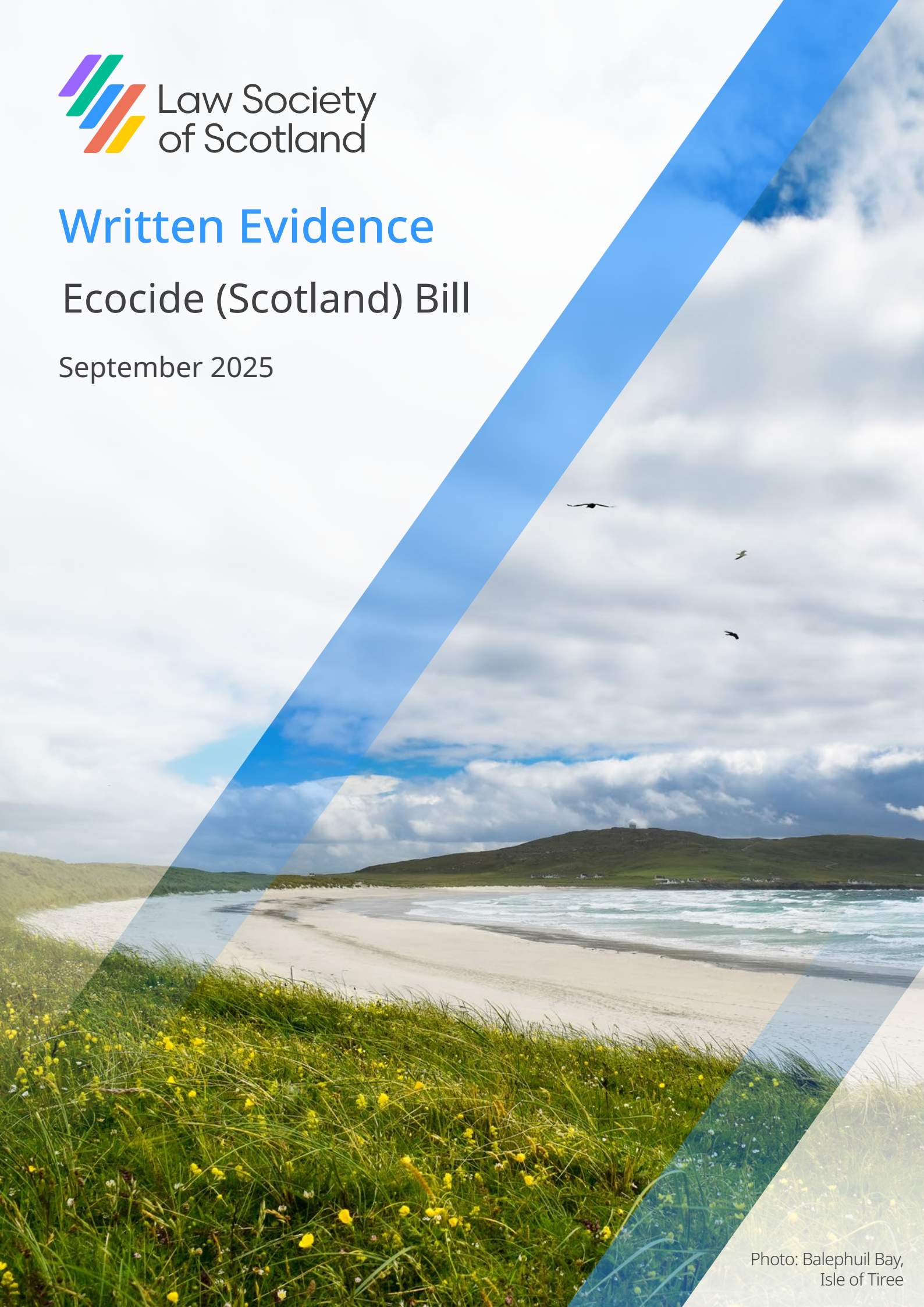


Written Evidence

Ecocide (Scotland) Bill

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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 Environmental Law Sub-Committee welcomes the opportunity to consider and respond to the [Net Zero, Energy and Transport Committee](#) of the Scottish Parliament's call for views¹ on the Ecocide (Scotland) Bill². The sub-committee has the following comments to put forward for consideration.

¹ [Ecocide \(Scotland\) Bill - Scottish Parliament - Citizen Space](#)

² [Ecocide \(Scotland\) Bill as introduced](#)

1. General Views

1.1. Do you support the overall aim of the Ecocide (Scotland) Bill to criminalise the most serious forms of environmental harm?

We recognise a need to provide a stronger legal mechanism to punish severe environmental harm given the twin climate and nature crises, where severe environmental harm needs to be mitigated through recognition and prevention. We therefore welcome the introduction of the Ecocide (Scotland) Bill.

The Bill serves to help foster a change of behaviour towards environmental risk so that those who might potentially cause severe harm to the environment are aware of potentially harsh sanctions, in turn seeking to prevent environmental harm from taking place in the first place.

The Bill builds on the significant work of the late Scottish barrister, Polly Higgins, who died in 2019³.

The Bill has strong similarities with the EU Environmental Crimes Directive 2024/1203⁴; and countries such as France, Belgium and Chile currently have existing ecocide laws.

The effectiveness of the Bill will hinge, however, on there being adequate resources in place for enforcement. This comment mirrors previous comments we have made on environmental governance in other consultations^{5, 6}.

The level of potential penalties (up to 20 years in imprisonment and/or unlimited fine) is severe. The severity of the penalties is intended to match the severity of harm and send a strong, clear, dissuasive message to those who might cause environmental harm so that there is a culture change in attitudes towards protecting the environment. However, it is a matter of the Court to decide the appropriate penalty based on its statutory powers and sentencing practices.

The case of *HMA v Doonin Plant*⁷ in 2011 where the level of the fine was increased significantly by the Court on appeal serves as an important example of where the penalty needs to be proportionate and fit the crime.

The further provisions of lifting the “corporate veil” so that those managing an organisation can be held liable as well as the organisation, in addition to provisions

³ <https://www.theguardian.com/environment/2019/apr/22/polly-higgins-environmentalist-eradicating-ecocide-dies>

⁴ Directive - EU - 2024/1203 - EN - EUR-Lex

⁵ <https://www.lawscot.org.uk/media/5ogog15z/review-of-the-effectiveness-of-environmental-governance-response-13-october-2023.pdf>

⁶ <https://www.lawscot.org.uk/media/o4imzvew/2023-12-21-env-rur-cons-strategic-framework-for-biodiversity.pdf>

⁷ HM Advocate v Doonin Plant Ltd 2010 Scot (D) 10/8, 3 August 2010

for vicarious liability, add strength of the Bill. An example of where provisions for vicarious liability have seen a change of culture in environmental matters is the Natural Environment and Wildlife (Scotland) Act 2011 (section 24)⁸ which has had a noticeable effect on changing attitudes towards wildlife crime in Scotland.

Additionally, the inclusion of scope for an order for compensation to include costs for personal injury, loss or damage as well as for remediation has an important practical effect for communities impacted by severe environmental harm and in terms of environmental justice.

1.2. How would the Bill interact with existing law, in particular section 40 of the Regulatory Reform (Scotland) Act?

The new offence largely overlaps with the offence set out in section 40 of the Regulatory Reform (Scotland) Act 2014⁹, but has a narrower *mens rea* (mental element), a narrower provision on corporate liability (as it does not include neglect), an additional vicarious liability provision, more severe maximum penalties, and a reporting requirement.

It may be that amending the section 40 offence as “ecocide”, and other provisions as necessary to cover the new elements proposed by the Ecocide (Scotland) Bill, may be a more effective and efficient way of integrating these provisions into law.

⁸ [Wildlife and Natural Environment \(Scotland\) Act 2011](#)

⁹ [Regulatory Reform \(Scotland\) Act 2014](#)

2. Definition and Scope of the Offence (section 1)

2.1. The Bill defines ecocide as causing "severe environmental harm", where "severe" means that the environmental harm has "serious adverse effects" and is either "widespread" or "long-term". Do you agree with the definition of ecocide in the Bill?

These definitions seem reasonable, but they will inevitably have differential effects depending on circumstances.

For example, a pollution spill near a river may have widespread effects downstream that a direct equivalent spill further away from a watercourse does not. Similarly, weather conditions will dictate whether a recklessly caused fire has widespread consequences.

2.2. Please comment on the definitions of the following and whether you consider they are defined clearly and appropriately:

No have no further comments.

2.3. The offence applies to harm caused either intentionally or recklessly. Do you consider this threshold to be appropriate?

- "Severe environmental harm"
- "Widespread"
- "Long-term"

All biodiversity harm is likely to be long-term since even apparently rapidly regenerating habitats take years to produce the same richness of species mix. Intentional or reckless tests mirror provisions in place in Scotland for wildlife crime – see, for example, section 1 of the Wildlife & Countryside Act 1981¹⁰ as it applies to Scotland.

¹⁰ [Wildlife and Countryside Act 1981](#)

2.4. Is it clear how the Bill would apply in cases such as where environmental harm is:

- A result of cumulative damage caused by multiple acts e.g. consumption or disposal of a product

If an isolated action causes less than severe harm, it would seem that an ecocide offence, as defined in the Bill, would not be committed.

- A result of a form of land management which is otherwise legal e.g. use of chemicals

A fundamental problem in this area is that the cumulative effect of lawful activities can cause greater harm to the environment than any one-off incidents that might fall under a definition of “ecocide”. This needs to be addressed.

- A result of a project or development which has been consented or licenced by a public authority?

A large development may well go through the Environmental Impact Assessment process so that its environmental impacts are considered in advance and so that its design, operational and construction methodologies, and mitigation plans, are planned accordingly. However, that does not mean that the development won't cause an ecocide offence at some point in the future.

The presence of an ecocide penalty may help focus the design of developments further so that there is increased awareness of the consequences of environmental harm.

3. Defence of Necessity (section 2)

3.1. The Bill includes a defence of "necessity" where ecocide was committed to prevent greater harm (not including financial harm). Do you agree with this approach?

We have no specific comments.

3.2. Do you have any concerns about how this defence could be interpreted or applied?

We have no specific comments.

4. Individual and Organisational Liability (sections 3 and 4)

4.1. The Bill allows for individuals, organisations and specified senior individuals (e.g. directors or partners) of organisations to be held liable for ecocide. Do you support this approach?

Unlike many other offences, for example section 40 of the Regulatory Reform (Scotland) Act 2014¹¹, the basis of individual liability is consent or connivance, not “attributable to the neglect” of the listed people (section 42 of the Regulatory Reform (Scotland) Act 2014¹²).

4.2. Are the provisions on individual and organisational culpability sufficiently clear and appropriate, including the definitions of who is a “responsible individual”?

Yes, however there is cross-over with the existing wording at section 42 of the Regulatory Reform (Scotland) Act 2014 (were the ecocide provisions to be integrated into that Act).

4.3. Are the provisions on vicarious liability clear and appropriate?

Please see previous response to question 1.2 in reference to the Wildlife & Natural Environment (Scotland) Act 2011¹³.

¹¹ [Regulatory Reform \(Scotland\) Act 2014, section 40](#)

¹² [Regulatory Reform \(Scotland\) Act 2014, section 42](#)

¹³ [Wildlife and Natural Environment \(Scotland\) Act 2011](#)

5. Penalties and Deterrence (sections 5-8)

5.1. The Bill proposes a maximum custodial sentence of 20 years and unlimited fines (or an unlimited fine in the case of an organisation). Are these penalties appropriate and proportionate?

Please see response to question 4.3.

It is essential that penalties are proportionate and dissuasive. The levels significantly exceed those contained in section 40(7) of the Regulatory Reform (Scotland) Act 2014. However ecocide law is focussed on “**severe**” environmental harm, dealing with a more extensive class of environmental harm than might otherwise presently be captured under the provisions of the Regulatory Reform (Scotland) Act 2014.

5.2. Should the Bill consider alternative or additional penalties?

There is no provision for the offender to be required to undertake remediation themselves, unlike other some other environmental offences such as the contaminated land regime.

Instead, offenders can be required to pay for others to do this, which is perhaps justified in terms of trust that appropriate steps are taken properly and avoiding any spin into “good news” story based on the tidy up.

Furthermore, if there is severe environmental harm, such as an oil spill, then steps need to be actioned swiftly and effectively to remediate the harm which an offender may not be best placed to do.

5.3. Does the potential for publicity orders (mandatory publication of conviction details) add meaningful deterrence?

It could add to the dissuasive effect on environmental harm that the Bill is ultimately trying to bring attention to, and certainly adverse publicity can change the way in which businesses operate in a world of increasing corporate and social responsibility.

6. Enforcement and Institutional Readiness (section 9)

6.1. Which enforcement bodies do you consider to be key to responding to potential ecocide events, and do you believe enforcement agencies such as SEPA, Police Scotland and COPFS are currently equipped to investigate and prosecute ecocide?

All enforcement bodies will be required to contribute to enforcement. It would be essential that there is sufficient long-term resourcing so that enforcement can be achieved.

6.2. What additional resources, training or powers (if any) would be required to effectively enforce the provisions in the Bill and are these reflected in the Financial Memorandum?

We note that there has been very limited use of the Environmental Liability (Scotland) Regulations 2009, SSI 2009/266¹⁴ which provides liability for “significant” harm, which is the closest comparator from an enforcement and sanctions perspective.

It would be useful to review the extent of these Regulations’ use and impact as part of considering how best to integrate the provisions of the Bill and so as to ensure that there is coherence within environmental law provisions.

¹⁴ [The Environmental Liability \(Scotland\) Regulations 2009](#)

7. Sectoral, Economic and Community Impacts

7.1. What impact could the offence of ecocide have on Scottish businesses and what sectors could be most impacted?

We have no specific comments.

7.2. Are the Bill's safeguards (e.g. mental threshold, necessity defence, vicarious liability provisions) sufficient to protect legitimate industrial and other activities which may pose a risk to the environment?

See comment above about permitted actions.

7.3. The Committee is interested in your views on the potential implications of the Bill on:

- Local communities
- Rural economies
- Innovation or investment
- Equalities and human rights

We have no specific comments.

8. Alignment with International and EU Law and developments in other countries

8.1. How well does the Bill align with international developments (e.g. EU Environmental Crime Directive, Stop Ecocide campaign, individual country approaches)?

With the section 40 of the Regulatory Reform (Scotland) Act 2014 offence, there are parallels with the EU requirements, but the levels of penalties in Article 7 of the EU Environmental Crime Directive¹⁵ are significantly higher than the levels set out in section 40 of the Regulatory Reform (Scotland) Act 2014 (see Article 7(3)).

In addition, the EU Directive at Article 7(4) extends the level of penalties further for certain criminal environmental penalties.

The offence in this Bill is wider than that proposed for the International Criminal Court which is limited to individual liability.

We also highlight section 1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021¹⁶ where the Scottish Ministers may make provision to implement an EU Directive so that Scots Law corresponds with EU Law.

¹⁵ [Directive \(EU\) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC](#)

¹⁶ [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021, July 2022 - regulation making power under Section 1: statement of policy - gov.scot](#)

9. Reporting and Oversight (section 10)

9.1. The Bill requires regular reporting by Scottish Ministers on enforcement and outcomes. What are your views on these provisions and if they are appropriate?

The Bill as drafted requires a single report at the end of the first five years, which is quite common in other legislative proposals.

However, there are two standout issues with the provisions:

Firstly, police statistics are not always gathered or presented in a way that allows easy interpretation and interrogation.

Secondly, and aligned with the overlap with section 40 of the Regulatory Reform (Scotland) Act 2014, we have concerns around continued 'visibility' of a newly created offence being forgotten about amidst existing crimes.

Provisions, like those presented in the Bill, are one remedy, but they will do so in a fragmented and onerous way that does not necessarily deal with the underlying concerns. It is important that ecocide provisions sit within a coherent context of the law to ensure that underlying harms to the environment are addressed but that penalties, whether for significant environmental harm or severe environmental harm (as targeted via the Bill), are enforced effectively.

9.2. What other forms of parliamentary or independent oversight might be appropriate?

We have no further comments.

10. Final Comments

10.1. Are there any other issues or concerns you would like to raise regarding the Bill?

We have no further comments.

10.2. Do you have suggestions to improve the Bill or make it more effective?

As highlighted in question 1.2, we would query whether a new Bill is necessary in of itself, or whether it would be more effective and coherent to integrate the provisions into amendments to section 40 of the Regulatory Reform (Scotland) Act 2014.



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