

**REVIEW OF THE *NATURE CONSERVATION ACT 1980*: DISCUSSION PAPER
NOVEMBER 2010**

COMMENTS BY ANIMAL LIBERATION ACT

Animal Liberation ACT (AL) welcomes the opportunity to comment on the Discussion Paper regarding the review of the *Nature Conservation Act 1980* (the NC Act).

One of AL's fundamental objectives is to protect the environment and the individual animals and species who depend on it for their survival and wellbeing. Our comments on the Discussion Paper (the Paper) are therefore focussed on the role of the NC Act in protecting the ACT's natural habitat and the individual animals and ecosystems existing within it.

Definition of 'animal' and 'native animal'

One of the key issues the Paper discusses is the definition of 'animal' under the NC Act. The current definition excludes most fish and invertebrates. AL agrees that the definition should be refined (as suggested in the Paper at p40). The existing definition is out of step with both contemporary legislative definitions of 'animal' in Australia and other jurisdictions, and with modern scientific understandings of sentience. AL suggests that a definition based on the meaning given to 'animal' in the *National Parks and Wildlife Act 1974* (NSW), but which includes any animal or fish whether vertebrate or invertebrate, and at whatever stage of development. Moreover, to ensure the class of beings covered by the NC Act is sufficiently flexible, the definition could allow additional species or types of animals to be prescribed as our scientific and philosophical understanding of other beings matures. An example of such a flexible definition can be found in the *Animal Welfare Act 2006* (UK) (s 1 'Animals to which the Act applies'):

... (3) The appropriate national authority may by regulations for all or any of the purposes of this Act—

(a) extend the definition of 'animal' so as to include invertebrates of any description;

... (4) The power under subsection (3)(a) ... may only be exercised if the appropriate national authority is satisfied, on the basis of scientific evidence, that animals of the kind concerned are capable of experiencing pain or suffering.

The concept of native animal should not be qualified depending on minority sectors' views of the animals' impact on their land or activities. Native animals should not, for example, be referred to as 'pests', which is an unscientific, partial and controversial term.

Should objects be incorporated in the NC Act? What would be appropriate objects?

AL supports the view that objects be incorporated in the NC Act. Including an objects clause in the Act would provide greater clarity as to the Act's purpose and values, especially regarding the protection of native animals and plants.

One of the key objects of the NC Act should be the protection of all forms of native flora and fauna. Inherent in this object is the understanding that animals and plants can be both protected and managed at the same time. Having the protection of native animals as a guiding principle would mean that the Act should only allow *non-lethal* management strategies for conservation purposes. This approach would demonstrate the respect for the inherent value of individual sentient creatures that should underpin the NC Act. Moreover, while licences to take or kill native animals continue to be granted, the licence fee should not

only reflect cost recovery (as suggested in the Paper at p47), but also include a levy for research into non-lethal methods of control. This would have the effect not only of deterring applications for such licences, but of overcoming some of the obstacles to conducting this type of research, such as the lack of resources.

It also follows from this proposed object that in our view the NC Act should retain its focus on protecting individual plants and animals and their habitat, while also encompassing a whole-of-ecosystem approach. One approach need not necessarily be at the expense of the other, and the NC Act should strive to achieve both.

How best to achieve conservation goals

According to the Paper, the NC Act should ensure that 'biodiversity and ecological processes are considered appropriately within the triple bottom line of social, environmental and economic perspectives' (p9). In our view, it is not feasible to 'balance' these competing interests. Indeed the current degraded state of the Murray-Darling Basin is a salutary, and geographically close, example of how focussing on short-term, socio-economic factors can have devastating consequences for the natural environment. AL considers that the NC Act should focus on ensuring the ecological sustainability of putative social and economic needs rather than trying to balance conservation, social and economic interests.

How best to protect wildlife

AL recommends the NC Act be based on a general prohibition against the killing of native animals, except in certain limited circumstances (for example, if the animal is suffering due to disease, or where it is endangering the life of a person).

Where licences regarding native animals are required, they should only be issued with broad community consultation. For example, the NC Act should provide mechanisms whereby applications to kill native animals can be made public and the community offered the chance to comment on the applications. Such mechanisms should be a normal part of an open and democratic society, and could take the form of the community (and animal protection) groups as suggested in section 8.4 of the Paper. The current appeals mechanisms under the NC Act must also be maintained and improved in order to enhance the transparency of licence decision-making under the Act. Genuine appeals relating to licences to kill or take native animals must be allowed to be brought in the public interest, and at little or no cost to those representing the public interest.

Indigenous groups should also be consulted as part of any decision-making process regarding native animal or plant licences. The criteria for granting or refusing to grant a licence under the NC Act are currently set out in the 'Determination of Licensing Criteria' (legal instrument No.47 of 2001). The 'general considerations' the Conservator must take into account when deciding whether to grant or refuse an application for a licence relating to native animals do not refer to local aboriginal communities in **any** capacity (see s7 of the criteria).

The situation is the same in the specific case of an application for a licence to take or to kill a native animal (s10(h)). The Conservator is not specifically required under this instrument to have regard to the views of the local Aboriginal people, or the significance of the animal to Aboriginal tradition, when deciding whether to grant or refuse an application for a licence to kill native animals.

The Conservator can grant a licence 'to take' protected native animals if he or she is satisfied that the taking of such animals 'is of particular significance to Aboriginal tradition'

(s16(1)(d)), but this appears to be relevant only where Aboriginal people are actually applying for the licence. The failure to require the views of local indigenous communities to be taken into account when dealing with native animal licences sought by non-indigenous applicants is a serious omission in the licensing criteria under the NC Act, and should be remedied.

Another serious omission in the Paper is the lack of discussion regarding animal welfare concerns when dealing with native animals under the NC Act. For example, the Paper fails to mention the *Animal Welfare Act 1992* in any context, even when considering 'related legislation' (pp11-13). Elsewhere the Paper simply asserts that 'licences currently issued for the culling of eastern grey kangaroos take into account animal welfare issues' (p40). It is difficult to see how this could possibly be the case when the current licensing criteria, which the Conservator must take into account when considering a licence relating to native animals, only refer to the concept of 'welfare' **once** in relation to animals (in the context of an application *to keep* a protected native animal). In all other circumstances animal welfare is not a consideration, and the term 'humane' is not used at all. Moreover, recent examples of actual licences granted clearly demonstrate that animal welfare issues were **not** taken into account.

The most infamous example of when animal welfare issues could not have been considered was the licensed killing of 514 kangaroos on the Belconnen Naval Transmission Station (BNTS). The licence allowed these native animals to be trapped in pens in order to be darted with tranquillisers then euthanized by lethal injection. According to the code of practice relating to killing kangaroos in effect at the time,¹ '[t]rapping to enable destruction is not recommended' (s2.1). Even those in favour of a lethal solution to the issue of the kangaroos' presence on the site, such as the Commissioner for Sustainability and the Environment ACT's Expert Panel, acknowledged that the mode of killing was far from the most humane method of destruction.² Other 'experts' agree that darting followed by lethal injection is not a humane way of dealing with animals at high density.³ Indeed, numerous accounts and video footage posted on websites after the kill reveal attempts to herd the kangaroos from the holding pens into the killing pens with security guards as well as four-wheel drives and other motor vehicles, and that several of the kangaroos crashed into fences and each other causing serious injuries. Thus the decision to grant the licence to kill the 514 kangaroos at the BNTS by trapping, darting and lethal injection could not possibly have taken animal welfare issues into account. It is also difficult to monitor the welfare aspects of other instances of killing kangaroos or other native animals in the ACT, as they usually happen at night, in secret, and often on Commonwealth defence land.

The NC Act and the licensing criteria must therefore be amended so as to ensure that animal welfare concerns are the **primary** consideration when deciding whether to grant or refuse an application for a native animal licence. Moreover, policy documents such as the partial and scientifically questionable *Kangaroo Management Plan* must **not** be given statutory force (as suggested in the Paper at p36). Turning policy documents into law defeats their intended purpose. The point of policy documents is **to guide** government decision making, rather than be applied inflexibly in every occasion (which is unlawful). Finally, any form of hunting should be an offence under the Act, given the serious welfare concerns for both the hunted and hunting animals. The ability to ensure hunting occurs in accordance with any relevant code of practice is minimal given that hunting usually takes

¹ The *Code of Practice for the Humane Destruction of Kangaroos in the ACT* (1994).

² Cooper, M (2008i), *Report on Belconnen Naval Transmission Station (BNTS) Site as part of the Investigations into ACT Lowlands Grasslands* Office of the Commissioner for Sustainability and the Environment ACT, 26 February 2008, p9.

³ 'Kangaroo cull in Canberra – experts react' Australian Science Media Centre website, 25 March 2008: www.aussmc.org/2008/03/rapid-roundup-kangaroo-cull-in-canberra-experts-react/

place in remote areas and often at night. The effect of hunting on hunting animals is also a serious concern and difficult to monitor. For example, dogs used in pig hunting can experience horrific injuries which are often poorly treated, if at all, by their owners.

Another key issue regarding the protection of native animals under the NC Act is the inadequacy of the penalty and enforcement regime under the Act. AL supports the proposal to increase the maximum possible penalties imposed by the Act in line with analogous legislation in other jurisdictions. AL would also support a proposal to apply the penalty to take, harm or sell a native animal or plant to **each** animal or plant affected (rather than to the overall offence committed). The proposal to expand the use of strict liability offences should also be applied to offences relating to native animals, rather than simply to the clearing of vegetation or damaging of land. Strict liability offences maintain the criminality of acts and the strong deterrent against contraventions, but usually involve faster prosecution, fewer costs, reduced risk of insincere objections or appeals, and reduced burden on police time and resources in pursuing breaches.

How best to protect habitat

One of the fundamental ways of protecting native animals in the ACT is of course to protect their habitat. AL is concerned that the Paper does not sufficiently acknowledge the link between habitat destruction and human intervention in the landscape. Urban growth and land clearing for agricultural purposes are two of the most serious contributors to habitat destruction, and yet too often the Paper simply refers to 'weed and feral animal invasion, fire management and recreate pressure' as its 'cause' (see for example, pp 5 and 15). A failure to acknowledge and deal with the primary cause of habitat fragmentation and destruction will severely limit the NC Act's capacity to protect wildlife and conservation areas in the ACT. AL therefore supports the argument for the NC Act to include an offence of destroying the habitat of a threatened and protected species or community (as suggested in the Paper on pp39, 41-42). AL also supports tighter control of vegetation clearance across the ACT where such control will improve connectivity between conservation areas and halt further biodiversity decline. However, AL supports a commitment to protecting and enhancing **existing** habitat and biodiversity, rather than committing to nebulous concepts such as 'no net loss of biodiversity', of which the impact on individual animals and plants and on flora and fauna communities is at best unclear or at worst unknowable.

In summary, AL looks forward to the review of the NC Act resulting in greater protection for the environment and for the individual animals and species who depend on it for their survival, and to including indigenous people in decisions affecting native flora and fauna. Only in this way will the ACT truly be able to live up to its reputation as Australia's Bush Capital.

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