified in the Issues Paper.

1.4.1 Should the Act prescribe a general duty of care related to wildlife conservation or biodiversity protection more broadly? Why or why not? How could it work in practice?

We support the inclusion of a new duty of care to wildlife in the Act. While the protection of biodiversity and environmental values should be an objective of any such duty, given the Act's focus on safeguarding *wildlife*, the obligation must holistically address the complex needs and interests of wild animals. Accordingly, we recommend the development of a duty of care with at least two constituent elements.

First, the duty of care should require all persons whose activity interfaces with wildlife populations and their habitats – even indirectly -- to take all reasonably possible measures to preserve and promote their health and wellbeing. Legal commentators have observed that provision for the welfare of wild animals – as distinct from the protection of such animals for their ecological value -- represents a major lacuna in Australian environmental law. Cao claims that the welfare of wild animals is a marginal priority for wildlife protection legislation in Australasia; she explains that the focus of this legislation is instead on 'how to conserve, hunt, or otherwise exploit, wild animal species'.¹ Similarly, Finn observes that 'while legal frameworks for wildlife *conservation* are robustly debated, legal frameworks for wild animal *welfare* have received much less attention'.² This substantive oversight is problematic in light of the exclusion of wild animals from much of the reach of animal welfare legislation in Australia on account of their unique relationship with humans: unlike their domestic counterparts, wild animals generally do not enjoy the protection and care of an owner or person in charge of them in the sense intended by that legislation. For this reason, while acts of overt cruelty to wild animals might fall within the statutory remit of animal welfare legislation, it generally falls short of imposing any kind of duty to provide for the peculiar needs of these animals in their natural state.³ Finn argues that the relative self-sufficiency of wild animals necessitates the development of a distinct, tailored model for evaluating anthropogenic harm to these populations. He reasons that 'harm' might be said to have been occasioned to a wild animal when 'a human action affects or determines the conditions in which that animal lives and dies'; the infliction of such harm should, according to Finn, 'support the imposition of legal responsibilities on humans', such as an obligation to take reasonable care not to harm animals that may be affected by a particular activity.⁴ We submit that any duty in the new Act should proactively provide for the prevention of harm to the welfare of wild animals.

¹ Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010) 246.

² Hugh Finn, 'Legal frameworks for wild animal welfare' (2019) 34(6) *Australian Environment Review* 116, 116 (emphasis added).

³ Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010) 231.

⁴ Hugh Finn, 'Legal frameworks for wild animal welfare' (2019) 34(6) *Australian Environment Review* 116, 117.

Secondly, a statutory duty of care in respect of wildlife should contemplate the conservation of ecosystems and biodiversity more broadly. In developing a framework duty of care for biodiversity, Earl et al observe that such a legal mechanism could have salutary environmental effects that cannot be secured – or secured as effectively -- using other regulatory models. They posit that:

In Australia many instruments for biodiversity conservation emphasise increasing the quantity of habitat. A major gap in the suite of instruments currently used for biodiversity conservation is a mechanism for encouraging ongoing responsible management activities that avoid or minimise harm to biodiversity... Instruments that do address this need are voluntary, e.g. Land for Wildlife, conservation covenants, and though their outcomes are positive, their application to date has been limited. A statutory duty of care for biodiversity has been suggested as a policy instrument that could meet this need.⁵

However, Earl et al confirm that the imposition of a duty of care is not – by itself – sufficient to achieve optimal environmental outcomes; they suggest the use of a duty of care as part of a collection of mechanisms that together offer a multifactorial approach to the challenge of preserving biodiversity. Likewise, while Bates observes that the development of a statutory duty of care could afford ‘considerable benefits’ to the objective of biodiversity conservation ‘by providing guidance to resource users on what practices are acceptable’, he affirms that it would not be a ‘panacea’: the success of any such policy shift would be contingent upon the robustness of the broader framework, including the ‘encouragement of voluntary action, education and financial incentives’.⁶ As above, we argue that the new duty of care should internalise a preemptive harm prevention principle, rather than simply provide a basis for reactively penalising breaches in circumstances where damage has already been caused. It should be targeted at the prevention or mitigation of harm to wildlife and, by extension, ecosystems, biodiversity and environmental values.

Together, the contemplation of welfare-related considerations and ecological factors by the new duty of care would produce a comprehensive mechanism for protecting wildlife that, combined with other measures, could improve outcomes for this cohort. By addressing *both* issues with equal concern, the Act would avoid criticisms that are frequently levelled at wildlife protection laws: that their excessive preoccupation with the retention of species leads them to overlook the suffering of individual animals, and means that they fail to capture incremental impacts on wild animal populations.⁷

Section 2.3 The current legislative framework doesn’t preserve and conserve habitat

2.3.1 In what ways does the Act succeed or fail in protecting and conserving wildlife habitat? Please provide examples from your own experience.

The Act (and its associated Regulations) confer limited protection upon wildlife habitat. Regulation 42(1) of the *Wildlife Regulations 2013* (Vic) provides that ‘[a] person other than a person referred to in subregulation (2) must not damage, disturb or destroy any wildlife habitat.’ The defect of this provision is that reg 42(2) exempts a raft of activities from its reach, many of which are leading causes of habitat degradation. For example, reg 42(2)(a)

⁵ G Earl, A Curtis & C Allan, ‘Towards a Duty of Care for Biodiversity’ (2010) 25 *Environmental Management* 682, 684.

⁶ Gerry Bates, *A Duty of Care for the Protection of Biodiversity on Land* (Report, 2001) viii.

⁷ See, eg, Jonathan Lovvorn, ‘Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action’ (2016) 29(1) *Georgetown Environmental Law Review* 1, 55.

permits the destruction of habitat authorised under any other Act; this includes actions undertaken in accordance with development approvals under the *Planning and Environment Act 1987* (Vic). Concerningly, as the Black Summer Bushfires made plain, the policies contained in state-based planning and development legislation have a profound impact on the vulnerability of wildlife populations. A report sponsored by the WWF quantifying the fires' animal toll listed a number of direct and indirect factors that would have influenced wild animal mortality during the fires. Among other things, direct factors included: species' ability to flee or shelter from fire; and availability of suitable habitat, including unburnt refuges.⁸ Indirect factors included matters such as the availability of resources and risk of predation.⁹ Significantly, the WWF Report also noted the damage caused by 'anthropogenic factors at play in the immediate post-fire environment such as salvage logging and "clean up" operations in burnt forest or *clearing of unburnt vegetation from previously approved development applications*'.¹⁰ As this affirms, by exempting activities undertaken in accordance with planning and development legislation, the Act enables the inadequate standards contained in that separate body of legislation to prevail, and accordingly falls short in affording wildlife habitat vital and much-needed protection.

2.3.2 How should the Act provide for the protection and conservation of wildlife habitat?

Protections for habitat in the Act should not only account for wild animals' present needs. They should also anticipate and make provision for 'future pressures' caused by climate change, disasters and other disruptions.¹¹

Section 2.4 The treatment of wildlife as property

2.4.1 Do property rights related to wildlife need clarifying? If so, how?

We support legislative clarification of property rights related to wildlife.

In our view, wildlife should not be considered as property. The law should recognise inherent rights in wild animals. This would improve the protection of wild animals by expanding the range of legal options available to enforce protections.

Nevertheless, we recognise that this view is unlikely to be accepted by contemporary society. In the alternative, we support the express clarification in legislation that wildlife is the property of the Crown. We also recommend that the legislation expressly recognises that, as property holders, the Crown has fundamental obligations to ensure the protection and conservation of wildlife and habitat, to ensure good animal welfare and, in undertaking activities related to wildlife, to recognise that animals are sentient.

2.4.3 Should the Act recognise sentience of some wildlife and, if so, what would this achieve? How would this recognition affect the rights and responsibilities of governments, businesses and individuals?

⁸ Ibid 7.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Independent Review of the EPBC Act, *Final Report* (2020) 128.

We support the legal recognition of wildlife sentience, in accordance with the current status of scientific knowledge.

Expressly acknowledging wildlife sentience will be a positive step for improving the legal protection for wildlife, lead to better public awareness of wildlife welfare, and as a result should help to reduce cruelty to wildlife. It may also assist in the interpretation of the new Act and help to guide decision-makers.

Wildlife sentience should be recognised in the objects or purposes of the Act, with express wording linking it to positive and negative obligations under the Act. Wildlife sentience should also be referenced in any Principles section in the Act.

In accordance with recognition of wildlife sentience, the Act should:

- Ban any inhumane methods of culling animals (eg poison baits, hunting with dogs and some forms of traps);
- Protect wildlife as sentient animals, rather than remove protection through designation as 'vermin' or 'pests';
- Ban any form of hunting that does not directly support subsistence, eg duck hunting;
- Require that subsistence or customary hunting operations, including hunting by Traditional Owners and Aboriginal Victorians, employ the least cruel methods of hunting and slaughter, and that all possible efforts should be made to reduce the time to death of animals killed in subsistence or customary hunts.

Thank you for the opportunity to make this submission.

Yours sincerely

Dr Jane Kotzmann and Ashleigh Best