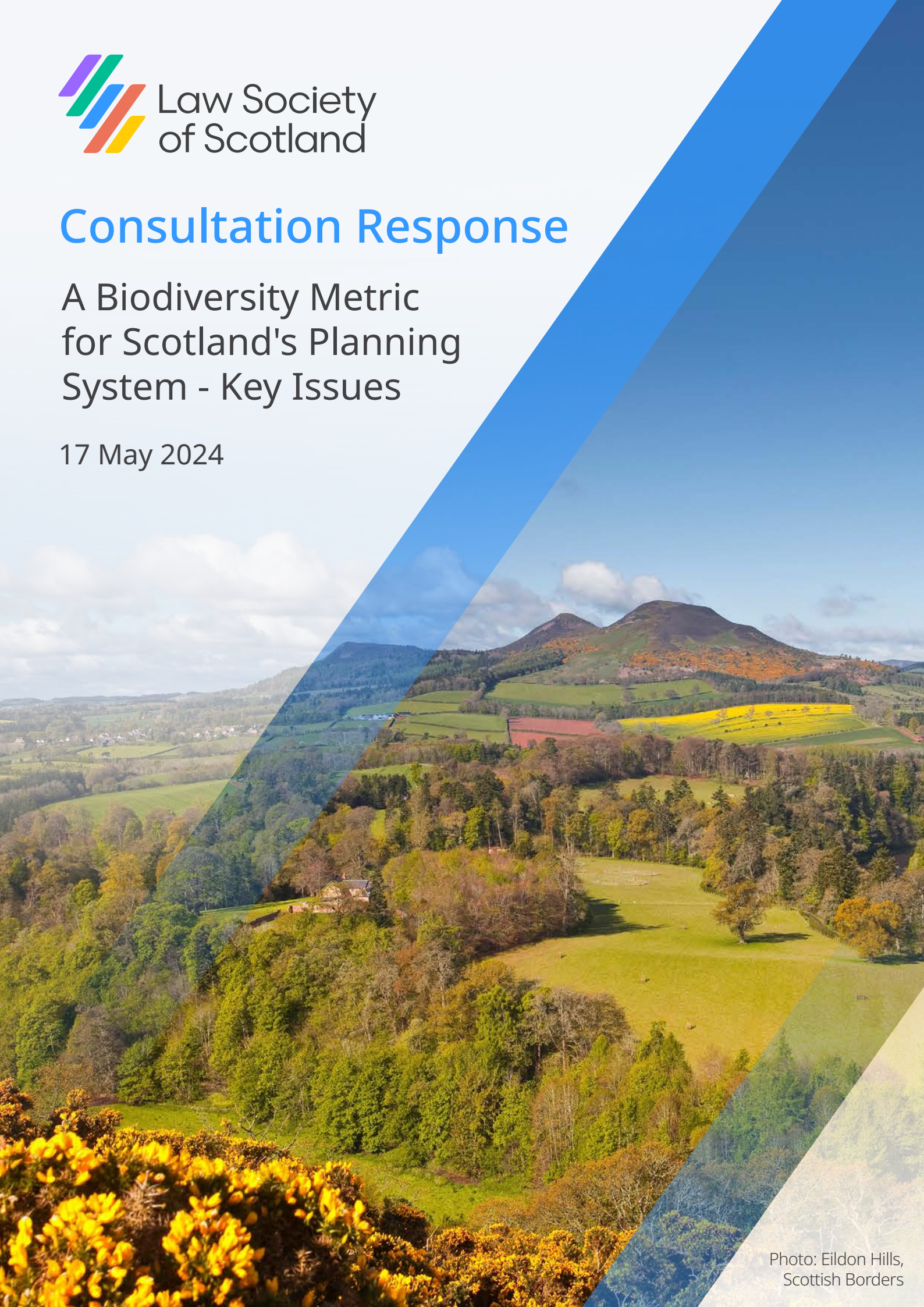


Consultation Response

A Biodiversity Metric for Scotland's Planning System - Key Issues

17 May 2024



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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Planning Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government's consultation: *A Biodiversity Metric for Scotland's Planning System - Key Issues* (the "**Consultation**").¹ It has the following comments to put forward for consideration.

Consultation Questions

Questions 2 – 10²

We have no specific comments to make.

Question 11. Our approach to developing a Scottish Metric

a) Do you have any comments on the phased approach set out, and priorities indicated?

We would question whether there is a preliminary point which requires to be addressed in terms of how a biodiversity metric would be used in Scotland. The English biodiversity metric is used to calculate both existing biodiversity and proposed enhancement in the context of the 10% biodiversity net gain (**BNG**) requirement imposed by law. It is a formula based approach for that context. The Scottish planning system does not contain such a legal requirement and does not prescribe minimal levels of biodiversity enhancement and hence the biodiversity metric would seem to have a different function than in England. Care needs to be taken that the different functions of the biodiversity metric are taken into account.

b) If you have any further comments on the development of a biodiversity metric for Scotland's planning system, please provide them here.

We have limited our comments to the legal aspects and related considerations, in line with the remit and expertise of our membership, and do not look to comment

¹ [A Biodiversity Metric for Scotland's Planning System - Key Issues consultation](#) | NatureScot

² Question 1 relates to the Consultation respondent's contact information.



on the technical environmental and biodiversity elements discussed in the Consultation.

We note the discussion throughout the Consultation of the legislative and policy position in England in relation to BNG. We welcome that consideration is being given to how best this model could be adapted and best tailored to take into account the legal framework and wider practical considerations in Scotland.

As noted in the Consultation, Policy 3(b) of the National Planning Framework 4 includes a requirement for all national, major and EIA development to include “significant biodiversity enhancements” that leave nature in a “demonstrably better state than without intervention”. We highlight the subjective nature of this assessment, and consider that a consistent approach would be welcomed to how this applied across different planning authorities.

Whilst we appreciate there are benefits to the current flexible approach adopted in Scotland, we welcome the progress being made to move towards there being a clearer framework and guidance in this area.

Members have experience working across both the English and Scottish planning systems, and note challenges and inconsistencies in respect of the BNG framework in England. For example, that developers may be incentivised by scoring higher for completing works which are more straightforward and have a higher chance of success, rather than more creative measures (which may be less likely to succeed). There would be merit in having regard to any anomalies or issues raised by stakeholders in relation to the BNG framework in England when developing the metric.

It is noted that the Consultation refers to the English metric’s use of trading rules and risk factors which apply penalties in relation to off-site biodiversity enhancement. Whilst the Consultation recognises that a Scottish approach to factors such as spatial risk will require to be developed, there are preliminary questions which may need to be considered in terms of the extent to which this sort of approach is appropriate for the Scottish planning system, which has a different conceptual base for biodiversity enhancement.

The Consultation also does not acknowledge that the English BNG system has a separate biodiversity metric for small sites.³ The small sites metric includes a more flexible approach to trading rules and this needs to be considered as part of the current consultation exercise.

It is important that the metric is clear and easy for users of the planning system to understand. In particular, we highlight that the more complex a metric is, the more expensive it can be to assess compliance in relation to relevant projects – which could present a barrier to market for smaller developers. Clarity on what the metric

³ [The Small Sites Metric \(Statutory Biodiversity Metric\) – User Guide \(February 2024\)](#)



means in practice for developments, and what is required to comply with it, is important.

We further note the Scottish Government's *Draft Planning Guidance: Biodiversity*,⁴ published in November 2023. As a general comment, it is important that the link and interaction between the guidance and the metric once finalised is clear.

We also highlight the importance of there being sufficient resources and personnel both in the market and within planning authorities to facilitate these requirements and proposals once finalised.

⁴ [Biodiversity: draft planning guidance](#)



For further information, please contact:

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