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Dear Edward,

ECOCIDE (SCOTLAND) BILL

I would like to respond to the Committee's Stage 1 report on the Ecocide (Scotland) Bill ("the Bill") that was published on 23 January.

I would like to acknowledge the considerable work conducted by the Committee and witnesses during the Committee's inquiry into the Bill. I would also like to acknowledge the commitment shown by Monica Lennon and the role she has played in raising the profile of the importance of preventing serious damage to the environment. Her consultation on the Bill showed again that protecting our natural environment and preventing environmental crime are important to the public.

The Committee's report raises a number of important questions about the provisions of the Bill including the overlaps with the section 40 offence of causing significant environmental harm in the Regulatory Reform (Scotland) Act 2014, comparisons with the EU Environmental Crime Directive and the terms used in the Bill, such as "severe environmental harm", "widespread", "long-term" and "serious adverse effects". The Stage 1 report also raised important questions on the Bill's treatment of cumulative harm, omissions and courses of conduct, as well as its potential impact on the planning system and permitted activities. I will set out below a response to the recommendations in the report that are directed at the Scottish Government, and comment on the conclusions concerning guidance. I will not reply in detail to the recommendations that are primarily directed at the Member in Charge.

I note the final conclusion of the report on the Bill, that a majority of the Committee do not see a realistic prospect of the questions you identify about definitions and enforcement being addressed comprehensively in the few remaining weeks before this session of the Parliament ends and, given this, they do not consider that it would be responsible to recommend to the Parliament that the Bill should proceed any further. The report states that, in that context, a majority of the Committee do not support the general principles of the Bill.

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As we set out in our Memorandum on the Bill, the Scottish Government is supportive of the principle of an offence of ecocide for the most serious and wilful acts of harm to the environment. I see that this is much in line with the view of the Committee.

I have considered carefully the view of a majority of the Committee that there is not sufficient time to resolve outstanding concerns with the Bill before the end of the session. I have also considered the Member in Charge's view that, with a sufficient focus from her over the coming weeks, that there is sufficient time to address the issues that have already been considered in some detail during Stage 1. Therefore, the Scottish Government will continue to support the principle of the Bill at Stage 1. If the general principles of the Bill are agreed to by the Parliament at Stage 1, the Government will look to work constructively and rapidly with Monica Lennon and the Committee to prepare and agree effective amendments to the Bill where these are appropriate to address the concerns raised. I was able to set out during my evidence session at Stage 1 where the Government would need to see changes to the Bill and we have been working on potential Government amendments, should the Bill proceed.

Recommendations addressed to the Scottish Government

The Committee recommends that the Scottish Government undertakes or commissions a short, targeted review of the operation of section 40 and the Environmental Liability (Scotland) Regulations 2009, examining why they have been rarely used and whether procedural, evidential or resource constraints are limiting their effectiveness.

The Committee agrees that, whether or not this Bill progresses to Stage 2, there is a case to consider strengthening maximum penalties under section 40 of the 2014 Act, and that this should be considered as part of a review of that legislation (as recommended in paragraph 106)

Given the stage we are in the session, these are not recommendations that can be practically addressed before the election period. It will be for the next government to consider whether to take this recommendation forward. It should be noted that I am on record as saying that when Ms Lennon first approached me with the proposal for an ecocide offence, that a suggestion was made to amend the section 40 to include ecocide, but Ms Lennon wanted to proceed with a separate offence.

NatureScot is not formally an enforcing body under section 108 of the Environment Act 1995. This means that it would not be automatically covered by the provisions extending the enforcement bodies' remits to ecocide. Instead, it would require authorisation from SEPA to undertake ecocide-related investigations. As the Committee understands it, this also applies in the case of investigations potentially leading to a prosecution under section 40 of the 2014 Act. The Committee invites the Scottish Government to clarify whether investigations of possible environmental offences would benefit from NatureScot being designated an enforcing body and to comment on any significant resourcing or other implications of doing so.

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The powers at section 108 of the Environment Act 1995 allow entrance to and investigation of premises in order to secure any evidence relating to environmental crimes. In general, the expertise of NatureScot can be expected to be more relevant to the assessment of environmental damage caused by a serious pollution event, rather than an investigation into a possible criminal offence. There is no need for the powers at section 108 to be extended to NatureScot to allow it to investigate the commission of criminal offences. Section 9 of the Bill extends SEPA's powers under section 108 to this new offence, but that does not mean that SEPA are the only agency that could collect evidence relevant to an alleged offence. There is, in any case, provision for SEPA to authorise NatureScot staff under section 108 should this be relevant to a particular case. Therefore, we do not see any pressing argument to change these provisions.

Recommendations for the Bill should it proceed past Stage 1

The Committee recommends that, if the Bill proceeds, section 2(3) be amended to remove any doubt as to ECHR compatibility on this ground.

The Scottish Government has made clear its position on this issue, and has prepared an amendment to ensure the bill is ECHR compatible.

The Committee therefore recommends that the Bill be amended to provide for a defence based on carrying out licensed activities, including the position of operators acting competently within authorisations and of regulators and consenting authorities exercising statutory functions in an appropriate manner.

I agree that there should be a defence of acting within an authorisation under legislation specified in a statutory instrument, similar in effect to the defence provided at section 40(6) of the Regulatory Reform (Scotland) Act 2014. We have prepared an amendment on this issue.

I am still considering how best to respond to concerns about the possible impact of the new offence on the operation of consenting systems, including development planning functions of local authorities. Should the Bill progress to Stage 2, I will discuss possible amendments with the Member in Charge, and I am happy to engage with any other members who have amendments in this area.

If the Bill proceeds past Stage 1, the Committee recommends that there be discussions between the Member in Charge, the Scottish Government, prosecutors, police and environmental regulators with a view to producing revised and agreed estimates to complement further Parliamentary consideration of the Bill. This is complementary to the Committee's earlier recommendation on reviewing the operation of the section 40 offence, including why it has been so little used by prosecutors, which may itself suggest an existing resourcing, capability development, and inter-agency coordination issue.

Should the Bill progress to Stage 2, there will be limited time for such further discussions to take place. As has been discussed, it is inherently difficult to produce estimates when the incidence of an offence is thankfully so rare. As the Member in Charge made clear in her evidence, the strong likelihood is that any ecocide offence would be investigated under other, existing, provisions should there be no ecocide law in place. Nevertheless, I will seek to ensure that any possible further clarity on costs is obtained within the time available.

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The Committee therefore recommends that the Member in Charge consider lodging amendments to replace the current five-year reporting requirement with a duty on Scottish Ministers to publish a report within 12 months of any conviction for ecocide. The Committee considers that such a report should include, at a minimum, information on the environmental harm involved, the outcome of the case, and any lessons learned that could help prevent similar incidents in the future.

This recommendation is primarily for the Member in Charge to consider. I will look carefully at any amendment that is brought forward on reporting requirements. These do not usually form a part of criminal law, and we need to ensure that any requirement is proportionate and fully respects the role of the judiciary. It may be that, for example, information on relevant cases can (and would under existing arrangements) be published through sentencing statements which are regularly published in certain criminal cases and includes details of relevant cases such as the facts and circumstances which have led to imposition of the sentence.

Recommendations about the production of guidance

The Committee does recognise that not all matters can be expressed on the face of legislation, and that it is not possible to 'predict' exactly what types of environmental harm could amount to an ecocide event in future. The Committee further recommends that guidance for prosecutors, police and regulators be developed on the different elements of the definition, including ecological criteria, scientific indicators, and practical examples.

In the event of the Bill becoming law, the Committee notes that guidance on the operation of the defences under the Bill could fulfil a useful role. This could be developed collaboratively with bodies including SEPA, NatureScot and COPFS.

I agree it is important that there is understanding on how new legislation operates which can be useful for those affected by the legislation. However, I think that it would be inappropriate for prescriptive guidance as suggested to be developed by the Scottish Government, as this would impact on what are appropriately independent law enforcement matters. While information can certainly be developed to aid understanding of the legislation, it cannot be as prescriptive as suggested as these relates to matters of law enforcement and, fundamentally, legal interpretation which ultimately would be beyond the appropriate scope of any Scottish Government guidance.

Within this context, the Scottish Government is happy to consider further with the Member in Charge how information on the legislation could be developed which aids general understanding.

Yours sincerely,



GILLIAN MARTIN

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