



Environmental
Defenders Office

Submission on the NSW Koala Strategy Review

26 April 2024

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

www.edo.org.au

Submitted to:

NSW Koala Strategy Review
Department of Climate Change, Energy, the Environment and Water
By email: koalasummit@environment.nsw.gov.au

For further information on this submission, please contact:

Rachel Walmsley
Head of Policy and Law Reform
T: (02) 9262 6989
E: rachel.walmsley@edo.org.au

Cerin Loane
Special Counsel, Nature
T: (02) 9262 6989
E: cerin.Loane@edo.org.au

Overview

Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the NSW Koala Strategy Review and make recommendations for improving koala conservation in New South Wales (**NSW**).

The plight of koalas in NSW has garnered significant attention in recent years. There have been multiple government policies and programs aimed specifically at koala protection and conservation, reports by the NSW Chief Scientist, and a parliamentary inquiry into koalas and their habitat.

In 2022, the threat status of koalas was revised from vulnerable to endangered under both Commonwealth¹ and NSW² laws, meaning that koalas are at a very high risk of extinction in the near future.³ A parliamentary inquiry into koalas and their habitat found without urgent government intervention to protect habitat and address all other threats, the koala will become extinct in NSW before 2050 (Finding 2).⁴

In April 2022 the former NSW Government released a new Koala Strategy for NSW.⁵ It includes a key goal of doubling koala numbers in NSW by 2050. The Koala Strategy commits to important key actions including:

- Protection, restoration and improved management of 47,000 hectares of koala habitat over the next 5 years.⁶
- Investment will be made in 50 priority koala populations where koalas have potential to persist over the long-term.⁷ Priority will also be given to areas that are likely to be used as refuges from the impacts of climate change.⁸

¹ See Department of Agriculture, Water and the Environment, 'Conservation Advice for Phascolarctos cinereus (Koala) combined populations of Queensland, New South Wales and the Australian Capital Territory', in effect under the *Environment Protection and Biodiversity Conservation Act 1999* from 12 February 2022.

² NSW Threatened Species Scientific Committee, 'Final Determination, Phascolarctos cinereus (Koala) Goldfuss 1817 – Endangered Species listing', 20 May 2022, <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/nsw-threatened-species-scientific-committee/determinations/final-determinations/2022/phascolarctos-cinereus-endangered-species-listing>

³ See s 182 (2) EPBC Act 1999 (Cth); s 4.4(2) Biodiversity Conservation Act 2016 (NSW).

⁴ NSW Parliament, Legislative Council – Portfolio Committee No. 7, Koala populations and habitat in New South Wales – Report 3, June 2020, <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2536/Koala%20populations%20and%20habitat%20in%20New%20South%20Wales%20-%20Report%203.pdf>

⁵ Department of Planning and Environment, 'NSW Koala Strategy', 2022, available at <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Threatened-species/koala-strategy-2022-220075.pdf>

⁶ NSW Koala Strategy, p 18. This will involve:

- purchasing up to 15,000 hectares of koala habitat to the national park estate,
- permanently protecting 7,000 hectares of koala habitat on private land through a conservation program,
- restoring 20,000 hectares of koala habitat across NSW,
- landscape scale restoration projects for 5,000 hectares, and
- leveraging private sector investment in koala conservation.

⁷ NSW Koala Strategy, pp 10-14.

⁸ NSW Koala Strategy, p 14.

- Intensive intervention to mitigate threats in koala stronghold areas will include restoring and protecting habitat, fire and drought management, preventing vehicle strikes and dog attacks, and improved emergency responses.⁹
- Supporting local communities to conserve koalas. This includes working with landholders and supporting Local Councils to prepare koala habitat maps¹⁰;
- Improving the health and safety of koalas by removing threats and providing rehabilitation;¹¹ and
- Building knowledge of NSW koala populations.¹²

The current Koala Strategy, like many other recent initiatives for koala conservation, is focused mainly on increased funding for programs, land acquisition and policy changes. These are all important initiatives.

However, **one of the key gaps in the NSW Koala Strategy and other initiatives to date, is action to strengthen laws to effectively curb habitat loss and fragmentation from activities such as land clearing, urban development, industry, infrastructure and forestry on public and private land.** Without legislative reform to address habitat clearing, there is a real risk that efforts to increase koala conservation on one hand will be undermined by lax laws that continue to allow habitat destruction on the other.

EDO has written extensively on the failure of NSW laws to effectively protect koala habitat and made numerous recommendations for law reform. We **attach** two of our most relevant reports:

- *Submission to the Inquiry into koala populations and habitat in New South Wales*, August 2019 (**Attachment 1**).¹³
- *Protecting koalas in the Sydney Basin bioregion - Strengthening NSW laws to protect the trees that koalas call home*, February 2023 (**Attachment 2**). While this report was written in the context of the Sydney Basin bioregion, recommendations for law reform are relevant to all of NSW.¹⁴

Many of the concerns and recommendations in these reports remain unaddressed.

This submission focuses primarily on the role of the law in koala conservation and highlights that **effective implementation and regulatory reform of laws is a key gap in the NSW Government's Koala Strategy.**

Our submission addresses the following key issues:

1. Habitat loss is a key threat to koalas
2. Overarching comments on the NSW Koala Strategy
3. Laws are letting koalas down
4. Improved implementation of current laws
5. Legislative reform to better protect koalas and their habitat

⁹ NSW Koala Strategy, p 15.

¹⁰ NSW Koala Strategy, p 20.

¹¹ NSW Koala Strategy, p 22.

¹² NSW Koala Strategy, p 24.

¹³ https://www.edo.org.au/wp-content/uploads/2019/12/190814_NSW_Koala_Inquiry_-_EDO_NSW_Submission_-_Edited.pdf

¹⁴ https://www.edo.org.au/wp-content/uploads/2023/02/EDO-Report-Protecting-koalas-in-the-Sydney-Basin-Bioregion_February-2023-.pdf

If the NSW Government is serious about koala conservation, then a revised Koala Strategy must include clear actions for legislative reform to strengthen and better implement the laws aimed at protecting koala and their habitat.

Our primary recommendation is that a revised Koala Strategy needs to commit to clear actions to better implement existing laws and strengthen legal regulation of activities that impact on koala habitat.

Key Issues

1. Habitat loss is a key threat to koalas

It is well known that habitat loss, modification and fragmentation is one of the biggest threats to koalas in NSW. Our failure to curb habitat loss is driving this iconic species to extinction.

In 2020, the NSW parliamentary inquiry into koala populations and habitat in NSW found that (emphasis added):

- the **fragmentation and loss of habitat poses the most serious threat to koala populations** in New South Wales (Finding 4); and
- the **future of koalas** in the wild in New South Wales **cannot be guaranteed unless the NSW Government takes stronger action to prevent further loss of koala habitat** (Finding 5).¹⁵

In deciding to upgrade the koala's conservation status from vulnerable to endangered, the NSW Threatened Species Scientific Committee found that (emphasis added):

- **Vegetation clearance from activities including urbanisation, grazing, agriculture, and mining have significantly reduced the distribution of koalas** (McAlpine et al. 2015). Climate change drivers (e.g. drought and rising temperatures) have also resulted in a reduction of climatically suitable habitat (Adams-Hosking et al. 2011).
- Human activities including **deforestation and land clearance for grazing, agriculture, urbanisation, timber harvesting, mining and other activities have resulted in loss, fragmentation, and degradation of koala habitats.**
- **Land clearing continues to impact habitat across the koala's range** (DES 2018).
- **Modelled climatic suitability from 2010 to 2030 indicates a 38-52% reduction in available habitat for the koala, and a 62% reduction in koala habitat by 2070** has been forecast (Adams-Hosking et al. 2011).
- **Vehicle related mortality occurs regularly on roads close to occupied koala habitat** (Gonzalez-Astudillo 2018; Queensland-Government 2021). **Dog attacks are a significant cause of death and injury especially in areas within and adjacent to peri- urban and**

¹⁵ NSW Parliament, Legislative Council – Portfolio Committee No. 7, *Koala populations and habitat in New South Wales – Report 3*, June 2020, <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2536/Koala%20populations%20and%20habitat%20in%20New%20South%20Wales%20-%20Report%203.pdf>

residential areas (DPIE 2020). Koalas are unable to adapt to these threats and **as human activities continue to expand into koala habitat, trauma from these threats will increase.**

- Wild populations of koalas carry disease pathogens including koala retrovirus (KoRV) and Chlamydia (*Chlamydia pecorum*). **The prevalence of disease (chlamydiosis) has been found to increase following** extreme stress from hot weather, drought, **habitat loss and fragmentation** (Lunney et al. 2012; Davies et al. 2013).

We know what is driving koalas to extinction – ongoing habitat fragmentation, modification and loss from human activities, and the related impacts including vehicle strikes, dog attacks and stress-induced disease. The NSW Koala Strategy must continue to address this key threat, including through better implementation and strengthening of the laws that regulate habitat destruction.

2. Overarching comments on the NSW Koala Strategy

New commitments to add areas to the National Park Estate or restore degraded landscapes, while welcomed, provide limited refuge for koalas in circumstances where contradictory policy settings continue to allow land to be cleared elsewhere - **see Box 1 - The NSW Koala Strategy.**

The NSW Koala Strategy will not be able to do its job of reversing the decline of koalas while deficient laws continue to undermine conservation efforts, particularly by allowing ongoing fragmentation, modification and loss of koala habitat.

This is consistent with the Conservation Advice given in support of the decision to uplist the Koala from vulnerable to endangered in 2022. The Conservation Advice stated that:

*“Management actions alone will not be sufficient to recover the koala. Actions are needed to ensure harmonisation of existing and future planning and policy settings such that they collectively contribute appropriately to maximising the chances of long-term survival of koalas in the wild”.*¹⁶

The advice identified conservation and recovery actions, including strengthening statutory planning instruments, policies, and compliance controls:

4 b: “Review, revise, and strengthen where appropriate, statutory planning instruments, policies, and compliance controls at all levels of government, including local government, to avoid or minimise impacts of land use or land management on koala conservation”.

¹⁶ Department of Agriculture, Water and the Environment, ‘Conservation Advice for *Phascolarctos cinereus* (Koala) combined populations of Queensland, New South Wales and the Australian Capital Territory’, 2022, at p 29, <https://www.environment.gov.au/biodiversity/threatened/species/pubs/85104-conservation-advice-12022022.pdf>

Box 1 – The NSW Koala Strategy

Extract from EDO’s *Protecting koalas in the Sydney Basin bioregion - Strengthening NSW laws to protect the trees that koalas call home*, February 2023¹⁷

2.1 Overview

In April 2022 the NSW Government released a new *NSW Koala Strategy*.¹⁸ The Strategy follows on from the previous *NSW Koala Strategy 2018–21*; and is the first Strategy aimed at achieving the Government’s commitment to double koala numbers by 2050. The Government has allocated more than \$190 million to 2026 to deliver the targeted conservation actions that the strategy sets out.

The NSW Government has mapped Areas of Regional Koala Significance (**ARKS**) across NSW identifying areas where koalas are known to occur in moderate to high densities.¹⁹ ARKS have been developed to guide the government in prioritising areas to invest in for habitat conservation and restoration, including through the NSW Government’s Save our Species program²⁰ and *NSW Koala Strategy*.²¹ ARKS have no legal status. They do not trigger any additional legal requirements or protections. The statewide Koala Habitat Information Base has also been developed as part of the *NSW Koala Strategy*. It is not a regulatory tool – that is, it does not identify and categorise land for the purpose of triggering and implementing laws. Rather, it simply aims to collate various layers of existing spatial information in one location,²² in order to provide the best available scientific information to support decision makers, rehabilitators, land managers, and community members involved in koala conservation.²³

¹⁷ <https://www.edo.org.au/wp-content/uploads/2023/02/EDO-Report-Protecting-koalas-in-the-Sydney-Basin-Bioregion-February-2023-.pdf>

¹⁸ <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Threatened-species/koala-strategy-2022-220075.pdf>

¹⁹ NSW Department of Planning, Industry and Environment, *Framework for the spatial prioritisation of koala conservation actions in NSW*, 2020, available at <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Threatened-species/framework-spatial-prioritisation-koala-conservation-190045.pdf>

²⁰ See <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/saving-our-species-program#:~:text=Saving%20our%20Species%20%28SoS%29%20is%20one%20of%20the,the%20future%20of%20Australia%20%28%20unique%20plants%20and%20animals>.

²¹ See <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/programs-legislation-and-framework/nsw-koala-strategy#:~:text=NSW%20Koala%20Strategy%20%20Towards%20doubling%20koalas%20by,...%203%20Delivering%20targeted%20action%20and%20investment%20>

²² The Koala Habitat Information Base comprises several layers of existing spatial information, including:

- Koala Habitat Suitability Model (KHSM) – the probability of finding koala habitat at any location
- Koala Tree Suitability Index (KTSI) – the probability of finding a tree species that koalas are known to use for food or shelter
- Koala Likelihood Map (KLM) including a confidence layer – predicts the likelihood of finding a koala at a location
- Areas of Regional Koala Significance (ARKS) – identifies key koala populations and management areas with potential for long-term viability as well as priority threats to key koala populations.
- Native vegetation of NSW – this is a high-resolution model of native tree cover and water bodies
- All koala sightings recorded in NSW Bionet

²³ See <https://datasets.seed.nsw.gov.au/dataset/koala-habitat-information-base>

2.2 Key issues for koalas

From a legal perspective, the *NSW Koala Strategy* has no legal weight. It is not required to be prepared by legislation and it is not legally enforceable. While it sets out the current government's initial 5-year strategy for doubling koala numbers by 2050, funding has only been committed for five years, and the Strategy can be overridden by successive governments.

Pillar 1 of the Strategy is aimed at koala habitat conservation. It makes some important commitments to purchase high-quality koala habitat on private land to add to the national park estate, to permanently protect koala habitat on private land through in-perpetuity conservation agreements, and to deliver restoration projects across the state. These are important undertakings that utilise existing legal mechanisms to manage koala habitat through protected area frameworks.

However, one of the biggest flaws of the Strategy is its failure to effectively address the major threat of habitat fragmentation, modification, and loss. While the Strategy aims to secure, restore or create an additional 100,000 ha of habitat by 2050, it does not estimate how much existing koala habitat is at risk of being lost over that same period due to clearing for development, infrastructure, agriculture or forestry, or suggest options for slowing rates of habitat loss. There are no commitments to reform land clearing laws to reverse skyrocketing clearing rates, overhaul the problematic biodiversity offsets scheme, or address ongoing concerns about the impacts of forestry operations on koalas and koala habitats.

Additionally, the Strategy does not propose a method for monitoring and reporting on koala habitat loss through to 2050 so that gains made through the Strategy can be understood in the context of other changes in the landscape over that time.

3. Laws are letting koalas down

We highlight several overarching examples of how our laws are letting koalas down:

- **Poor interaction between NSW laws** - Contradictory policy settings in NSW laws undermine efforts to protect biodiversity, including koala populations and habitat. The *Biodiversity Conservation Act 2016 (BC Act)* (which itself has its own deficiencies, as highlighted in its recent 5-year statutory review²⁴) aims to conserve biodiversity and maintain the diversity and quality of ecosystems and provides mechanisms for listing threatened species and key threatening processes (**KTPs**).²⁵ The koala is listed as an endangered species under the BC Act and has received targeted recovery planning through the Save our Species program. Yet other legislation such as the *Local Land Services Act 2013 (LLS Act)*, *Forestry Act 2012*

²⁴ Independent Review of the Biodiversity Conservation Act 2016 – Final Report, August 2023, <https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

²⁵ Key threatening processes are those that adversely affects threatened species, populations of a species or ecological communities or could cause species, populations of a species or ecological communities to become threatened. KTPs include clearing native vegetation and loss of hollow bearing trees. For more information see <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/about-threatened-species/key-threatening-processes>

(Forestry Act) and *Environmental Planning and Assessment Act 1979 (EP&A Act)* facilitate forestry, agricultural activities and developments that exacerbate the identified key threats to listed species. For example, under the EP&A Act State significant development can still be approved despite having significant or irreversible impacts on biodiversity (including threatened species and critically endangered ecological communities). The LLS Act allows mature paddock trees to be removed without proper environmental assessment despite the loss of hollow bearing trees identified as a key threatening process under the BC Act. This means that despite efforts to conserve and recover koalas, including through actions taken under the BC Act, habitat loss is facilitated under other legislation.

- **Failures to prohibit or strictly limit the clearing of koala habitat** - NSW laws do not prohibit the clearing of koala habitat. Rather than providing outright prohibitions or strict limits on clearing koala habitat, our laws simply create additional obligations for assessing and considering impacts on koalas, but retain discretionary decision-making powers that often allow economic and social considerations to trump environmental considerations. The result is that koala habitat is often allowed to be cleared for development, infrastructure, industry or agricultural purposes.
- **Weak biodiversity offsetting rules** - The current policy settings for biodiversity offsetting in NSW do not meet best-practice and undermine what protections there are for koala habitat. For example, the rules do not require ‘like-for-like offsetting’ and allow supplementary measures and monetary payments in lieu of genuine offsets. This means impacts on local populations of koalas can be offset by indirect measures that do not actually benefit that population. EDO has undertaken a more detailed analysis of biodiversity offsetting, including an analysis of the NSW Biodiversity Offsets Scheme, in our report *Defending the Unburnt: Offsetting our way to extinction*.²⁶
- **Failure to comprehensively map ‘core koala habitat’** – Many NSW laws set the intention of protecting ‘core koala habitat’. For example:
 - for the purpose of the land management regime under Part 5A of the LLS Act, category 2-sensitive regulated land (on which clearing is more strictly regulated) is to include ‘core koala habitat’.
 - for the purpose of private native forestry, current PNF codes provide that forest operations are not permitted within any area identified as ‘core koala habitat’ within the meaning of the Koala SEPP.Generally, ‘core koala habitat’ is defined in the Koala SEPPs and identified in Koala Plans of Management. However, the failure of all relevant councils to complete the identification of ‘core koala habitat’ through the finalisation of Koala Plans of Management means that protections intended to apply to core koala habitat have limited application.
- **Increased reliance on self-assessable codes** – There has been an increased reliance on ‘self-assessable codes’ for tree clearing in NSW. Codes are only an appropriate regulatory tool for *low risk* activities. The use of self-assessable codes increases the risk that habitat needed for koalas will be inadvertently cleared, or cleared due to lower standards of

²⁶EDO, ‘Defending the Unburnt: Offsetting our way to extinction’, November 2022, www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf

environmental oversight. This is particularly the case where core koala habitat is not mapped (and therefore intended protection of koala habitat as category 2-sensitive land has no application, see above).

- **Failure to assess cumulative impacts** - There are no legal mechanisms for addressing and monitoring cumulative habitat loss and impacts on koala populations as a result of competing land uses such as agriculture, industry and development. This can result in ‘death by a thousand cuts’ where incremental clearing under various legal frameworks can lead to significant cumulative habitat loss.

4. Improved implementation of current laws

There are a number of things the NSW Government can do now to improve implementation of current laws and outcomes for koalas:

- **Identify and protect all core koala habitat:** Support all relevant councils to identify core koala habitat and finalise Koala Plans of Management. This will ensure that existing legal protections that have the intention of protecting core koala habitat can do their job. In the alternative, the NSW Government could lead the development of a single, state-wide map of koala habitat to be adopted in law.
- **Implement a single Koala SEPP:** The fact we have two Koala SEPPs is a result of the unresolved ‘Koalas Wars’ (see **Box 2**) and was only ever meant to be temporary. Failure to resolve outstanding issues and put in place a single, permanent framework has delayed the effective implementation of important koala protections. The NSW Government must:
 - Adopt a single Koala SEPP for use across all relevant local government areas (**LGAs**).
 - Update the list of LGAs to which the Koala SEPP applies to ensure it encompasses all relevant LGAs.
 - Finalise Guidelines as a matter of urgency.
 - Clarify the application of the Koala SEPP to regionally significant development and state significant development.
 - Support councils to implement KPoMs (see above)
 - Remove the arbitrary 1 ha threshold from the Koala SEPP.
- **Progress work towards establishing areas of koala habitat as Areas of Outstanding Biodiversity Value:** The NSW Koala Strategy commits to establishing one Area of Outstanding Biodiversity Value (AOBV) for koalas under the BC Act (Action 1.10). The *NSW Koala Strategy Implementation Plan and Progress Report 2021–22*²⁷ outlines work still to be done against that action. Declaration of koala habitat as an AOBV could be an effective tool for protecting key habitat and supporting private landholders (who would be eligible for priority funding). Consideration should be given to expanding the commitment in the current strategy to make use of this tool.

²⁷ <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Threatened-species/koala-strategy-implementation-plan-and-progress-report-2021-22-220576.pdf>

Box 2 – The NSW Koala Wars

Adapted from EDO's *Protecting koalas in the Sydney Basin bioregion - Strengthening NSW laws to protect the trees that koalas call home*, February 2023²⁸

On 1 March 2020, former NSW *State Environmental Planning Policy No 44 – Koala Habitat Protection* (**SEPP 44**), which had been in place since 1995, was repealed and replaced by a new *State Environmental Planning Policy (Koala Habitat Protection) 2019* (**Koala SEPP 2019**).²⁹

However, in late 2020, after two Nationals MPs threatened to quit the NSW government due to issues with Koala SEPP 2019,³⁰ the Government attempted to make changes to both Koala SEPP 2019 and the *Local Land Services Act 2013* (**LLS Act**) to change the way koala protections applied to rural land.³¹ In particular, it intended to 'decouple' the LLS Act from the Koala SEPP.³² The Government's proposed changes were defeated after a principled crossing of the floor by then Liberal MP Catherine Cusack, concerned that the changes represented a weakening of protections for koalas.³³

Having failed to implement its proposed changes, the NSW Government abandoned Koala SEPP 2019 after it had been in operation for less than 12 months. It put in place *State Environmental Planning Policy (Koala Habitat Protection) 2020* (**Koala SEPP 2020**) – which mirrored many of the policy settings of former SEPP 44 – as an interim measure, with plans for a new Koala SEPP to be developed in 2021.

Subsequently in March 2021, the Government introduced *State Environmental Planning Policy (Koala Habitat Protection) 2021* (**Koala SEPP 2021**), which largely reinstates the policy framework of the 2019 Koala SEPP. However, it does not apply across the board. Koala SEPP 2020 (modelled off Koala SEPP 44) continues to apply to some rural zones. That is, the updated Koala SEPP rules do not apply in certain rural zones.

The Government indicated that two Koala SEPPs were temporary, announcing that it still intended to remove links between the Koala SEPPs and both the land management framework and private native forestry (**PNF**) framework, after which time Koala SEPP 2020 would be repealed and Koala SEPP 2021 would apply uniformly to all relevant LGAs.³⁴

²⁸ https://www.edo.org.au/wp-content/uploads/2023/02/EDO-Report-Protecting-koalas-in-the-Sydney-Basin-Bioregion_February-2023-.pdf

²⁹ See <https://www.edo.org.au/2020/02/20/koalas-nsw-new-laws-old-tricks/>

³⁰ See The Guardian, Nationals MPs threaten to quit NSW government unless koala protection watered down, 3 September 2020, available at <https://www.theguardian.com/environment/2020/sep/03/nationals-mps-threaten-to-quit-nsw-government-unless-koala-protection-watered-down>

³¹ See Land Services Amendment (Miscellaneous) Bill 2020 <<https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3805>>

³² The key link between the Koala SEPP and Part 5A of the LLS Act is through the adoption of the concept of core koala habitat.

³³ See <https://www.edo.org.au/2020/11/20/controversial-nsw-koala-bill-defeated-by-single-vote/>

³⁴ See <https://www.planning.nsw.gov.au/News/2021/NSW-Government-delivers-Koala-SEPP-2021>; see also <https://www.planning.nsw.gov.au/-/media/Files/DPE/Factsheets-and-faqs/Policy-and-legislation/Frequently-Asked-Question--State-Environmental-Planning-Policy-Koala-Habitat-Protection-2021.pdf?la=en>

In November 2022, the Government again attempted to legislate to remove links between the Koala SEPP and the PNF framework through the *Environmental Planning and Assessment Amendment (Private Native Forestry) Bill 2022*. However, after considerable backlash by both the community and independent and some Coalition MPs in the NSW Parliament,³⁵ it indicated it would not proceed with the Bill. Anticipated changes to the land management framework have also not eventuated.

Both Koala SEPP 2020 and Koala SEPP 2021 remain in place. These have been consolidated as Chapter 3 and 4 respectively of *State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and Conservation SEPP)*.

5. Legislative reform to better protect koalas and their habitat

In addition to recommendations to improve implementation of current laws and outcomes for koalas outlined above, comprehensive law reform is needed to better protect koalas and their habitat.

A number of reports have made recommendations for improving protections for koalas and strengthening biodiversity conservation laws. These include:

- NSW Chief Scientist & Engineer, *Report of the Independent Review into the Decline of Koala Populations in Key Areas of NSW*, December 2016.³⁶
- NSW Parliament, Legislative Council – Portfolio Committee No. 7, *Koala populations and habitat in New South Wales – Report 3*, June 2020.³⁷
- New South Wales. Parliament. Legislative Council. Portfolio Committee No. 7 - Integrity of the NSW Biodiversity Offsets Scheme. Report no. 16, November 2022.³⁸
- Independent Review of the Biodiversity Conservation Act 2016 – Final Report, August 2023.³⁹

EDO's recommendations to strengthen laws for koala habitat are set out in our report *Protecting koalas in the Sydney Basin bioregion - Strengthening NSW laws to protect the trees that koalas call home*.⁴⁰

Relevantly, these include:

³⁵ See The Guardian, 'Koala wars': NSW government scraps contentious native forestry bill to head off revolt, 14 November 2022, available at <https://www.theguardian.com/australia-news/2022/nov/14/koala-wars-nsw-government-scraps-contentious-native-forestry-bill-to-head-off-revolt>

³⁶ https://www.chiefscientist.nsw.gov.au/_data/assets/pdf_file/0010/94519/161202-NSWCSE-koala-report.pdf

³⁷ <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2536/Koala%20populations%20and%20habitat%20in%20New%20South%20Wales%20-%20Report%203.pdf>

³⁸ <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2822/Report%20No.%2016%20-%20PC%207%20-%20Integrity%20of%20the%20NSW%20Biodiversity%20Offsets%20Scheme.pdf>

³⁹ <https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

⁴⁰ <https://www.edo.org.au/wp-content/uploads/2023/02/EDO-Report-Protecting-koalas-in-the-Sydney-Basin-Bioregion-February-2023-.pdf>

<p>A. Ensure legal protections apply to all koala habitat by adopting consistent, comprehensive mapping across NSW as a matter of urgency</p>
<ul style="list-style-type: none"> • Recommendation 1: Apply a scientifically robust, and clearly defined, definition of koala habitat to be used consistently across various legal frameworks. • Recommendation 2: Map all koala habitat in approved maps as a matter of urgency. This could be achieved by either: <ul style="list-style-type: none"> • the NSW Government funding relevant local councils to develop maps as part of koala plans of management (KPoMs) under the Koala SEPPs, and legislating a timeframe for the finalisation of plans; or • the NSW Government leading the development of a single, state-wide map of koala habitat to be adopted in law. • Recommendation 3: Update all relevant laws to align legal definitions of and protections for koala habitat with approved maps.
<p>B. Maximise protection of koala habitat by mandating appropriate and consistent levels of oversight</p>
<ul style="list-style-type: none"> • Recommendation 4: Direct all proposals likely to have an impact on koala habitat into the most robust assessment pathway. In particular: <ol style="list-style-type: none"> a) Strictly limit the scope of allowable activities under the <i>Local Land Services Act 2013</i> (LLS Act). b) Ensure only genuinely low impact activities are permitted as allowable activities under the Vegetation in non-rural areas SEPP. The Government should abandon plans to expand the scope of allowable activities to include sustainable grazing, removing invasive native species, and native vegetation thinning. These should remain as activities that require a permit or approval. c) End code-based clearing of koala habitat for agricultural and urban development. All such proposals must be subject to full environmental assessment. This can be achieved by: <ul style="list-style-type: none"> - updating the definition of ‘<i>environmentally sensitive area</i>’ in cl 1.5 of the Exempt and Complying Development SEPP to explicitly include koala habitat; or - ensuring all koala habitat (not just that currently mapped as core koala habitat in approved KPoMs) is categorised as category 2 sensitive land. • Recommendation 5: Abandon plans to ‘decouple’ koala protections from rural land. There must be consistent, robust mapping and protections for koalas across all land tenures.
<p>C. Bolster safeguards in assessment and determination processes</p>
<ul style="list-style-type: none"> • Recommendation 6: Reform biodiversity laws to strengthen protections for koala populations and habitat, including by:

- a) Re-introducing provisions to list specific koala populations as a separate listing, irrespective of whether a species is already listed;
 - b) Giving stronger legislative effect to the Save our Species (SoS) program;
 - c) Impose duties on developers and development decision makers to act consistently with SoS conservation priorities;
 - d) Require environmental assessments to state whether approving the development will contribute to key threatening processes listed under the BC Act, and if so, how this will be minimised, and any alternatives available for the decision-maker to consider.
- **Recommendation 7: Overhaul the NSW Biodiversity Offsets Scheme in line with best practice.** In particular:
 - a) Offsets must be designed to improve biodiversity outcomes.
 - b) Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts.
 - c) Legislation and policy must set clear limits on the use of offsets.
 - d) Offsets must not be available for development or activities that will clear or impact on areas of high environmental values, including important threatened species habitat.
 - e) Offsets must be based on genuine ‘like for like’ principles.
 - f) Time lags in securing offsets and gains should be minimised.
 - g) Indirect offsets must be strictly limited.
 - h) Discounting and exemptions should not be permitted.
 - i) Offsetting must achieve benefits in perpetuity.
 - j) Offsets must be additional.
 - k) Offset arrangements must be transparent and legally enforceable.
 - l) Offset frameworks must include monitoring and reporting requirements to track whether gains and improvements are being delivered.
 - m) Offset frameworks should build in mechanisms to respond to climate change and stochastic events.
 - **Recommendation 8: Strengthen the ‘serious and irreversible impacts’ mechanism to more accurately reflect the principles of ecologically sustainable development.** Specifically:
 - a) Reframe the standard as serious ‘or’ irreversible impacts.
 - b) Require the test to be applied objectively, not subjectively (i.e. – not in the opinion of the decision maker).
 - c) References to extinction risk should be clarified to refer to an appropriate scale and scope (see Principles applicable to determination of “serious and irreversible impacts on biodiversity values”).
 - d) Consent authorities should be required to have regard to the precautionary principle and cumulative impacts on threatened species.
 - e) Provide specific guidance on the application of serious and irreversible impacts (SII) to koalas and koala habitat.
 - f) The mandatory requirement to refuse development proposals that will have serious and irreversible impacts on biodiversity should be applied to both state

significant developments and state significant infrastructure (replacing the current discretionary application of the mechanism).

- **Recommendation 9: Address ongoing concerns with the operation and implementation of the Koala SEPP.** Specifically:
 - a) Adopt a single Koala SEPP for use across all relevant local government areas (LGAs).
 - b) Update the list of LGAs to which the Koala SEPP applies to ensure it encompasses all relevant LGAs.
 - c) Finalise Guidelines as a matter of urgency.
 - d) Clarify the application of the Koala SEPP to regionally significant development and state significant development.
 - e) Ensure all koala habitat is mapped (see Recommendations 1 - 3).
 - f) Remove the arbitrary 1 ha threshold from the Koala SEPP.

D. Prohibit logging in core koala habitat

- **Recommendation 10: Reinstate a comprehensive exclusion of private native forestry (PNF) in all koala habitat.** Specifically, PNF should be excluded in all koala habitat, and this should be properly implemented by completing comprehensive koala habitat mapping in all relevant LGAs per Recommendations 1 - 3.
- **Recommendation 11: Prohibit public land native forest logging in koala habitat.** This can be implemented by finalising comprehensive mapping of koala habitat and introducing exclusions for forestry operations in these areas.

E. Improve accountability and enforcement of laws

- **Recommendation 12: Improve transparency by ensuring public registers are in place and information available on public registers is comprehensive and readily accessible.** This includes registers of approvals for development, clearing and forestry, offset agreements, biodiversity certificates etc.
- **Recommendation 13: Improve reporting and monitoring of compliance with consent and approval conditions to ensure conditions are met and biodiversity outcomes are achieved.** This can include, for example, monitoring and reporting on set aside obligations under clearing laws, biodiversity offsets obligations under development approvals and clearing approvals, and mitigation measures under biodiversity certificates.
- **Recommendation 14: To improve accountability, ensure that third party appeal rights are available,** including third party merit appeal rights for major projects under the EP&A Act and open standing to enforce breaches of the Forestry Act.
- **Recommendation 15: Compliance and enforcement policies should identify and promote opportunities to seek remedies for unlawful activities that include the restoration and enhancement of koala habitat.**

F. Optimise the use of conservation and strategic planning tools

- **Recommendation 16: Make better use of the area of outstanding biodiversity value (AOBV) mechanism to protect koala habitat**, including by:
 - a) Declaring SoS sites (outside national parks and reserves) AOBVs; and funding these AOBVs for protection and making them off-limits from harm – including by mining interests (which otherwise continue to override biodiversity protection);
 - b) Removing the requirement for third parties to obtain landholder support prior to nominating an area as an AOBV.
- **Recommendation 17: Continue and enhance funding to protected areas including national parks and conservation agreements on private land.** This should include continued targeted funding for the NSW Biodiversity Conservation Trust to drive an uptake in private land conservation in priority koala habitat areas.

Conclusion

One of the key gaps in the NSW Koala Strategy and other initiatives to date, is action to strengthen laws to effectively curb habitat loss and fragmentation from activities such as land clearing, urban development, industry, infrastructure and forestry on public and private land.

Without legislative reform to address habitat clearing, there is a real risk that efforts to increase koala conservation on one hand is undermined by lax laws that continue to allow habitat destruction on the other. If the NSW Government is serious about koala conservation, then a revised Koala Strategy must include clear actions for legislative reform to strengthen and better implement the laws aimed at protecting koala and their habitat.

Our primary recommendation is that a revised Koala Strategy needs to commit to clear actions to better implement existing laws and strengthen legal regulation of activities that impact on koala habitat.

Our more detailed recommendations for reform are set out in the attached EDO reports:

- *Submission to the Inquiry into koala populations and habitat in New South Wales*, August 2019 (**Attachment 1**).⁴¹
- *Protecting koalas in the Sydney Basin bioregion - Strengthening NSW laws to protect the trees that koalas call home*, February 2023 (**Attachment 2**). While this report was written in the context of the Sydney Basin bioregion, recommendations for law reform are relevant to all of NSW.⁴²

⁴¹ https://www.edo.org.au/wp-content/uploads/2019/12/190814_NSW_Koala_Inquiry_-_EDO_NSW_Submission_-_Edited.pdf

⁴² https://www.edo.org.au/wp-content/uploads/2023/02/EDO-Report-Protecting-koalas-in-the-Sydney-Basin-Bioregion_February-2023-.pdf