



The Scottish Parliament

ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

AGENDA

9th Meeting, 2003 (Session 2)

Wednesday 29 October 2003

The Committee will meet at 10.00 am in the Chamber, Assembly Hall, The Mound, Edinburgh.

1. **Nature Conservation (Scotland) Bill:** The Committee will take evidence at Stage 1 from—

Councillor Alison Hay, Malcolm Muir and James Fowlie, COSLA

Jo Lenthall, Scotland LBAP Project Officer, Scottish Biodiversity Forum

Professor Jeff Maxwell, Royal Society of Edinburgh

Professor Colin T Reid, UK Environmental Law Association.

2. **National Waste Plan inquiry (in private):** The Committee will consider a draft report.
3. **Budget process 2004-05 (in private):** The Committee will consider a draft report.

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The following papers are attached or are relevant to this meeting:

<u>Agenda Item 1</u>	
Briefing paper from SPICe (<i>for members only</i>)	ERD/S2/03/9/1a
Paper from the Clerk (<i>for members only</i>)	ERD/S2/03/9/1b
Paper from the Clerk (<i>for members only</i>)	ERD/S2/03/9/1c
Submission from COSLA	ERD/S2/03/9/1d
Submission from the Scottish Biodiversity Forum	ERD/S2/03/9/1e
Submission from the Royal Society of Edinburgh	ERD/S2/03/9/1f
Submission from the UK Environmental Law Association	ERD/S2/03/9/1g
<u>Agenda Item 2</u>	
Draft report on the National Waste Plan inquiry (<i>for members only</i>)	ERD/S2/03/09/2a
<u>Agenda Item 3</u>	
Draft report on the Budget process 2004 – 2005 (<i>for members only</i>)	ERD/S2/03/09/3a
Paper from the Scottish Executive Finance Department (<i>for members only</i>)	ERD/S2/03/09/3b

SUBMISSION FROM COSLA

INTRODUCTION

The Convention of Scottish Local Authorities welcomes the opportunity to respond to the Environment and Rural Development Committee's call for evidence on the Nature Conservation (Scotland) Bill. This written response details COSLA's answers to the questions set out by the Committee, and complements evidence that will be presented to the Committee by COSLA's Environment, Sustainability and Community Safety Spokesperson Councillor Alison Hay on Wednesday 29th October 2003. Their comments add to those already made in the previous consultation by the Scottish Executive.

PART 1 OF THE BILL: THE CREATION OF A NEW GENERAL DUTY ON PUBLIC BODIES TO FURTHER THE CONSERVATION OF BIODIVERSITY:

Is the scope and effect of the duty appropriate and clearly understandable?

COSLA recognises that it is the Scottish Biodiversity Strategy, which we understand will be issued for consultation later in the year, which will determine the scope and effect of the duty on local authorities and other public bodies. The absence of a detailed biodiversity strategy does create a difficulty for COSLA in commenting on the appropriateness of the duty, but this document is our attempt to present our understanding as based on the Bill and accompanying documents. We would also stress that given the short timescale to respond, over a holiday period, and the fact that COSLA represents 31 councils, it has not been easy to compile an entirely representative response. As such, COSLA may wish to raise further important points concerning the Bill at a later stage in the consultation period, and if so we will submit these in writing.

COSLA welcomes the intention of the duty to 'further biodiversity,' and believes that if implemented successfully the duty could revolutionise nature conservation, allowing local authorities to manage their environments in an inclusive way that benefits the entire local community and ecosystem, and which does not rely on simply protecting individual sites or species. COSLA believes that, in order to realise the major benefits of the duty, councils will require some additional funding and the ready availability of practical advice. This advice needs to be drawn up with assistance from COSLA and other partner agencies and linked to the Biodiversity Strategy. This will be especially important in the process of implementing the duty. The exact funding required can only be fully quantified once the detail of the Biodiversity Strategy is known.

COSLA would also like to take this opportunity to emphasise the importance of ensuring that this Bill links in with future legislation, especially the forthcoming Planning Bill and the implementation of the Strategic Environmental Assessment.

The committee will be aware that local authorities are currently engaged in work to introduce Local Biodiversity Action Plans (LBAPs), which go some way towards structuring a council or joint council strategy for managing biodiversity. However, the wide ranging duty proposed in Part 1 of the Bill will require a formal approach that will go beyond the LBAP process, requiring local authorities to take an active role in furthering biodiversity across departments and services. Currently it is biodiversity officers that are tasked with promoting biodiversity within councils; however, the demands of the duty will require council wide changes in culture and organisation that will require senior officer and elected member support. It is COSLA's judgement that the efforts of biodiversity officers, although vital, will be not be sufficient to change policy throughout a council. Only by convincing senior local authority

decision makers that the Bill represents an opportunity to gain substantive benefits, particularly relating to councils continuing work on sustainability, and by stressing the possible economic and social benefits, will local authorities adopt and implement new policies that place the duty at their heart. This is why the development of practical guidance, with the assistance of COSLA and others is so important.

As in the LBAP process, local authorities will continue to take the lead in promoting local biodiversity, but they will be looking for the new duty and the Biodiversity Strategy to present councils with a clear and attractive path to follow to begin the process of change. It will be important to be able to help the process along with assigning some additional funding by the Scottish Executive to projects and departments, thereby assisting councils overcome the initial challenges of implementing the duty. Over the longer term, once the benefits have become apparent, councils will be more able to integrate biodiversity into everyday activities and thus further the Act's implementation.

As mentioned in the first paragraph it will be the Scottish Biodiversity Strategy that will inform public bodies on how the duty should be best applied to benefit local ecology. Local authorities will require, especially in the early stages of implementing the Act, practical guidance on the steps required to begin altering their corporate processes to comply with the duty. The guidance must be framed by COSLA, with partners and must link closely to the Biodiversity Strategy. Much of the information that will be required by councils is already possessed by agencies such as Scottish Natural Heritage and the Scottish Environment Protection Agency. The sharing of data between agencies and with councils will be a vital part of informing those tasked with implementing the duty. The strategy is vital to the whole process and will determine the cost implication of the Bill; therefore, it is of crucial importance to COSLA and local authorities that they continue to be involved as central partners in the development of the strategy.

It is COSLA's view that the great benefits arising from the Bill will be realised when local authorities with the statutory agencies SNH and SEPA etc work together for the benefit of all. Scottish Natural Heritage currently funds many Local Biodiversity Action Plans and officers, and will be best placed to provide the central pool of expertise needed by local authorities to support delivery of the Bill. This may require SNH moving away from an orthodox nature conservation role, to provide ecological advice as and when required by a local authority, and as guided by the Biodiversity Strategy. Who ever provides the central advice required, it needs to be available to senior officers and elected members who have the strategic view and political awareness to engender change within their council. If this advice is not provided by SNH as part of their statutory duty to advise government, then local authorities will require extra funding for the hiring of consultants and strategists.

As mentioned previously we believe that some additional funding will be required to implement the duty, and to assist the joining up of processes and the work that councils already undertake. COSLA would wish to reiterate that the exact value of funding required cannot be quantified until after draft Biodiversity Strategy is issued for consultation, but we firmly believe that the initial stages will not be cost neutral for councils. Over the longer term, once the changes and benefits have started to be recognised, we believe that finances already allocated to nature conservation, sustainability projects, parks and land management concerns will, by definition, be better focused.

In conclusion it is COSLA's firm belief that if adequate resources are provided and if expert advice is made available to those responsible for implement change, then the biodiversity duty, as guided by the strategy, will give Scottish Local Authorities an invaluable tool to benefit biodiversity in local communities and their environs.

PART 2 OF THE BILL: CHANGES TO THE EXISTING ARRANGEMENTS FOR THE ESTABLISHMENT AND PROTECTION OF SITES OF SPECIAL SCIENTIFIC INTEREST (SSSI):

Do the proposals for changes to the SSSI regime mesh appropriately with other legislation in this area, both domestic and at an EU wide level?

Yes, it is COSLA's belief that there is now an opportunity to ensure that the SSSI changes and other components of the Bill mesh with existing, and with pending legislation. A joined up approach is vital.

Will the proposals achieve the stated aim of encouraging stakeholder involvement and making the administration of SSSIs more transparent and accessible?

COSLA is happy with the desire of the Bill to make notification of SSSIs a more inclusive process, and the increased openness presented by Site Management Statements.

Do the proposals strike the right balance between the public interest and the interests of land managers?

The proposals are weighted towards the public interest; however, this is probably necessary to gain added protection of SSSIs, although a flexible approach is required that takes account of legitimate local economic and community interests as well as important scientific concerns. It is COSLA's view that a reasonable balance has been reached.

Are the new provisions relating to Land Management and Nature Conservation Orders appropriate?

The Land Management and Nature Conservation Orders are appropriate to allow for increased protection of SSSIs and surrounding land, while also helping to reduce bureaucracy for land managers. The impact on local communities of designating land surrounding SSSIs with Nature Conservation Orders needs to be assessed, and a flexible approach pioneered that allows for positive discussions with local people.

Do the proposals provide sufficient incentives to land managers to engage in positive management measures?

The reduction in 'red tape' should go some way to provide an incentive to landowners to manage their land in a positive way.

Are the offences and penalties set out in this Part of the Bill appropriately and clearly defined? Is the scope of the right of appeal to the Scottish Land Court appropriate?

COSLA welcomes the strengthening of the protection of SSSIs from poor land management and third parties, and also the right of appeal to the Scottish Land Court.

PART 3 OF THE BILL: THE EXTENSION AND ENHANCEMENT OF THE LAW IN RELATION TO THE PROTECTION OF BIRDS, ANIMALS AND PLANTS BY AMENDING THE CURRENT PROVISIONS OF PART I OF THE WILDLIFE AND COUNTRYSIDE ACT 1981:

Are the offences and penalties set out in this Part of the Bill appropriately and clearly defined?

Yes, COSLA is happy that offences and penalties are appropriate and clearly defined.

Are the powers conferred on police and wildlife inspectors adequate and clearly defined?

COSLA again believes that the powers mentioned above are adequate for the purpose of protecting wildlife. We are also satisfied that this Bill closes loopholes that existed in previous legislation.

Do the provisions of the Bill provide adequate protection to rare or endangered species?

It is the belief of COSLA that the Bill strengthens the protection of rare species by tightening the law, and introducing the concept of reckless endangerment of wildlife.

Do the provisions relating to the use of snares strike an acceptable balance between land management and animal welfare concerns?

Yes, the balance struck is acceptable to COSLA

Do the proposed amendments to the 1981 Act mesh appropriately with other legislation in this area, both domestic and at an EU wide level?

In general the amendments interlock successfully with national and European legislation, although COSLA believes that measures to control alien and invasive plants overlap with this Bill and should be included in an appropriate manner.

OTHER MATTERS: VIEWS ARE ALSO WELCOME ON THE POLICY MEMORANDUM AND FINANCIAL MEMORANDUM OF THE BILL:

How helpful do you find these documents?

Does the policy memorandum adequately set out (in paragraphs 49 – 56) the impact of the Bill on matters such as sustainable development and local government? Are the financial consequences of the Bill sufficiently clear? Also, do you have any comments on the consultation that the Scottish Executive carried out prior to the introduction of the Bill?

The documents are helpful and provide a useful breakdown of the Bill's intentions while also providing background information. The crucial document will be the Biodiversity Strategy that has yet to be published, which is to be regretted.

COSLA is pleased by the acknowledgment in paragraph 55 that there is a fundamental connection between this Bill and sustainability. Local authorities need to be aware how their work to comply with this Bill complements their existing drive for sustainable development and their power to advance well being.

The financial consequences of the Bill will only be clear when the draft Biodiversity Strategy has been issued for consultation. Only then will the true impact of the Bill on local authorities be known.

Finally, COSLA welcomes the efforts of the Scottish Executive to consult widely on the Bill prior to its introduction.

SUBMISSION FROM THE SCOTTISH BIODIVERSITY FORUM LBAP WORKING GROUP

The Scottish Biodiversity Forum's (SBF) Local Biodiversity Action Plan (LBAP) Network responded and supported the publication of the draft bill in June 2003, and is happy to give evidence to the Environment and Rural Development Committee on Wednesday 29 October 2003.

What is an LBAP?

The LBAP is a mechanism that seeks to ensure that nationally and locally important species and habitats are conserved and enhanced in a given area through focussed local action. The LBAP process is a resounding success reflecting the significance of biodiversity to life in Scotland, and because everyone (national government agencies, community groups, environmental organisations, businesses, farmers, fishermen, school children) have a stake in their environment and the quality of life it supports. The LBAP process brings the range of viewpoints together to agree, and then pursue, a common goal; it is this partnership element that has been the LBAP process' greatest strength, and which has been adopted nationally through the SBF and in its development of a draft Scottish Biodiversity Strategy.

What are LBAP functions?

- To translate national targets for species and habitats, as specified in the UK Biodiversity Action Plan (UKBAP), into effective action at the local level.
- To stimulate effective local working partnerships to ensure that programmes for biodiversity conservation are developed and maintained
- To raise awareness of the need and responsibilities for biodiversity conservation and enhancement in the local context.
- To identify biodiversity resources and priorities in the local area.
- To identify targets and habitats important to the local area, including both the rare and the common, according to local circumstances.
- To ensure that delivery mechanisms for conservation and enhancement of biodiversity resources are promoted and understood at the local level.
- To provide a local basis for monitoring progress in biodiversity conservation.

What are LBAP benefits?

Awareness

- Raises public awareness of the wildlife and flora of an area in the international, national and local context.
- Highlights the influence of local biodiversity on the quality of life and economic opportunities.
- Promotes knowledge of less well-known species and habitats.
- Emphasises the contribution of local wildlife and flora to local character and distinctiveness.

Action

- Focuses action on species and habitats most in need through prioritisation of resources at the local level
- Measures achievement through the identification of clear objectives and targets.

Involvement

- Promotes participation and consensus amongst a wide range of sectors.
- Enables local implementation, community involvement, and ownership.
- Develops responsibility for all.

Funding/resources

- Identifies a broad range of funding opportunities.
- Enables pooling of resources and expertise, and sharing of workload.

- Makes best use of existing funding sources, and identifies priorities for further resources if they are available.

Integration

- Informs other plans, programmes and strategies, including statutory development plans, of local priorities.
- Converts broad sustainability objectives into specific actions for wildlife and provides indicators of a wider environmental quality.

The essence of the work of the Local Biodiversity partnerships is the engagement of stakeholders at every stage of the LBAP development. This approach, which has been used in the advancement of this legislation, is wholly supported by the SBF.

The SBF's LBAP Network strongly welcomes this new legislation, for the duty to further the conservation of biodiversity by every public body and office holder, and the links made to the Scottish Biodiversity Strategy (SBS), in Part 1.

However, the SBF's LBAP Network put forward the following comments:

- The SBF has carried out market research, which indicates that only a limited number of the Scottish population have an understanding of the term 'biodiversity'. It is, therefore, important that the definition in the Convention of Biological Diversity is cited: *"Biological diversity" means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.*
- The link between the duty and the SBS can be improved and strengthened. In Section 1(2) "a body or office-holder must have regard to (a) any strategy designated under section 2(1)". Section 2(1) states that "Scottish Ministers may designate as the Scottish Biodiversity Strategy one or more strategies ...". However, as the Scottish Biodiversity Strategy will be the only means by which the duty to further the conservation for biodiversity can be further detailed and delivered, the wording should reflect that of a requirement eg "The Scottish Ministers must designate as the Scottish Biodiversity Strategy one or more strategies ...".
- A draft SBS (worked up by the SBF) was presented to Ministers in February 2003. The SBF are assisting the Scottish Executive in preparing a final SBS. This will contain actions required to further the conservation of biodiversity in Scotland. Therefore, there should be a statement under Section 2 stating that those public bodies and office holders who have actions, as detailed in the SBS, have a legal requirement to carry out these actions.
- As biodiversity conservation is about specific action for priority habitats and species there needs to be two further requirements:
 - the SBS must identify these priority habitats and species in Scotland, and to report on their status and trends;
 - ensure public bodies and office holders have regard for the aims and actions detailed in the UKBAP and LBAPs for priority habitats and species.

Although it is recognised that there will be resource implications associated with the duty and the SBS, the duty can, to a large extent, be implemented through existing functions and existing money. A couple of examples are cited below. A publication [in progress] looks at how biodiversity conservation can be achieved through the statutory obligations detailed in the Local Government in Scotland Act 2003, for best value and community planning and sustainable development.

Bingham's Pond (Glasgow City Council)

The site was subject to health and safety complaints from local residents. The pond supported around 90 mute swans, which were fed eight loaves of bread daily, despite notices asking the public to refrain. The main health and safety elements related to swan faeces (disease, dangers of slipping, caustic nature, smell). To deal with this complaint Glasgow City Council (in collaboration with Hesselhead Rescue Centre) removed the birds. The Council created a suitable breeding habitat for a pair of swans (their territorial nature will control future swan numbers) by creating two islands. Residents have been involved throughout. A response to a threat to public health has resulted in economic, social and biodiversity gain. In the long term this project will be cheaper than having to frequently remove the swans and keep cleaning the site. Socially, as the community was (and still are) involved they feel 'ownership' of the site by helping keep the pond clear of litter and using the area for recreational and educational activities. Biodiversity has benefited, and will continue to do so as the vegetation becomes more established and continues to increase.

Callander Meadows (Stirling Council)

Callander Meadows is a mix of amenity grassland, scrub woodland, and managed meadow offering a variety of recreational activities. In 1999 a project to increase the biodiversity of the park, by reducing the frequency of mowing from five to just once a year, was started. The economic gains are that the cost of one annual meadow cut and associated baling is less than five amenity cuts, with the opportunity of selling the annual cut as hay currently being investigated. Socially the park is offering more to the visitor as the area is very peaceful and attractive with the meadow flowers and long grasses, there are educational interpretation boards, and donated benches along the footpath so people of all ages and abilities can enjoy the experience. Biodiversity conservation gain includes an increased variety of grasses and flowering plants in the area, and many invertebrate and small mammals species have been newly noted to the park.

SUBMISSION FROM THE ROYAL SOCIETY OF EDINBURGH

Overall the RSE welcomes this Bill as a means of putting conservation measures within the wider context of biodiversity, and for the inclusion of the marine environment in due course. The specific sections of the consultation paper are now addressed below:

Section B: Key Features of the Draft Bill

Biodiversity

Section 1 of the Bill is vital, however, 'the conservation of biodiversity' should be clarified so that it is obvious that it means on land, in the soil, in freshwater and in the seas surrounding Scotland.

Section 2 of the Bill is also important as it brings within the legislative framework the strategy or strategies to conserve Scottish biodiversity, but in Section 2(3) it is unclear what is actually meant by 'different cases'.

Sites of Special Scientific Interest ("SSSIs")

Sections 3 - 18 strengthen the legislation for SSSIs, and this is to be welcomed. The Scottish Executive, however, need to be much more explicit about how the proposed system would work, especially with regard to the different bodies named in the report, such as the Advisory Committee on SSSIs and the Scottish Land Court. There should also be a statement that selection of new SSSIs must be done on the basis of national scientific guidelines, such as those produced by the Joint Nature Conservation Committee.

Species Protection and Wildlife Crime

Sections 19 - 24 strengthen Nature Conservation Orders, but it could be questioned whether the penalties in Section 35 are sufficient. For a major piece of environmental damage, £20,000 may be insufficient to restore the natural heritage to its former condition.

Section C: Draft Nature Conservation (Scotland) Bill

Conservation and Enhancement of Natural Heritage (Part 2)

In Section 17, 34(4), 40(2)(j) and Schedule 2 paragraph 17 the term 'interest in land' is unclear, and is not defined in s. 41(1). The land tenure reform legislation is seeking to do away with this unclear term, substituting 'land or a real right in land' in most cases. This phrase might or might not be appropriate, because it is not clear whether in some cases grant of a personal right might be intended to be covered in this legislation, but what is meant should be specified.

With regard to Section 40 (2), alterations to SSSIs could also be made known more widely, for example in the local press to give those who live in the area a chance to comment.

General (Part 3)

Under Schedule 4 of the Bill, modifications to the Conservation of Seals Act 1970 are proposed. Modification to Section 2 of this Act would appear to be appropriate in order to align it with the levels of management control that would be expected for a species that enjoys protection under the EU Habitats Directive. It would be appropriate, for example, to require individuals to apply for licenses to kill or take seals at all times of year, not just during the closed seasons. It may also be appropriate to require, as a condition of licenses granted under the Conservation of Seals Act 1970, all applicants to provide a return of seals shot together with proof of species identity. The reason for this is that it is, in effect, impossible to develop a structured management system for seals unless the main sources of killing are known.

Section D: Policy Statement on Wildlife Crime

The RSE notes the intention to strengthen the legislation protecting marine mammals, except for seals (Section D14-D17). While some cetacean populations are vulnerable, the same could be said for some seal populations. If seal populations are excluded because they are protected under the Conservation of Seals Act 1970, then it should be noted that this Act does not protect seals for most of the year. If seals are excluded because they are deemed to be a pest species, it should be noted that cetaceans are likely to be responsible for a greater level of predation of fish than seals. There is, therefore, little logic in not providing seals with the same level of protection as cetaceans, albeit that exceptions may be made possible to kill seals under the terms of the Conservation of Seals Act 1970. This is made more important because it is evident that there is confusion amongst the public about seal species identification. In certain areas the "common seal" is not common and is vulnerable to being confused with its more abundant cousin, the grey seal. Therefore, all seals should be afforded protection and this protection should only be lifted as a result of an application for a license to kill seals for the purposes specified in the Conservation of Seals Act 1970. Moreover, it should be noted that, while some seal populations in Scotland have been increasing, others have not. The slow demographics of seals are similar to those of cetaceans and many seabirds all of which enjoy protection based upon their level of vulnerability. Seals have the same level of vulnerability and should enjoy the same basic levels of protection.

With regard to D19, the most convenient source of DNA from birds is a plucked feather since cells containing DNA adhere to its base. DNA can also be obtained from blood but this is avoided in some species, which easily succumb to the stress involved (e.g. passerines and some tetraonids such as ptarmigan). So far as mammals are concerned, some researchers are licensed by the Home Office to take tissue samples from mammals for the purpose of DNA analysis. Where relevant (i.e. for species on one of the schedules of Wildlife and Countryside Act 1981), these researchers would also be licensed by SNH. In this context, it could be considered unnecessarily restrictive to ensure that the sample may only be taken by a qualified veterinary surgeon. Removal of a single feather from a bird does not require a veterinary qualification and in the case of some non-bird species, licensed researchers will be more proficient than inexperienced veterinary surgeons in obtaining the required samples. The act should, therefore refer to "suitably qualified and experienced personnel"

The RSE agrees with paragraphs D23, D28, D31, D32, D33, D34 D41, D46 and D53. However, D51 makes the point that possession of a self-locking snare, an unauthorised trap or poisoned bait is not currently prohibited under the act. D53 goes on to create a new offence of possessing a self-locking snare. The new bill should, therefore, also address the

problem for the possession of unauthorised traps and poisoned bait. Poisoning of raptorial birds remains a problem in Scotland and the proposed legislation is an appropriate opportunity to address this problem. One possibility would be that those who use poison to control vermin should be licensed to do so in return for the right of wildlife inspectors to investigate, without prior notice, how those poisons are deployed and what safeguards are in place to ensure that non-target species are not exposed to them. This would be analogous to the current Home Office system whereby researchers are licensed to carry out experiments on animals but inspectors can enter licensed premises at any time without notice.

Additional Information

In responding to this inquiry the Society would like to draw attention to the following Royal Society of Edinburgh responses which are of relevance to this subject: *National Parks for Scotland* (November 1998); *People and Nature: A new Approach to SSSI Designations in Scotland* (November 1998); *National Scenic Areas Review* (April 1999); *EU policy on Biodiversity* (May 1999); *Study of Environmental Planning* (October 1999); *National Parks (Scotland) Bill* (March 2000); *A Proposal for a Loch Lomond & the Trossachs National Park* (February 2001) *Proposal for a Cairngorms National Park* (April 2001); and *Cairngorms National Park - Consultation on draft Designation Order* (August 2002). Copies of the above publications and further copies of this response are available from the Research Officer, Dr Marc Rands (email: mrand@royalsoced.org.uk) and from the RSE web site (www.royalsoced.org.uk).

ADDITIONAL SUBMISSION FROM ROYAL SOCIETY OF EDINBURGH

1. The Royal Society of Edinburgh (RSE) is pleased to address the Scottish Parliament Environment and Rural Development Committee Inquiry into the Nature Conservation (Scotland) Bill.
2. The Society welcomes the Bill as a means of placing conservation measures within the wider context of biodiversity and as a means of delivering and securing the long-term health of our natural environment. It builds appropriately on the strengths of the Wildlife and Countryside Act 1981 and provides enhanced legislative measures. We believe that the Bill will have a potentially significant role in reconciling environmental priorities with socio-economic expectations and contribute to rural sustainable development.
3. Our submission to the Executive was put together from comments and responses to the Bill by a number of our Fellows who cannot be here. If further information on some of the detail of our response to the Executive is required which neither Professor Miller nor I can provide to day we will seek it from our colleagues and submit it in writing as soon as possible. We have considered the specific questions put by the Committee and prepared a response to only those where we believe we have the expertise to comment.

Part 1 of the Bill: The creation of a new general duty on public bodies to further the conservation of biodiversity.

Is the scope and effect of the duty appropriate and clearly understandable?

4. We believe that the focus on biodiversity is right and will provide the necessary context and objectivity required in promulgating the duties necessary to ensure the conservation and protection of Scotland's natural heritage.
5. We believe that greater clarity is required to specify those resources to which the Bill applies – biodiversity on land, in the soil, in freshwater and in the seas around Scotland. Clarification would enhance a general understanding of the purposes, intentions and context of the Bill particularly in relation to the Chapter dealing with Sites of Special Scientific Interest.
6. The Scottish Biodiversity Strategy is of significant importance to the interpretation of the Bill and the duties that this will imply for those who have to implement the measures contained in the Bill. Therefore, we believe it will be important to ensure that
 - a. the Scottish strategy is firmly embedded within the context of the UN Environmental Programme Convention on Biological Diversity to give it both national and international force;
 - b. it fulfils the obligations that Scotland has to effectively comply with the European Birds and Habitats Directive;
 - c. it takes account of Scottish sustainable development policies;
 - d. it takes account of the requirements of the conservation of the cultural and archaeological heritage of Scotland; and
 - e. it has the capacity to integrate with and provide the context whereby the CAP reforms for agriculture that impact on environmental protection and enhancement through the Rural Development Plan and decoupling proposals can and will add value to nature conservation in Scotland.

We would support measures that could strengthen and fully integrate these requirements within the context of the Bill.

7. It is not clear to us what is meant by 'provision for different cases' within the context of a Scottish Biodiversity Strategy (Section 2 (3))

Part 2 of the Bill: Changes to the existing arrangements for the establishment and protection of sites of special scientific interest (SSSIs):

Do the proposals for changes to the SSSI regime mesh appropriately with other legislation in this area, both domestic and at an EU wide level?

8. We welcome the statement of purpose and the strengthening of the legislation regarding SSSIs but we think that the Bill requires to be more specific and explicit about how the proposed system will work.
 - o Spatial unit used for selection – (at present the ‘area of search’ is based on an administrative entity) it should have a biogeographic significance - it has been suggested that the Natural Heritage units used by SNH for its Futures Programme are the most appropriate – whatever unit is chosen should be part of the Bill.
 - o In particular we think that the Bill should be clear about the scientific guidance that should be used in designating a site such as those produced by the Joint Nature Conservation Committee. This deals with such aspects as rarity and uniqueness, and threats and vulnerability of species.
9. Whilst the focus is on Scotland the wider context in which SSSIs might be considered in Scotland relative to the UK as a whole and internationally is also relevant and important. This is recognised in the accompanying Policy Memorandum should it not be explicit in the Bill?
10. We think that the current proposals have been developed as appropriate in the context of the broader European legislative frameworks determining protected sites (Natura 2000 sites (SACs and SPAs)) but could be strengthened as a consequence of our suggestions above.

Will the proposals achieve the stated aim of encouraging stakeholder involvement and making the administration of SSSIs more transparent and accessible?

11. We think that the Bill overall has improved the transparency and accessibility of the procedures involving the notification of an SSSI and for operations requiring consent.
12. We support the statutory requirement that SNH has to produce a management statement when an SSSI is notified and the fact that the socio-economic issues associated with the notification can also be addressed. The process is an evolving one which involves the owner/occupier and therefore should secure an agreed management procedure that succeeds in conserving and protecting the site with the owner/occupier’s cooperation and where necessary with a management agreement involving some form of financial compensation.
13. SNH is also obliged to publish details of notification in the local press and on its Web Site and to ensure that the general public are aware of its rights. The public therefore have the opportunity to comment and make representation.
14. The Bill and its accompanying schedules provide a clear statement about the procedures that are required for a notification, the procedures for representations, and the role of the Advisory Committee. Similarly the Bill is explicit about operations requiring consent and the appeals procedure that can be followed. It also makes clear the implications for third parties who may create damage.

Do the proposals strike the right balance between the public interest and the interests of land managers?

15. On the face of it, the overall procedures and accompanying policy statements with regard to the need to ensure the measures contained in the Bill are set within the context of sustainable development should provide the rationale whereby it ought to be possible to secure the right balance between the public interest and the land managers interest. There is also an obligation on SNH to keep the public informed and provide opportunities for representation both with respect to SSSIs and Nature Conservation Orders. However, much will depend on the implementation of the Act that follows and the approach adopted by SNH who will be largely responsible for its implementation ‘on the ground’.

16. The fact that owners/occupiers will receive compensation (reinforced by an appeals procedure) where they suffer financial loss because it is not possible to continue with an established management of the land is also a means of securing a balance that otherwise would not be possible.

Are the new provisions relating to Land Management and Nature Conservation Orders appropriate?

17. We believe that new provisions (SSSIs, Nature Conservation Orders and land Management Orders provide the necessary framework required to safeguard the natural heritage while at the same time recognising the impact that this may have on the operations of an owner/occupier. Opportunities to make representation by both the owner/occupier and the public are specified and where necessary arrangements for the compensation of owner/occupiers with respect to land management orders are clear and seem to us to be fair.

Do the proposals provide sufficient incentives to land managers to engage in positive management measures?

18. The requirement that SNH have to provide a management statement for SSSIs and that it is recognised that individual land managers should not be expected to carry an disproportionate share of the costs of delivering conservation and protection of special places are important positive features of the Bill. Existing legislation already provides for positive management payments to be made by SNH such as through the 'Natural Care' initiative. The Bill should improve the overall legislative framework by which payments such as these can be made.

19. A great deal will depend upon how SNH field officers approach their task in securing appropriate management of sites. Much has already been achieved through voluntary agreements with relatively little cost to the tax payer. Generally, owners/occupiers will co-operate if they understand the purposes and objectives involved in conservation and protection. It is therefore important that notification procedures use language that is understandable and that biodiversity strategies have resonance with both the owner/occupier and the public.

Are the offences and penalties set out in this Part of the Bill appropriately and clearly defined? Is the scope of the right of appeal to the Scottish Land Court appropriate?

20. In our submission to the Executive, we welcomed the strengthening of the Nature Conservation Orders but we were not convinced that the penalties were adequate regarding damage and prohibited operations. We reasoned that environmental damage in some circumstances may require a level of remediation that will cost much more than £20,000 – the original proposed upper limit of a fine. We welcome therefore the increase in the upper limit of a fine to £40,000 on someone who creates damage, undertakes a prohibited operation or who fails to carry out a remediation order: this should create the necessary incentive to avoid creating damage in the first place.

21. We support the right of appeal to the Scottish Land Court in relation to land management orders and also for the need for Ministers to hold inquiries where representation is made concerning nature conservation orders. We believe that this provides the necessary scope for an owner or occupier of land to safeguard his/her interests and for the public to influence outcomes. It is our opinion that the Land Court is the appropriate legal body to operate as the court of appeal to legislate in the areas specified by the Bill but its membership will require to be reviewed in order to ensure that appropriate ecological expertise is available to determine cases within the context of the purposes of the Bill.

Part 3 of the Bill: The extension and enhancement of the law in relation to the protection of birds, animals and plants by amending the current provisions of Part I of the Wildlife and Countryside Act 1981:

Are the offences and penalties set out in this Part of the Bill appropriately and clearly defined?

22. Overall, we believe that they are but make one or two specific comments regarding the protection of cetacean (dolphins, whales and porpoises) populations below.

Are the powers conferred on police and wildlife inspectors adequate and clearly defined?

23. We believe that they are and have previously expressed our support for the proposed revised powers and duties of wildlife inspectors though we have some comments about the taking of samples from animals and reservations about the need to always have a veterinary surgeon take samples.

24. With regard to taking of samples (Schedule 6, 15), the most convenient source of DNA from birds is a plucked feather since cells containing DNA adhere to its base. DNA can also be obtained from blood but this is avoided in some species, which easily succumb to the stress involved (e.g. passerines and some tetraonids such as ptarmigan).

25. So far as mammals are concerned, some researchers are licensed by the Home Office to take tissue samples from mammals for the purpose of DNA analysis. Where relevant (i.e. for species on one of the schedules of Wildlife and Countryside Act 1981), these researchers would also be licensed by SNH. In this context, it could be considered unnecessarily restrictive to ensure that the sample may only be taken by a qualified veterinary surgeon. Removal of a single feather from a bird does not require a veterinary qualification and in the case of some non-bird species, licensed researchers will be more proficient than inexperienced veterinary surgeons in obtaining the required samples. The act should, therefore refer to "suitably qualified and experienced personnel"

Do the provisions of the Bill provide adequate protection to rare or endangered species?

26. We believe that they do and we note the intention to strengthen the legislation protecting marine mammals, except for seals (Schedule 6, 8(6) page 47). While some cetacean (dolphin, whale and porpoise) populations are vulnerable, the same could be said for some seal populations. If seal populations are excluded because they are protected under the Conservation of Seals Act 1970, then it should be noted that this Act does not protect seals for most of the year. If seals are excluded because they are deemed to be a pest species, it should be noted that cetaceans are likely to be responsible for a greater level of predation of fish than seals. There is, therefore, little logic in not providing seals with the same level of protection as cetaceans, albeit that exceptions may be made possible to kill seals under the terms of the Conservation of Seals Act 1970. This is made more important because it is evident that there is confusion amongst the public about seal species identification. In certain areas the "common seal" is not common and is vulnerable to being confused with its more abundant cousin, the grey seal. Therefore, all seals should be afforded protection and this protection should only be lifted as a result of an application for a license to kill seals for the purposes specified in the Conservation of Seals Act 1970. Moreover, it should be noted that, while some seal populations in Scotland have been increasing, others have not. The slow demographics of seals are similar to those of cetaceans and many seabirds all of which enjoy protection based upon their level of vulnerability. Seals have the same level of vulnerability and should enjoy the same basic levels of protection.

27. However, we support the modification of the Conservation of Seals Act 1970 (Schedule 7, 2 page 55) in the Bill. This aligns it with a level of management control that would be expected for a species that enjoys protection under the EU Habitats Directive. It would be appropriate, for example, to require individuals to apply for licenses to kill or take seals at all times of year, not just during the closed seasons. It may also be appropriate to require, as a condition of licenses granted under the Conservation of Seals Act 1970, all applicants to provide a return of seals shot together with proof of species identity. The reason for this is that it is, in effect, impossible to develop a structured management system for seals unless the main sources of killing are known.

28. We note and welcome the decision to include fungi and non-vascular plants in the definition of 'wild plant'.

Do the provisions relating to the use of snares strike an acceptable balance between land management and animal welfare concerns?

29. We believe that they do and note that the changes made since the first draft of the Bill accord more closely to the submission that we made to the Executive regarding the use and possession of self-locking snares and other unauthorised traps.

30. The omission of unauthorised possession of poisoned bait is still of concern. Poisoning of raptorial birds remains a problem in Scotland and the proposed legislation is an appropriate opportunity to address this problem. One possibility would be that those who use poison to control vermin should be licensed to do so in return for the right of wildlife inspectors to investigate, without prior notice, how those poisons are deployed and what safeguards are in place to ensure that non-target species are not exposed to them. This would be analogous to the current Home Office system whereby researchers are licensed to carry out experiments on animals but inspectors can enter licensed premises at any time without notice.

Do the proposed amendments to the 1981 Act mesh appropriately with other legislation in this area, both domestic and at an EU wide level?

31. We have no comment to make here.

Other matters: Views are also welcome on the policy memorandum and financial memorandum of the Bill:

How helpful do you find these documents?

32. These were essential, as were the Explanatory Notes in being able to better understand the full implications of the Bill and the measures that it contains.

Does the policy memorandum adequately set out (in paragraphs 49 – 56) the impact of the Bill on matters such as sustainable development and local government?

33. It could be argued that a greater focus on how the concept of sustainable development is intended to guide the implementation of the Bill would be beneficial. It would be my personal view that this requires to have much greater weight in terms of thinking about how the Bill's measures accord with sustainable development policy and what this actually means in practice. SNH have a statutory obligation to operate within the context of sustainable development. A greater clarity as to the implications and interpretation of this obligation in relation to the requirements of the Bill would benefit from being unequivocally developed.

SUBMISSION FROM THE UNITED KINGDOM ENVIRONMENTAL LAW ASSOCIATION

The United Kingdom Environmental Law Association (UKELA) is grateful for the opportunity to give evidence to the Committee. UKELA is an association open to all those interested in the formulation and application of environmental law. Its concern with environmental policy is limited to promoting effective legislation and implementation of environmental policy through the law. This evidence is based on earlier comments prepared by a group of members from both the Scottish Law and Nature Conservation Working Groups of the Association.

General Comments

The Bill as a whole is strongly supported. It amounts to an improvement in the law overall, securing clearer provision for the protection of biodiversity whilst respecting the rights of the owners and occupiers of land, and we welcome the changes made between the draft Bill and the version introduced to the Parliament.

Nevertheless, we deeply regret that more is not being done to produce a consolidated statement of the law. This Bill offers a once in a generation opportunity to restate the whole of the law on nature conservation in a single, coherent set of provisions and achieve effective and accessible legislation; it should be taken. Although the Bill does offer a virtually complete statement of the law on SSSIs and related matters, other important habitat protection measures remain in other legislation, notably the Conservation (Natural Habitats etc) Regulations 1994, whilst the provisions authorizing management agreements remain scattered throughout several other enactments. More seriously, the amendments to the law on species protection by means of detailed amendments to the Wildlife and Countryside Act 1981 leave the law in a state that makes it all but unusable. Users of the law will be faced with the text of the 1981 Act as originally enacted, the text as amended on several occasions for the whole of Great Britain, then the text as amended separately for England and Wales by the Countryside and Rights of Way Act 2000 and for Scotland by the new Act, in each case having to “cut and paste” individual words and phrases into existing text in a way that makes it very difficult indeed to gain an overall impression of what the law says. The full legal picture can then be appreciated only by considering the 1994 Regulations as well. This is about as far as it is possible to get from accessible and effective legislation. A great opportunity is being missed. If legislative pressures lead to reform by way of amendment, there should be a clear commitment to consolidation in the very near future.

Part 1

The introduction of this general duty is strongly supported and we welcome the addition of a reporting requirement since the draft Bill. There may be questions over how this new duty relates to other existing duties, e.g. the duty to have regard to the desirability of conserving the natural heritage (Countryside (Scotland) Act 1967, as amended). The existence of overlapping duties is likely to confuse and obscure the message that care of the environment should be a basic consideration in all activities.

Part 2

Section 3(2) This sub-section makes use of the term “natural heritage” which has been increasingly used in other legislation, but the definition given in section 56 is slightly different from those used previously, e.g. in the Natural Heritage (Scotland) Act 1991 and the National Parks (Scotland) Act 2000. Although a definition that is thought to be flawed should not be maintained indefinitely simply for the reason of consistency, the advantage of using the same phrase in different legislation is lost if it is given a slightly different definition each time and users are left to wonder how significant the differences in wording are meant to be and how much impact they will have in practice.

Section 7. The introduction of the power to respond to urgent situations is a welcome provision that removes the need to be cautious in determining the operations to be listed as requiring consent, enabling the achievement of the policy goal of a “lighter regulatory touch”.

Section 16. The power for SNH to refuse consent to an application to carry out such operations is a significant and welcome change in the law.

Sections 18 and 34. There is clearly a need for an appeal mechanism in relation to the exercise of powers in the Bill and making use of an existing structure such as the Scottish Land Court is sensible. However, the Association believes that use of the Land Court will only be acceptable if there are clear changes to its composition to ensure that it has the expertise to deal with arguments based on ecology as well as agriculture and that it is seen as being a balanced tribunal, not one inevitably biased in favour of land managers. In this new role the Court is being asked to do something quite different from its current task, and it must change to reflect this. The legislation governing the Court does permit the use of assessors, who could provide the scientific expertise to support the Court, but the membership must also give confidence that there will be a fair assessment of conflicts between the demands of conservation and the desires of land managers. It is significant that at present the members of the Court (other than the Chairman) are sometimes referred to as 'the agricultural members' and a body that is seen in this way will hardly be accepted as an impartial tribunal to decide disputes between farmers and SNH. The membership of the Court must be visibly changed before it is acceptable as the appeal tribunal under this Bill, and to satisfy the requirement of being an “impartial” tribunal under article 6 of the European Convention on Human Rights. This might be achieved by introducing a suitable provision into the Bill, specifying the interests and expertise to be held by at least some members of the Court, offering a guarantee that a range of backgrounds will be represented.

Section 21. The incorporation of the provisions on the Advisory Committee on SSSIs within this Bill is a small but most welcome contribution to providing the comprehensive statement of the law called for in our General Comments.

Section 23. In the absence of wider measures for the marine environment, there is a case for extending the powers under section 23 to marine sites to provide a power to deal with any serious threats. This is seen as an interim measure, pending the comprehensive legislation on marine conservation that is urgently needed.

Section 31. We welcome the amendment of this provision since the draft Bill to include a express reference to when as well as how the operations are to be carried out (s.31(1)(d)(iii)).

Section 47. Given that the fact that certain actions have taken place may be known immediately but their consequences may not be obvious for some time (e.g. has inappropriately timed cutting of vegetation in fact damaged a colony of plants or will they reappear next growing season as usual), there is a case for making it clear that the evidence sufficient to warrant proceedings includes evidence of the consequences of the act, not just of the act itself. The consequences of a potentially harmful act are relevant to the prosecutor's decision whether or not a prosecution is in the public interest and it would be undesirable to force a premature decision in the absence of important evidence that will be to hand once the annual cycle has passed.

Section 48. Section 48(1)(c) appears to contemplate the commission of a criminal offence by an unincorporated association, which by definition lacks legal personality and therefore presumably cannot be convicted of a crime (unlike the bodies mentioned in section 48(1)(a) and (b)). Does this create a difficulty in establishing that 'an offence has been committed' by such a body in order to bring this provision into action?

Part 3

The Association strongly supports the changes proposed, including the penalization of "reckless" conduct and the limitation of defences to ensure compliance with EC law. Nevertheless, as set out in the General Comments above, it strongly believes that in view of the widespread changes which are being made in the Bill, there is a convincing argument for using the Bill as an opportunity for a comprehensive restatement of this area of law. It is deeply regrettable that the proposed changes are effected by means of amendments to the 1981 Act. Ideally the 1994 Habitats Regulations, which are themselves likely to be amended, should be wholly integrated into the restatement of wildlife law. If that is not possible, then there should be as much alignment as possible, adopting the same wording for the same ideas, rather than there being minor differences in wording where there seems no real difference in intended meaning.

Schedule 6

Paragraph 2(6). The Association notes that this provision is limited to disturbance of lek sites whilst in active use. Given the difficulty of identifying these sites at other times, this is appropriate, but does place an onus on ensuring that such sites are designated as SSSIs in order to protect them throughout the year. An alternative approach would be to add the capercaillie to the list of species protected under what is currently Schedule 2 to the 1994 Habitats Regulations, which would provide protection for their breeding grounds. This approach would blur what is at present a sharp divide between the measures implementing the Birds Directive and the Habitats and Species Directive, but shows the convenience of moving towards a single integrated statement of the law.

Paragraph 7. We welcome the introduction of this example of 'cross-compliance' but note that there is scope for wider application of this principle, e.g. between the wildlife provisions and those in relation to animal cruelty.

Paragraph 8(6). The Association supports this proposal. In order to avoid unjustified claims of ignorance when people persist in activities not immediately directed against these species but known to cause disturbance to them, there may be a case for official Codes of Conduct on particular activities (fishing, offshore energy operations (oil and gas, wind and tidal), 'whale-watching', etc.) which would spread good practice, identify particularly unacceptable practices and be taken into consideration when a court is considering whether particular harmful actions have been taken 'recklessly'.

Paragraph 13. There is a need for a review of the scheme for both general and specific licences. The general licences present a particular problem, in that although in effect they grant a wide exemption from the law for the benefit of all occupiers of land, they are not available in any public format. The difficulty of access to the law is exacerbated by the fact that there are so many general licences (more than 20 separate general licences), which makes it even harder to ascertain the overall position. There must be many unwitting breaches of the law because people know generally that certain actions are authorized but do not observe the terms of the licences; this will become more common if the restriction introduced by the new section 16(4A) is simply added as a qualification in the general licences. There is a major public education task to be carried out here, which can only be effective if the legal position is simplified and presented in a less secretive manner.

Paragraph 15. The powers of enforcement here might usefully be consolidated with those in sections 43 to 45 of the Bill to produce a simple, consistent and coherent set of powers. Consideration should also be given to the extent to which any further changes to the rules of evidence are needed to deal with the nature of the crimes here, in particular in relation to corroboration, similar to the provision in section 23(5) of the Deer (Scotland) Act 1996, or in relation to the use of presumptions.

Paragraph 17. Whilst the simplicity and flexibility of the new provision is noted, the power to amend Schedules in relation to particular provisions, places or times must be used with restraint. Having different versions of the same Schedule to the same Act for different parts of Great Britain will not contribute to the simplicity or accessibility of the relevant legislation.

Paragraph 20. The clarifications of these definitions is welcome, but there remains an unresolved issue in relation to hybrid species, as noted below.

Further issues

Hybrids. At present the legal protections (or exceptions) apply only to the species as listed in the various Schedules to the 1981 Act and 1994 Regulations. In practice, though, many species are subject to a degree of hybridisation in the wild. This is especially the case for plants, e.g. many hybrids of Japanese Knotweed, an invasive non-native species listed in Schedule 9 to the 1981 Act as *Polygonum cuspidatum* have been found in the wild in Great Britain. The recent controversy over the ruddy duck also highlights the issue of hybridisation. Especially as genetic technology reveals the diversity within apparent species, there is a danger of the current format, based on 'pure' species being found wanting. The legislation should expressly allow for hybrids, as has been done for deer in section 45(1) of the Deer (Scotland) Act 1996.

Non-Native Species. Given the recent consultation paper on this topic, it would appear likely that some provisions may be added to the Bill at a later stage. These should be announced as soon as possible to allow adequate time for their impact to be fully considered before the Bill is passed.