

Consultation response

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Environmental Law Sub-committee welcomes the opportunity to respond to Scottish Government's consultation on the *Scottish Biodiversity Strategy 2022*¹. We have the following comments to put forward for consideration.

General remarks

We welcome the focus and importance which is being given to biodiversity and are supportive of the development of a new strategy in this regard. We note that Chapter 5 of the consultation document recognises that the ambitions in this regard have not changed but have not been successfully achieved in the past due to failures in governance, accountability and in the mechanisms employed to try to make biodiversity a mainstream concern. This raises questions about what needs to change and how that will be achieved in order to ensure that ambitions are met.

We consider that it would be beneficial to see express references to the environmental principles which will shortly have to be taken into account for all policy decisions under the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

¹ <https://consult.gov.scot/environment-forestry/scottish-biodiversity-strategy-2022/>

Consultation questions

Chapter 2: The Evidence of Biodiversity Loss

Using your own knowledge and the evidence presented, to what extent do you agree that there is a nature crisis in Scotland? Why do you think that?

We have no comment.

What do you see as the key challenges and opportunities of tackling both the climate and biodiversity crises at the same time?

A particular challenge is the connection between climate and biodiversity on an international scale and the fact that what is done elsewhere will have inevitable impacts on Scotland.

We note that much of the diagnosis and remedies discussed in Chapter 5 of the consultation document applies as much to climate as to biodiversity issues.

Chapter 3: Our Strategic Vision – Framing and Context

Is the draft vision clear enough?

We consider that the vision of “substantially restored and regenerated biodiversity” could be criticised as being vague, however, recognise that this is more practically and ecologically realistic than anything expressed in more absolute terms. The recognition of resilience and adaptation to climate change is a good thing, given that protecting the status quo is unlikely to be feasible in coming decades.

Is the draft vision ambitious enough?

We have no comment.

Do you have any suggestions for a short strategic vision which would form the title for the strategy?

We have no comment.

Chapter 4: How Will We Know When We Have Succeeded?

1. Scotland's Rural Environment – Farmland, Woodlands and Forestry, Soils and Uplands

Do the 2045 outcome statements adequately capture the change we need to see?

We have no comment.

Are the 2030 milestones ambitious enough? Are we missing any key elements?

We have no comment.

What are the key drivers of biodiversity loss in this outcome area?

We have no comment.

What are the key opportunities for this outcome area?

We have no comment.

What are the key challenges for this outcome area?

We consider that a particular challenge is the wider issue about how recognition is to be given to those who are taking proactive steps to improve biodiversity, in particular, the balance between paying for outcomes actually delivered and providing support to enable the changes to be made which it is hoped will lead to better outcomes in future.

While payment of future land use subsidies could be conditional on, in this context, improved biodiversity, this causes concern for some landowners and others that by embarking on improvements projects at the present time, they could lose the opportunity at a future date to 'credit' the improvements in the future.

While this is relevant to the wider context of reducing emissions and enhancing natural carbon, this is particularly challenging in the context of biodiversity since many biodiversity interventions take a long time to mature. This is complicated by the fact that the shape and value of carbon and biodiversity credits and the markets for them are still evolving in a very fluid context.

In addition, if there is to be a major expansion of native woodland, we consider that there is a need to be putting in place the arrangements for this now, including the seed collection and nurseries to supply the locally sourced young trees needed to expand woodland in an ecologically sound way.

We note that the Werritty Report showed that some grouse moor owners are impervious to many of the usual policy incentives and so it is not clear how the high standards of sustainable use will be achieved.

In reference to deer, we note that reducing grazing requires either vigorous use of existing legal frameworks or innovations in policy and regulation.

2. Marine Environment

Do the 2045 outcome statements adequately capture the change we need to see?

Although the universality of the current expression has virtues, it might be useful to say something explicitly about fisheries, fish-farming and offshore energy. The interplay with other levels of government is particularly important in this area.

Are the 2030 milestones ambitious enough? Are we missing any key elements?

We have no comment.

What are the key drivers of biodiversity loss in this outcome area?

We have no comment.

What are the key opportunities for this outcome area?

We have no comment.

What are the key challenges for this outcome area?

We have no comment.

3. Freshwater Environment: Rivers Lochs and Wetlands

Do the 2045 outcome statements adequately capture the change we need to see?

We consider that the outcome statements might usefully say more about risks to water flows from changing climate – drought as well as flood.

Are the 2030 milestones ambitious enough? Are we missing any key elements?

We suggest that the 2030 expectation might usefully say something about water quality.

What are the key drivers of biodiversity loss in this outcome area?

We have no comment.

What are the key opportunities for this outcome area?

We have no comment.

What are the key challenges for this outcome area?

We have no comment.

4. Coastal Environments

Do the 2045 outcome statements adequately capture the change we need to see?

We note that the vision of “naturally functioning coastlines” means not pursuing coastal protection which will have consequences for those whose land is at risk from erosion and flooding. This vision statement is likely to have significant impacts on the lives of a large number of people.

Are the 2030 milestones ambitious enough? Are we missing any key elements?

We have no comment.

What are the key drivers of biodiversity loss in this outcome area?

We have no comment.

What are the key opportunities for this outcome area?

We have no comment.

What are the key challenges for this outcome area?

We have no comment.

5. Urban Environments – Towns and Cities

Do the 2045 outcome statements adequately capture the change we need to see?

We have no comment.

Are the 2030 milestones ambitious enough? Are we missing any key elements?

We have no comment.

What are the key drivers of biodiversity loss in this outcome area?

We have no comment.

What are the key opportunities for this outcome area?

We have no comment.

What are the key challenges for this outcome area?

The provision and maintenance of nature-rich environments requires progress on how green space is funded and managed in the long term. Unless the costs are to be government funded by tax revenue, improved means of securing contributions from those who benefit over an extended period must be developed. We also consider that ways of ensuring that the land continues to be devoted to nature must be found and used (for example, planning obligations conservation burdens), with a commitment to continuing monitoring and enforcement of these.

6. Across our Land and at Sea – Overall Health, Resilience and Connectivity

Do the 2045 outcome statements adequately capture the change we need to see?

We have no comment.

Are the 2030 milestones ambitious enough? Are we missing any key elements?

We have no comment.

What are the key drivers of biodiversity loss in this outcome area?

We have no comment.

What are the key opportunities for this outcome area?

We have no comment.

What are the key challenges for this outcome area?

We consider that the new concept of Nature Networks needs to be developed and its legal, regulatory and financial consequences clarified.

To what extent will these outcomes deliver the Vision?

We generally support the approach of a 2045 vision supported by shorter-term statements is a good one, but we note that 2030 commitments do not leave a lot of time for the planning, approval and implementation of any significant policy or legislative changes. This is especially so for the Scottish Government as a devolved administration that has to work within the legal constraints of the UK Government's actions under reserved powers and within the policy decision to keep pace with the EU.

There are other areas of important, relevant policy where there will be limited, if any, opportunity to reflect the new Biodiversity Strategy – for example, the National Planning Framework, which, as currently drafted, sets a vision for 2045.

We consider it appropriate that the term “rewilding” has not been used in the suggested outcomes as this carries different meanings.

We note the reference at page 23 to “halting biodiversity loss by 2030”, which is a major commitment, albeit one which has been made in the past and not fulfilled.

What might be missing?

We consider that the ability to realistically measure the effect of actions, especially long-term actions, is not well developed. Without more general scientific understanding, it is difficult to have confidence in the statements and commitments made. This is a limitation on future action in that work is necessarily going forward on a ‘best estimate’ approach.

What evidence and information should we use to assess whether we have delivered the Vision?

We have no comment.

Chapter 5: The Conditions for Success

Have we captured the key enabling factors which are essential in order for our strategy to be successful?

In relation to the proposed outcomes on Strategic Leadership, the “agreed priorities and outcomes” need to be determined alongside the other pressing demands on Government, including climate and the circular economy, recognising that even with due regard to a Just Transition, there will be those who suffer changes they will see as negative or will not be able to pursue their ambitions.

In connection with the proposed outcomes on Governance Structures and Accountability, the legislative framework that is to be reviewed for fitness for purpose must be not just nature conservation law but all areas that impact on how land is used. Nature conservation law itself would benefit from consolidation to simplify and make it easier to operate the law. The proposed outcomes around statutory targets and an independent monitoring body are innovative. In this regard, there needs to be clarity as to what happens if the statutory targets are not met, and careful consideration and clarity as to who is to do this job – for example, we consider that it would be a conflict of interest for NatureScot to undertake this role and it would require a significant change in the remit of Environmental Standards Scotland if that was to be the independent body.

Turning to the proposed outcomes on Funding and Responsible Private Investment, we note that one of the conditions for success is “private responsible investment” – how is this to be defined, measured and

controlled, particularly in the context of many of the levers regulating finance being matters not devolved to Scotland? Similar considerations apply to the proposed outcomes for businesses to report on their dependencies and impacts on biodiversity, and actions to inform consumers of their choices.

In connection with the proposed outcomes on Public Engagement and Communications and more generally, we consider that more will need to be done to provide the skills and experience needed, particularly in terms of ecologists, to provide the advice and guidance widely required to enable public and private bodies to respond to taking biodiversity seriously. There is unlikely to be sufficient expertise or capacity at present to achieve a widespread integration of biodiversity values.

In relation to the proposed outcomes on Evidence and Data, we recognise that effective monitoring is vital, but requires a legal framework and resources.

More generally, the recognition of past failures and the need to adopt a ‘whole-of society’ approach is very welcome, however, this will require action to ensure that this is adhered to.

The mainstreaming of biodiversity values suggests that there may need to be a greater focus on this in other policies, for example, the National Planning Framework, and that there may be risks around divergence or deregulatory measures across the UK (for example, under the Levelling-Up and Regeneration Bill). We note with interest that the consultation does not suggest the introduction of measures such as Biodiversity Net Gain which is being introduced elsewhere in the UK.

Are there good examples of enabling conditions in other strategies we could learn from?

We have no comment.

Can you set out how you think any of the proposals set out in the consultation might help to eliminate discrimination, advance equality of opportunity and foster good relations?

We have no comment.

Can you provide any evidence which informed your conclusions?

We have no comment.

For further information, please contact:

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