



Scottish  
Environment

**LINK**

# SCOTLAND'S ENVIRONMENTAL LAWS SINCE DEVOLUTION - FROM RHETORIC TO REALITY

PREPARED BY TAMSIN BAILEY for SCOTTISH ENVIRONMENT LINK

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## PREFACE

LINK commissioned this snapshot review of some key Scottish environmental legislation of the past decade to find out whether our collective aspirations for the environmental benefits that these laws would enable were borne out by experience. The review was prepared by Tamsin Bailey for discussions at our Members' Congress in November 2010, *The Environment and the Law*, where it stimulated lively and wide-ranging discussion.

It comes as no great surprise that there is often a gap between what our legislators (of all political parties) intended these laws should achieve and the actuality. Good law, vital as it is, is just the start of a process. Implementation, adequate funding, reporting on progress and ongoing scrutiny by the Scottish Parliament are crucial if they are to succeed. Reading this review and listening to discussions of the issues at the Members' Congress and in other forums, it is evident that changes need to happen. These are some of the issues that arose, areas that LINK members and allied interests will be pursuing during 2011 and beyond.

1. The Scottish Parliament's founding principle is to share power with civic society through participation. Constraints on Access to Justice, and adequate funding for citizens and citizen groups to use these laws, are fundamental concerns and are limiting the Parliament's achievement of this principle.
2. The nature of the debate needs to change to encompass the broader social and economic issues within the environmental context. Too often desire to continue with business as usual prevails, with only lip service paid that the environment is the context for all our activity.
3. We need to ensure more effective and rigorous scrutiny of what is being done to implement the legislation, challenging, in proportionate ways, where actions are not being followed up.
4. There is a need to pay greater attention to the development and scrutiny of secondary legislation.
5. In these times of cuts, government needs 'critical friends' challenging it to ensure environmental issues are adequately addressed and that, while economic and social factors need to be taken into account, they should not be viewed as over-riding any environmental concerns as a matter of course.

LINK welcome views on any of the issues raised in this report, and looks forward to working with Government, its agencies and all stakeholders to ensure our excellent, often world-beating, laws are effective. Together, we can make Scotland's environmental record second to none.



Helen Zealley, LINK President

# EXECUTIVE SUMMARY

## 1. BACKGROUND

Scottish Environment LINK commissioned a review of eight pieces of environmental legislation, to ascertain whether the outcomes in practice match up to the expectations at the time when the legislation was drawn up.

This time-limited review is based on the views and experiences of LINK members and others involved in implementing the legislation. Interviews were carried out with LINK members across a range of sectors, with government bodies tasked with delivery of the legislation, and with third party observers. Rather than investigating how each of the provisions is being applied in detail, this review seeks to highlight some of the successes and to identify some of the problems experienced with implementation of the legislation to date, in order that these may be addressed in the future.

For each piece of legislation considered by the review, the overall view of how implementation is progressing is summarised below. This is followed by five cross-cutting issues, with recommendations for how they could be addressed. The sections of the report dealing with each Act include specific recommendations and proposed ways forward to address the issues highlighted.

## 2. SUMMARY OF FINDINGS

### **National Parks (Scotland) Act 2000**

The existence of Scotland's two national parks was welcomed, but there is a strongly and widely held view within Scottish Environment LINK that the Cairngorms National Park is failing to apply the Sandford principle. Some believe that there should be a strategy and process for designating new parks, while others take the view that the failings with the existing Parks should be addressed before any further parks are designated.

### **Land Reform (Scotland) Act 2003 - Part 1**

More people are enjoying access and the outdoors, and the Act has given access takers - including those involved in cycling, horse riding, water sports and other activities - greater confidence in exercising their rights. There is concern about the reluctance of Access Authorities to take action against those who obstruct access; and a concern among some that insufficient action is being taken where access creates a threat of wildlife disturbance.

## **Water Environment and Water Services (Scotland) Act 2003**

The overall view is that it is too early to judge the success of the River Basin Management Plans, but they are seen as establishing a good framework for improving the quality of Scotland's water environment. There is widespread concern about the lack of action to tackle diffuse pollution and a recommendation that stronger enforcement action is needed.

## **Nature Conservation (Scotland) Act 2004**

There is some evidence that the biodiversity duty introduced in the Act has influenced the behaviour of public bodies (e.g. it is referred to in their corporate plan), but in general it has not altered priorities significantly. The failure to halt the loss of biodiversity was seen as a major issue, with lots of effort going into planning, but insufficient action on the ground.

## **Environmental Assessment (Scotland) Act 2005**

While the legislation was welcomed as going further than the Directive it transposes, and so creating the potential for environmental considerations to have a significant impact on the shape of public policy, so far the Act is not perceived to have had a major influence on the content of public sector plans and policies - although there is evidence of some impact on the content of these documents.

## **Planning etc (Scotland) Act 2006**

The overall view is that while some of the building blocks are in place, Scotland does not yet have a transparent, participative planning system in which communities feel they can influence decisions which affect their future. Those aspects of the Act designed to facilitate development have been taken forward, but those intended to improve participation have had negligible effect so far. It has taken a long time for new-style Development Plans to be adopted, so planning decisions continue to be made with reference to Plans which pre-date the Act.

## **Environmental Liability (Scotland) Regulations 2009**

The Regulations have not been - and are unlikely to be - used as their scope is narrow and the cost of taking action so high.

## **Marine (Scotland) Act 2010**

Most respondents were of the view that it is too early to judge implementation of this legislation.

### 3. ISSUES & RECOMMENDATIONS

The following cross-cutting issues emerged clearly from the review.

**ISSUE 1:** The Parliamentary rhetoric has not yet become reality. Much of the landmark environmental legislation adopted by the Scottish Parliament in the last ten years is about changing attitudes and behaviours, ensuring decision-makers take account of the need to safeguard the environment in exercising their functions. Some progress has been made, but the worthy ambitions of the legislators are not yet being achieved.

**Recommendation:** Existing laws must be made to work better. There is a need for more rigorous scrutiny and auditing of the performance of public bodies in implementing legislation. This would identify when those charged with delivery are failing to meet their statutory obligations; and when approaches undermine the intentions behind the legislation. The Parliament should allocate more time to making sure the laws we already have are working properly, rather than simply enacting new ones. Effective access to justice provisions in law and reform of judicial review procedures, especially regarding costs, standing and scope, are essential if citizens and community groups in Scotland are to be able to exercise their rights under the Aarhus Convention to support the implementation of environmental law.

**ISSUE 2:** The environment needs a strong voice at the heart of government. There is a growing fear that the environment is slipping down the list of public sector priorities, as tighter budgets start to bite. Now more than ever, with the pressures of climate change, Scotland needs resilient, healthy ecosystems to give nature the best chance of adapting in a changing world, and to secure valuable services for society from Scotland's 'natural capital'. Advisory bodies with environmental expertise should be encouraged to act independently and as 'critical friends' when necessary, to ensure that the environment is given the priority it deserves. The announcement on 25 November 2010 that the Scottish Government is 'streamlining sustainability delivery' - including ceasing to fund the Scottish Sustainable Development Commission from March 2011 - is further cause for concern.

**Recommendation:** Ministers need high quality, independent advice on environmental issues, based on sound science and high quality data. This advisory role should extend to championing the importance of the environment, providing leadership for public bodies and advice to private bodies on how they can safeguard the environment while exercising their functions. Legislation like the Environmental Assessment (Scotland) Act 2005 aimed to embed the environment at all levels of public decision-making, but this is not yet being achieved. More vocal championing of the environment within government would help to build recognition across the public and private sectors of the value of Scotland's natural assets and the requirements of genuine sustainability (see further Issue 3 below). Parallels exist in other sectors - such as Sports Scotland

acting as an advocate for sports and sporting facilities, as well as an adviser to Government.

**ISSUE 3:** Scotland needs genuine sustainable development - economic growth alone will not bring better lives. A healthy environment is the essential context for economic and social advancement - policies and practical delivery should reflect this at the national, regional and local levels. Current approaches pay lip service to the need to further biodiversity and to contribute to sustainable development, but the conventional measures of national economic performance and wealth, including GDP, fail to recognise fully the value of our natural assets - and therefore the need to protect and invest in them.

**Recommendation:** The mechanisms used to assess the state of the country's health and wealth should take full account of the financial and non-financial value of natural capital and ecosystem services. (See further TEEB (2010) *The Economics of Ecosystems and Biodiversity*<sup>1</sup>: *Mainstreaming the Economics of Nature: A synthesis of the approach, conclusions and recommendations of TEEB and Scottish Environment LINK's report Protecting the Environment in a Time of Cuts*).

**ISSUE 4:** Scotland is failing to protect its most important nature sites. Legislation is in place to protect and enhance Scotland's nature and landscapes, but the reality on the ground is that many of the most important sites - those designated as SSSIs - are under threat from inappropriate development; and those without legal protection are even more exposed. The Scottish Government's vision is that 'economic development should raise the quality of life of the Scottish people through increasing economic opportunities for all, on a socially and environmentally sustainable basis'. A high quality environment is not a luxury but a necessity for sustainable growth - it needs to be protected and restored for the benefit of present and future generations.

**Recommendation:** The requirements of the EU Habitats Directive should be properly implemented, by ensuring that all designated sites are properly protected. This would provide a long-term future for biodiversity, with designated sites acting as nodes from which biodiversity can expand through the wider countryside via ecologically coherent networks.

**ISSUE 5:** Scotland needs a more strategic approach to land use. Scotland's Marine Act recognised the merits of a strategic approach to safeguarding our seas and managing the different demands on them. There is a complex mix of legislation affecting the terrestrial environment, but taken together the various Acts do not consider the health of ecosystems as a whole and the vital role that ecosystem health plays in delivering services for society and the protection and enhancement of nature.

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<sup>1</sup> <http://www.teebweb.org/>

**Recommendation:** The draft Land Use Strategy (proposed under section 57 of the Climate Change (Scotland) Act 2009) presents a once-in-a-generation opportunity to fulfill the long-held ambition for a more strategic and sustainable approach to managing land use in Scotland. The current draft issued for consultation falls far short of what is required. It presents direction and aspiration, but is weak and unambitious. This is not a strategy with clear goals and actions, and in its current form is unlikely to move Scotland towards more sustainable use of land resources and the optimal delivery of multiple benefits. Ultimately new and visionary legislation may be required to ensure we move towards a healthy, productive and ecologically rich environment in Scotland in the coming decades. For detailed recommendations for the Land Use Strategy, see Scottish Environment LINK's report *Living with the Land*<sup>2</sup>.

## 1. INTRODUCTION

Over the past 10 years, the Scottish Parliament has adopted a significant number of environmental laws, some of them ground-breaking. Looking back over the years since devolution, and forward to a Scottish Parliament election in 2011, Scottish Environment LINK wanted to assess how successfully environmental legislation, which LINK campaigned for, is working to protect Scotland's environment.

### 1.1 Aims

LINK commissioned a review of eight pieces of environmental legislation, to ascertain whether the outcomes in practice match up to the expectations at the time when the legislation was drawn up. The purpose is both to inform Scottish Environment LINK's future work and to gather information which can be fed back to politicians and other decision-makers to help ensure that the legislation is as effective as possible going forward. The report aims to make a constructive contribution to the ongoing work of those charged with implementing the legislation.

### 1.2 Approach

This time-limited review is based on the views and experiences of Scottish Environment LINK members and others involved in implementing the legislation. Interviews were carried out with LINK members across a range of sectors, with government bodies tasked with delivery of the legislation, and with third party observers. Some desk research into other reviews and academic literature on progress with implementation, where they exist, was also carried out.

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<sup>2</sup> <http://www.scotlink.org/files/publication/LINKReports/LINKReportLivingwithLand.pdf>

<http://www.scotlink.org/files/policy/PositionPapers/LINKPaperProtectEnvTimeOfCut.pdf>



All of the legislation covered by the review is fairly recent, and much of it has involved changes to the way public organisations work, and in some cases, has led to the creation of entirely new organisations or structures. These cultural and structural changes take time to bed down, and for much of the legislation it is still considered too early to pass judgement on whether the laws have been a success. Nevertheless, there was a wide range of views about how implementation is progressing.

Rather than investigating how each of the provisions is being applied in detail, this review seeks to highlight some of the successes and to identify some of the problems experienced with implementation of the legislation to date, in order that these may be addressed in the future.

## **2. SCOTLAND'S ENVIRONMENTAL LAWS - PROGRESS TO DATE**

### **2.1 Scope of the review**

Since devolution, the Scottish Parliament has adopted important legislation covering many aspects of the environment. Much of this legislation was driven by EU laws - in some cases (such as Environmental Assessment) Scotland was ground-breaking and went further than required by the Directive; in others (such as the Environmental Liability Regulations) the law reflects the minimum requirements of EU law. The legislation on national parks, land reform and nature conservation was not driven by an EU imperative, but rather by Scottish priorities or needs.

This review covers legislation up to and including the Marine (Scotland) Act 2010, and excludes the Climate Change (Scotland) Act 2009. This was hailed as a world-leading piece of legislation, but it was considered too early in the implementation cycle for it to be included in this review. Only the access provisions of the Land Reform (Scotland) Act 2003 were included.

The following sections summarise the main points raised in relation to each piece of legislation, and suggest potential ways forward where problems are identified.

## 2.2 National Parks (Scotland) Act 2000 (NPSA)

**The main issue raised regarding implementation of the NPSA is the perceived failure of the Cairngorms National Park to apply the Sandford principle.**

The NPSA was adopted following a sustained campaign over many years for national parks in Scotland. The Act established the national park aims, discussed in more details below, and outlined the purpose and functions of national park authorities. It established a procedure for proposing and consulting on the designation of national parks, and for the making of designation orders.

The political realities of how the NPSA came about meant that the national parks here were established on different terms from those in other countries, such as the United States, Canada and Australia. Furthermore, the geographical, economic and social context of the first two national parks designated in Scotland is very distinct, creating a different ethos and style of operating in each.

Recommending the Bill for approval by the Scottish Parliament, Sarah Boyack, then Minister for Transport and the Environment, described how it “provides a framework, a set of common values and principles and a set of processes to ensure that the designation of an area as a national park can happen only after full consultation. Within that framework there is scope for differences between parks, for setting different priorities in national park plans, which reflect the needs and characteristics of the particular area and, crucially, for innovative thinking and ways of involving people.”

She explained how Scotland’s national parks are established with four aims. “Those aims must operate together in a co-ordinated and integrated way. We do not regard them as polar opposites. One of the challenges for national park authorities is to integrate those key aims and to reach agreement in a co-ordinated way.

We all agree that we must get the balance right...We must not rely on the old-style system in which economic development was weighed up against nature conservation... In the new national park areas the challenge will be integration. It underpins the objectives of national parks and comes from an aspiration to do things better and to make the most of the opportunities provided by our natural areas.”

She then went on to offer this warning: “The legislation must stand the test of time. It must ensure that the reasons for designating an area as a national park are not destroyed by virtue of the designation. Our high-quality environment is a vital asset for Scotland and for the communities in the national park areas. National parks offer us the chance to manage our resources better and in a much more sustainable way.”

Scotland's National Parks are still relatively new. The Parks in England and Wales were established by legislation in 1949. It is too early to tell whether the aspirations behind the Scottish legislation will be achieved. Indeed, there is a range of views about what Scotland's national parks should deliver. For some, the Act will never, in its adopted form, deliver the vision of those who campaigned for national parks in Scotland for so long. For others, the mere existence of the national parks demonstrates the importance of Scotland's amazing landscapes and wild areas to the nation.

### **Positive outcomes**

Following a thorough and effective consultation exercise, Scotland now has two National Parks. The Loch Lomond and The Trossachs National Park has a strong park plan with nature conservation at its heart.

The recent decision of the Loch Lomond and The Trossachs National Park to refuse permission for a new gold mine at Cononish was cited as a positive example of how the Park can exercise its functions under the Act. It was a close decision (12 - 10 Board members) but the comments of Dr Mike Cantlay, Convener for the Park Authority, on announcing the decision demonstrate how the Board approached the key issue of balancing the different National Park aims: "At the end of the day, we could not balance the potential economic benefits against our primary aim to conserve and enhance our natural heritage, one of the original reasons for establishing National Parks in Scotland."

During Parliamentary debates on national parks in 2008 and 2009, praise was heaped upon the two Parks for their achievements. In 2008 Sarah Boyack MSP lauded the National Parks "as being one of devolution's successes". A year later in 2009, the Minister Roseanna Cunningham MSP noted that "the Cairngorms national park was awarded the 2005 European charter for sustainable tourism—a first for a United Kingdom national park—and Loch Lomond and the Trossachs was awarded it in 2008". Peter Peacock MSP noted that: "The Cairngorms national park is a young institution that is still maturing and has, no doubt, made errors along the way. However, it already has many successes to its name: it has progressed the work of the Cairngorms Partnership...has strengthened the identity of the Cairngorms as a cohesive area; it has helped to create greater coherence between institutions and landowners in the area; it has helped to lever funding into the area for investment; and it has improved the path network, interpretation and the tourism that is on offer."

### **Disappointments**

The original aspiration of those who campaigned for many years for national parks in Scotland was for parks of IUCN Grade II Protected Area status (i.e. whose main purpose is 'to protect natural biodiversity along with its underlying ecological structure and supporting environmental processes, and to promote education and recreation'). In reality, Scotland's National Parks are said to more

closely resemble IUCN Grade V Protected Areas (whose main purpose is 'to protect and sustain important landscapes/seascapes and the associated nature conservation and other values created by interactions with humans through traditional management practices'). For those who campaigned long and hard for the Parks, this is a huge disappointment, but is perhaps a failure of the Act itself rather than its implementation.

The aims of Scotland's National Parks, set out in Section 1 the Act, are:

- (a) to conserve and enhance the natural and cultural heritage of the area,
- (b) to promote sustainable use of the natural resources of the area,
- (c) to promote understanding and enjoyment (including enjoyment in the form of recreation) of the special qualities of the area by the public, and
- (d) to promote sustainable economic and social development of the area's communities.

Some argue that the existence of the second National Park aim (to promote sustainable use of natural resources in the area) has created a balance which favours development within the parks, which would not be countenanced elsewhere.

The main concern among LINK members arising in relation to implementation of the NPSA is the perceived failure of the Cairngorms National Park Authority (CNPA), in particular, to abide by the Sandford Principle in exercising its functions. The purpose of a National Park authority is set out in Section 9(1) of the Act: to ensure that the National Park aims are collectively achieved in relation to the National Park in a co-ordinated way.

The CNPA is widely seen by LINK members as acting in breach of Section 9(6) of the Act (setting out the Sandford Principle) which says: In exercising its functions a National Park authority must act with a view to accomplishing the purpose set out in subsection (1); but if, in relation to any matter, it appears to the authority that there is a conflict between the National Park aim set out in section 1(a) and other National Park aims [see above], the authority must give greater weight to the aim set out in section 1(a).

The decision in 2010 to grant in principle approval for up to 1500 new houses at An Camas Mor near Aviemore was cited as an example of the CNPA's failure to apply this principle. The proposed development, within the National Park and a National Scenic Area, was given the go-ahead (subject to multiple conditions), despite planning officers recommending that only a maximum of 1100 houses should be approved because 'unacceptable' environmental damage would result from the 1500 house plan. Concerns about the impact of the development on a range of species - wildcats, otters, red squirrels, badgers, groundhoppers and several bird species including black grouse - and on the landscape, were

considered to be outweighed by the benefits of additional housing, including affordable housing, for the area. The decision has been described as “fundamentally at odds with the National Parks Act”. Yet the development is identified as an exemplar by the Scottish Sustainable Communities Initiative, and its proponents argue that it offers a model which allows people to live and work within the Park, rather than commuting long distances as at present.

However, questions have been raised about the veracity of the housing demand figures used to justify developments like An Camas Mor and others within the Park area. Indeed, the report into the Cairngorms National Park Local Plan (CNPLP) raised concerns about the basis for these housing demand figures: at section 7.33 the reporters state: ‘we conclude that that the rationale for the calculation of the housing requirement is unconvincing’ and that ‘we are in no doubt that the overwhelming weight of evidence before us leads to a conclusion that the calculation of 1568 housing units as the housing land requirement to 2016 is a substantial over estimate. ... the housing land requirement is overly generous in any context, let alone that set by the aims of the National Park.’

Concerns were also expressed about the transparency of decision-making within the CNPA, the quality of ecological information on which decisions are based, and in particular, how this information is assessed and weighted.

There is concern that thinking about both National Parks is driven too much by local issues and not enough by national strategy. There is a parallel concern about the composition of the Park Boards on which, since changes made in 2010 following the National Parks Review, there are now fewer members with conservation expertise or interests. Some argue that Scotland’s National Park Authorities operate more like rural development agencies than park authorities.

There is currently no vision or strategy at the national level which sets out how the general aims set out in the Act are to be pursued - how the “integration” described by Sarah Boyack should be achieved. Some argue that some greater clarity would be helpful, provided it was not too prescriptive.

A further issue was highlighted in relation to the mechanisms established under the National Parks Act and how these operate. For example, the Designation Order, which set out how the Park operates, is key to how the Park’s functions are exercised. These Orders can be amended through Statutory Instruments without this having to undergo full legislative scrutiny. The fear was voiced that this could be used to erode the principles which underpinned the legislation, without any opportunity for full parliamentary scrutiny and wider consultation.

The recent review of the Parks too was criticised as being too narrow in scope. It failed to consider boundary issues except in relation to the Cairngorms National Park southern boundary; and other issues pertaining to how the Parks are performing were not considered.

There seems to be little political desire to designate any new Parks. No process has been established to review the options and consider where Parks could be designated, despite various initiatives aimed at taking this forward. For example, the referendum held in Harris in 2009 showed strong support for National Park status - with 732 votes in favour and 311 against - but this has not been pursued by the Scottish Government. The previous Executive's initiative to identify at least one Coastal and Marine National Park has similarly not been advanced.

## **Ways forward**

Despite what was at times outspoken criticism of how the National Parks are performing, it was noted that the Parks have not long been in existence and new institutions take time to settle. The Loch Lomond and The Trossachs Park, in particular, was seen as making progress in engaging the key stakeholders which will assist in delivering the Park Plan - Forestry Commission Scotland, SEPA, and those administering rural development grants.

It remains to be seen what impact the recently agreed changes to National Park Boards will have on how the Parks take forward their remit in future. Some respondents expressed a concern that reducing the size of the Boards would only serve to make them less representative of a wide range of stakeholders.

There are broadly two schools of thought about whether Scotland should be moving forward with designating additional Parks. Some argue that there should be a national strategy and process in place for future designations. Others argue that the two existing Parks should be made to work better before any further designations are discussed.

Where communities e.g. Harris are strongly in favour of a Park designation, it was suggested that this may not necessarily be the best way of achieving their aims, and other alternatives such as the designation of new National Scenic Areas (NSAs) or the better management of existing NSAs should be explored.

## 2.3 Land Reform (Scotland) Act 2003 - Part 1 (LRSA)

**The key points identified with regard to implementation of Part 1 of the Land Reform (Scotland) Act 2003 were that more people are enjoying access and enjoyment of the outdoors, but there is concern about the reluctance of Access Authorities to take action against those who obstruct access; and a concern among some that insufficient action is being taken where access creates a threat of wildlife disturbance.**

This landmark piece of legislation enshrined a general right of access in law in Scotland for the first time. The Act placed important obligations on access takers to exercise their rights responsibly, and a duty on landowners to behave responsibly with regard to access. It also established new mechanisms for resolving access disputes, and provided for SNH to produce a Scottish Outdoor Access Code, setting out how access rights should be exercised responsibly, and how landowners should behave in relation to access. The Act identified authorities responsible for regulating access, and imposed a duty on these bodies to draw up a 'core path plan' to facilitate public access within their area.

Thirty nine Local Access Forums have been established under the Act, to perform a number of functions, which include advising on core paths, and helping to resolve disputes.

Angus Mackay, then Deputy Minister for Justice, described the purpose of the bill to the Parliament as follows: "The legislation is about a responsible right of access. It is about codifying what happens currently. It makes it clear to landowners and those who want to walk and have sensible recreation in the countryside what they are fairly allowed to do and what is expected of them." Importantly, access is far wider than simply access on foot - it covers access for recreational and educational purposes, as well as for some commercial purposes.

This is the one piece of legislation covered by this review for which the Parliament has commissioned a thorough Post Legislative Scrutiny report<sup>3</sup> (the 'Scrutiny Report'). The Scrutiny Report contains a useful review of academic and other literature on the access provisions of the Act, as well as findings from questionnaires and interviews completed by a range of stakeholders. The key findings in relation to access (set out in Section 3.6) are broadly similar to the points raised as part of this Scottish Environment LINK review.

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<sup>3</sup> Post-Legislative Scrutiny of the Land Reform (Scotland) Act 2003 - Calum Macleod *Centre for Mountain Studies*; Tim Braunholtz-Speight, Iessie Macphail (*UHI Centre for Remote and Rural Studies*); Derek Flyn; Sarah Allen and Davie Macleod (*Rural Analysis Associates*) September 2010

## Positive outcomes

More people, and a wider range of people, are enjoying access. Ongoing monitoring of recreational access in Scotland, conducted for Scottish Natural Heritage and Forestry Commission Scotland, reports annually on participation in walking and other outdoor recreation and on awareness and understanding of the Scottish Outdoor Access Code. The latest available survey results for 2009 indicate that almost 80% of Scottish adults visited the outdoors for recreation in the previous 12 months. Almost half (46%) visit at least once a week. Walking is by far the most popular activity - with 75% of outdoor visits said to be for walking.

This is a significant achievement - although it is not clear to what extent it can be attributed to the existence of the Act. A study carried out in the Cairngorms National Park<sup>4</sup> suggests that the impact of the Act has been more about giving existing access takers greater confidence in exercising their rights than about encouraging more people to do so. Others have identified economic and social factors as being the main influences on whether people exercise their access rights<sup>5</sup>.

According to Scottish Government data, over 20,000 km of paths have been signposted or waymarked; and 16 Access Authorities had adopted core path plans by May 2010<sup>6</sup>. The Scrutiny Report notes (Section 3.6) that: 'Core Paths Planning is considered to have raised the profile of access issues within Local Authorities and encouraged community engagement and constructive dialogue between stakeholders'. Although it goes on to say that the focus on core paths is seen as having 'a detrimental effect on addressing more routine access issues'.

A number of LINK respondents noted that the Act had brought particular benefits for access takers other than walkers and climbers. For example, those enjoying horse-riding, cycling and water sports are seen as having benefited from clarification of their rights under the legislation.

Overall this greater enjoyment of access and the outdoors brings significant health and social benefits, as well as encouraging more people to enjoy and value Scotland's natural environment.

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<sup>4</sup> Brown KM, Marshall K, Dille R 2008 *Claiming rights to rural space through off-road cycling*. Paper presented to the annual conference of the Association of American Geographers, Boston

<sup>5</sup> Mackay J W 2007 *New legislation for outdoor access: a review of Part 1 of the Land Reform (Scotland) Act 2003* Scottish Affairs; Warren C 2010 *Managing Scotland's environment* (2nd Ed) EUP

<sup>6</sup> Paths for All Partnership



The designation of a core path network in some areas has led to access being integrated within other strategies and programmes - such as Single Outcome Agreements and Local Plans. North Ayrshire was cited as a best practice example, where the wider benefits of access and the path network in helping to deliver wider social, economic, transport and health outcomes are being recognised. Where core paths are working well, there is also felt to be a good level of community involvement and ownership and strong Local Access Forums.

By and large the Scottish Outdoor Access Code is seen as working well, although it is a long and complex document and some believe more should be done to communicate what it means in practice to the general public. For this reason, ongoing information and public engagement campaigns are thought to be necessary, as many people are aware of the 'right to roam' but are not necessarily familiar with the responsibilities they have in exercising their rights.

Some targeted communications, e.g. leaflets, have been produced to address specific aspects of the Code e.g. on dog walking, wild camping and the new 'Heading for the Scottish Hills' leaflet addressing issues around stalking and access. These more targeted approaches are considered a more effective way of getting across the information to the wider public than the rather unwieldy and detailed Code itself.

In terms of the new stakeholder forums established by the Act, the National Access Forum was widely seen as a useful and effective forum for discussion of access issues. Some Local Access Forums (LAFs) were seen as making a positive contribution, especially where they have strong support from the local access authority. North Ayrshire was cited as an example. The picture is not consistent, however (see further 'Disappointments' below).

Some LAFs were seen as having helped to resolve conflicts in relation to access. This view is broadly supported by the findings of the Scrutiny Report, which found that 'Local Access Forums are viewed as having made a positive contribution to resolving local access disputes and advising on contentious proposals for core paths'.

## **Disappointments**

While some of the LAFs are seen as useful and effective, overall performance is described as 'patchy'. Their effectiveness seems to depend a great deal on the individuals involved and how strongly the Forum is supported by the local Access Authority. Various respondents pointed out that a number of long-running disputes remain unresolved and the Forum is unlikely to be able to break the deadlock. This finding is broadly supported by the Scrutiny Report which notes (section 3.6) that: 'their [LAFs'] overall performance is influenced by factors including resourcing, level of dependency on their Access Authorities for support, membership profile and levels of engagement'.

Where a Local Access Forum has supported access takers in a dispute, there are examples of where the local authority is still reluctant to take action against a landowner. This reflects a widespread concern that local authorities are generally reluctant to enforce the law because of the associated costs and conflict involved. This is a considerable weakness in the system because it means that illegal practices can continue unchallenged (e.g. erecting obstacles to access). This finding is supported by the Parliament's Post-Legislative Scrutiny Report, which notes (section 3.6) that: 'There is a widely held view that Access Authorities are reluctant to pursue access cases in court due to cost implications in the event of losing the case'.

The integration of access across policy areas within local authorities is not seen as happening everywhere. In some cases, there appears to be no common understanding across council departments about access and what it means. The *Gloag v Perth & Kinross Council & Ramblers' Association* case was cited as an example of where the case could have been avoided if the Council's Planning Department had adhered to the advice of the Access Officers.

A specific concern was raised about access to areas where wind farms are being developed. There was a suggestion that planning conditions should be used to make clear that access can only be restricted to specific areas of a site while construction is under way - at present, some developers are accused of closing off entire sites unnecessarily.

Some argued that at times access is promoted at the expense of the natural heritage. They believe that where there is potential disturbance of an important species for conservation, or on a nature reserve, the access authorities should be more robust and prepared to seek changes to where/how access rights are exercised (e.g. requiring people specifically to keep dogs on a lead rather than simply 'under close control').

A similar issue was raised in a response to the Scrutiny Report, concerning a perceived imbalance between the rights of access-takers and those of land managers. While Access Officers may assist landowners where there is a persistent problem (e.g. dogs not under proper control), it was suggested that there is no clear legal process for the landowner to pursue.

While most local authorities have made good progress with their duty to adopt a system of 'core paths', there was concern that there is no obligation on these bodies to maintain the path network. There are fears that this will become more of an issue with increasing constraints on local authority funding. The Scrutiny Report also noted 'concerns that Access Authorities will have insufficient funding to maintain and manage core path networks' (section 3.6).

Furthermore, it was noted that most core path plans designate pre-existing routes, rather than creating new ones. There is also some evidence of an unintended consequence of the law - that landowners who have traditionally

been supportive of access over their land are reluctant to have routes designated as part of the core path network when others, who have traditionally been less welcoming to access takers, are seen to 'get away with' resisting access over their land and are unlikely to have their land included in the core path network.

It was noted that many Access Officers in local authorities are very stretched, and in some cases, posts have remained vacant for long periods. This limits their effectiveness in resolving issues and supporting LAFs. Furthermore, withdrawal of SNH funding for Access Officers in other organisations, such as NFUS, SCA and MCoFS was highlighted as an issue.

## **Ways forward**

The Act has established mechanisms for opening up access to a local authority area through the designation of core paths, but funding cuts threaten to undermine this because there is no obligation to maintain the path network. It was suggested that new ways must be found to support public enjoyment and access e.g. through wider use of volunteers to assist with maintenance.

Many respondents felt that landowners who continue to obstruct access should be challenged. The costs of legal proceedings were acknowledged as a major barrier to this and it was suggested that other mechanisms should be looked at, such as the withholding of SRDP payments to landowners.

Given the difficulties associated with legal proceedings, it was suggested that access cases could perhaps be taken forward in alternative ways. For example, if a land manager wishes to challenge the action or inaction of the access authority (or vice versa), their first recourse could be to a land use arbitration panel<sup>7</sup>, rather than to the Sheriff. This could be a more timely and cost-effective way than going through the Sheriff Court.

The Access Code is seen by most to be working well, but some believe it should be reviewed; others argue that it should be given evidential status in legal proceedings. A suggestion was made that a wider range of media could be used to communicate with access takers about their rights and responsibilities - currently SNH rely heavily on leaflets, but electronic and other media should be explored.

In order to make the LAFs more effective across the board, it was suggested that more and better training could be provided for Forum members, to ensure they understand their role and the role of the LAF itself. Best practice should be shared between Access Authorities.

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<sup>7</sup> This might be to the Lands Tribunal or the Land Court, which would then allow for an appeal to a higher court if the arbitration failed.

In relation to the specific concern raised about how access provisions apply to wind farm sites, it was suggested that this is a specific issue which should be investigated further as currently whole areas are being 'closed off' in a way which is considered unnecessary and contrary to the Act.

## **2.4 Water Environment and Water Services (Scotland) Act 2003**

**The main points arising in relation to implementation of the WEWS Act were that it is too early to judge the success of the River Basin Management Plans. There is widespread concern about the lack of action to tackle diffuse pollution and a recommendation that stronger enforcement action is needed.**

The 'WEWS' Act was introduced to transpose into law in Scotland the requirements of the EU Water Framework Directive (2000/60/EC). The Directive set out to prevent deterioration of and improve the quality of all fresh surface and ground water, and some coastal waters in Europe. For the first time, the Directive set quality objectives for the water environment, with a view to ensuring that waters meet 'good status' by 2015. It introduced an approach which looked to the ecological quality of water and provided for the management of water resources at the river basin level, across political boundaries where necessary.

The far-reaching piece of legislation, which transposed this Directive in Scotland, established a system for managing water resources through river basin management plans, and gave Scottish ministers powers to regulate water activities in order to protect, improve and promote sustainable use of Scotland's water environment (wetlands, rivers, lochs, estuaries, coastal waters and groundwater). A fundamental goal of the Directive and the WEWS Act was to encourage more active public participation in management of water resources.

The legislation also introduced a new system of pricing, and for funding new connections to the water and sewerage infrastructure. This review however focuses on Part 1 of the Act, concerning the protection of the water environment.

### **Positive outcomes**

The Scotland River Basin Management Plan (RBMP) and the Solway Tweed RBMP were both adopted in 2009. Overall there was support for the RBMPs, but it is too early to say whether the objectives will be achieved - especially as the significant water quality improvements are to be delivered in the latter phases of implementation. Despite concerns about the environmental objectives outlined in

early drafts of the Plans, through the consultation these were revised and most view the final objectives set as being realistic and achievable (some believe they could have been more ambitious).

The RBMPs are seen as creating a good framework for action, but it is too early to judge what they will deliver as reporting has not yet begun against the objectives set. It was noted that the legislation is not only about improving water quality, but also about preventing any deterioration - and prevention has largely been the focus of activity to date.

## **Disappointments**

The RBMPs have deferred a lot of action to the third RBMP cycle 2021-2027, so it could be a long time before it is possible to assess whether or not the objectives will be delivered. There is concern that monitoring is being scaled back and this will have implications for assessing whether water quality objectives are being achieved.

Some respondents expressed concern that there is a tendency to see the RBMP as 'SEPA's plan, whereas other stakeholders need to consider their role in delivery - for example Scottish Water and others. Ministers will need to ensure that all stakeholders play their role, especially in difficult financial times, when organisations may have other priorities, and reduced funds available for agri-environment measures too could significantly impede progress.

One suggestion was that it might be more cost-effective to fund NGOs and other organisations, to build their capacity to deliver aspects of the Plans rather than relying largely on public bodies.

There are significant ongoing problems with diffuse pollution which need to be addressed, and many feel that SEPA needs to use 'sticks' as well as 'carrots' to secure compliance by farmers. At present the focus is on informing land managers and seeking to secure their support for action - most LINK members argue that the time for encouragement is past and enforcement action is needed. It is important that funding for landowners is better aligned to the WEWS objectives, so payments are supporting rather than undermining delivery.

Many expressed concerns about the Controlled Activities Regulations (CAR) - the mechanism by which SEPA regulates water activities (discharges, disposal to land, abstractions, impoundments and engineering works) and SEPA's lack of progress in reviewing licences granted when the new regulatory regime was set up. There has been a lack of transparency about what SEPA is doing, and a suspicion therefore that too little is being done. SEPA is due to announce its future strategy and plans for CAR reviews shortly.

There has been little progress to date on restoration of water bodies. The Restoration Fund is relatively small and is not being targeted strategically (focusing on removal of river barriers and responding to project submissions,

rather than setting the agenda). There was a view within and beyond LINK that a national strategy is needed to address restoration, and this is something SEPA is understood to be working on.

The National Advisory Group (NAG) and Area Advisory Groups (AAGs) set up under the Act were designed to achieve the key objective of greater participation in the management of water resources. While the NAG was seen by some as a useful and effective forum, performance of the AAGs was seen as patchy. There is a concern that participants are becoming dis-engaged because the meetings are not seen as dynamic or productive. Initially the groups were focused on developing the RBMPs and some argue that they have perhaps lost focus since the Plans were adopted, but they should develop a renewed focus scrutinising and monitoring performance against the environmental objectives set in the RBMPs, and also in ensuring that the CAR review process moves forward.

Some concern was expressed about a proliferation of plans being developed, supplementary to the RBMPs. A draft plan on Invasive Non-Native Species was cited as an example. It is important to have clarity about how these supplementary plans relate to the RBMP and Area Management Plans. There are likely to be three such plans: to address diffuse pollution, invasive non-native species and restoration - key pressures which require action above and beyond what the RBMPs will deliver.

## **Ways forward**

A clear strategy for restoration is needed, including a more strategic use of the Restoration Fund to support projects.

AAGs require support from SEPA and a clear focus to ensure they are effective and useful. There was a suggestion that the means of involving the public in water resource management needs to be reviewed, as the current approach is too 'top down' and this fails to achieve genuine engagement in the process. Successful approaches in countries like New Zealand, Australia and Canada were referred to as offering an alternative way forward.

Tougher action is needed on diffuse pollution, including use of cross-compliance measures to secure action by landowners.

In difficult financial times, Government should look at the most cost-effective means of achieving the ends - and whether this is to build capacity in other organisations to deliver or to rely on the public sector.

The annual report to Parliament could be a useful tool for legislative scrutiny, provided it is given sufficient prominence (e.g. linked to a Parliamentary debate or Committee inquiry). Its usefulness will also depend on the information provided - for example, it was suggested that the report should include detailed information on progress towards achieving the environmental objectives set in

the RBMPs; as well as details of how many CAR licences have been reviewed/how many are still to be reviewed.

One respondent suggested that a different type of scrutiny approach is now needed, which involves other stakeholders (e.g. Audit Scotland, Scottish Environment LINK, academics). They suggested that scrutiny should focus both on whether the ends objectives set out in the RBMPs are being delivered; but must also look in detail at whether the right means are being used to achieve the ends.

There is a need to ensure action to implement the Flood Risk Management (Scotland) Act 2009 is well integrated with the WEWS objectives, as this may be the best way to lever substantial capital resources for action to tackle major water quality issues such as those related to hydromorphology.

## 2.5 Nature Conservation (Scotland) Act 2004 (NCSA)

**The main issue identified in relation to implementation of the Nature Conservation Act is the failure to halt the loss of biodiversity. There has been progress with planning, but insufficient action on the ground.**

The NCSA was introduced to improve protection of Scotland's natural heritage. For the first time, the Act went beyond measures relating to the protection of important sites and species, and recognised that Scotland has an obligation to conserve biodiversity.

The NCSA introduced a duty on every public body in Scotland to further the conservation of biodiversity, consistent with the proper exercise of its functions. Key to this 'biodiversity duty' was the notion that the public sector should play a leadership role. As Ross Finnie, then Minister for Environment and Rural Affairs, explained when introducing the bill to the Parliament at stage 1: "The innovation in this bill is explicitly to seek that Scotland's public institutions should play a special role—a leadership role—on behalf of the wider community. Many public bodies already work imaginatively to protect and enhance biodiversity and to conserve our natural heritage. In future, every one of them will have to demonstrate that it has integrated biodiversity issues in its policy-making processes and day-to-day operations."

Scottish Ministers were required to adopt a Scottish Biodiversity Strategy (SBS) as well as identifying a list of species of flora and fauna and habitats of primary importance.

The NCSA also introduced a range of provisions for the protection and management of SSSIs, including making it an offence for a third party to damage an SSSI. It enabled Ministers to make Nature Conservation Orders to

protect features of special interest; and to make Land Management Orders to require operations to be carried out on land in, or contiguous with, an SSSI where this is necessary to conserve, restore or enhance a natural feature specified in the SSSI notification.

Enhanced species protection provisions were also introduced. These include extending the provisions of the Wildlife and Countryside Act 1981 to include 'reckless' acts; providing for year-round protection for the nest sites of threatened species of birds and prohibiting disturbance of certain lek sites; and making it an offence to disturb dolphins, whales or basking sharks intentionally or recklessly.

During the stage 1 debate in the Parliament, Ross Finnie outlined the rationale for the bill in these terms: "There can be no doubt that Scotland's natural heritage matters to us all. It matters both in its own right and because it is one of the most basic national assets—a key resource for our most important industries and a resource that sustains the quality of life. So often, we take it for granted. Scotland's natural heritage matters because we cannot squander our environmental capital and still hope to deliver the sustainable, long-term economic prosperity and environmental justice to which the Executive and the Parliament are committed."

Comments in relation to this legislation focused mainly on the biodiversity duty and delivery of the SBS. The 2008-2010 SBS implementation plan introduced significant changes to the delivery mechanisms for biodiversity (designed to integrate Local Biodiversity Action Plan activity better with national management of biodiversity). This approach aimed to place greater emphasis on whole ecosystems rather than individual species and habitats. Audit Scotland<sup>8</sup> noted in January 2010 that: 'It is too early to assess how effective the restructuring has been and no timescales have been set for reviewing it.'

### **Positive outcomes**

There is evidence that the biodiversity duty is having some impact on the content of plans and policies (e.g. some local authorities refer to the biodiversity duty in their draft Development Plans). Research carried out by the Scottish Wildlife Trust found that 5 local authority Single Outcome Agreements (SOA) refer to the biodiversity duty in the NCSA; 22 out of the 32 local authority SOAs included at least one natural heritage indicator; and 11 have one biodiversity indicator; but only 3 have an LBAP indicator.

There are some positive examples of public bodies putting nature and biodiversity at the heart of their programmes - e.g. the new SNH HQ building (which achieved an 81% BREEM rating) and eco-schools were seen as showing

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<sup>8</sup> *'Protecting and improving Scotland's environment'* Audit Scotland (January 2010)



how biodiversity and nature conservation can positively influence the design and layout of public buildings. Forestry Commission Scotland was cited as having responded effectively to the duty. However, the examples are limited and not necessarily directly related to the duty established under the Act.

It was noted that the 'biodiversity duty' provides a useful statutory basis for action in some areas e.g. applying planning conditions.

The powers established under section 19 of the Act to prosecute landowners where damage is caused to SSSIs or requiring SSSIs to be reinstated have been used in a number of cases - for example, in the case of an unconsented track across the Solway Merse (designated SSSI, SAC and SPA), which was required to be restored. Four prosecutions have been pursued under this provision to date, three of them successfully (one failed on a technicality).

Similarly, the species protection provisions have been used to secure a number of convictions for wildlife crime. A total of 16 charges have been brought in relation to persecution of birds of prey, of which 13 resulted in guilty verdicts. Furthermore, custodial sentences have been handed down to those convicted of stealing wild birds' eggs for the first time. In general, however, there has been limited use of the enhanced penalties for wildlife crime introduced by the Criminal Proceedings (Reform) Scotland Act 2007 (see further 'Disappointments' below).

## **Disappointments**

The fundamental problem is that, in spite of the legislation, Scotland is failing to address the core issue: loss of biodiversity. The SBS talked about the importance of public sector leadership - yet this is seen to be sorely lacking. 'Less paper more action' is called for in the management of biodiversity.

The duty to promote biodiversity seems to have had limited impact on the attitudes and behaviour of public bodies, and to have failed to embed biodiversity at all levels of government and public services. "The biodiversity duty has been dwarfed by process - re-arranging the deck-chairs on the Biodiversity Titanic, adjusting the methodologies for reporting and surveying..." according to one respondent.

There is a perception that, with both the biodiversity duty and the SBS Implementation Plans, staff within public bodies - such as Forestry Commission Scotland, the Scottish Government, and the Enterprise Agencies - have not been enabled to take action beyond that which they were already taking. This suggests that the fundamental principle of 'hardwiring' biodiversity into public sector delivery mechanisms has failed.

The Department for Environment, Food and Rural Affairs (DEFRA) commissioned a review of the Biodiversity Duty contained in s40 of the Natural Environment

and Rural Communities Act 2006<sup>9</sup>. It compared the impact of the duty which requires public bodies in England and Wales to 'have regard to the purpose of conserving biodiversity', with the duty under the NCA to 'further' biodiversity. The study concluded that there was no evidence that the Scottish duty has been more effective at delivering biodiversity benefits.

These findings are supported by Audit Scotland's report on 'Protecting and improving Scotland's environment'<sup>10</sup>, which concludes that:

'There has been mixed progress in protecting and improving Scotland's biodiversity.

The Scottish Government's target for 95 per cent of all protected areas to be in favourable condition by 2010 is at risk of not being met. Its target to increase the number of terrestrial breeding birds is being met.

The duty on all public bodies to promote biodiversity has had limited impact, due to a lack of sufficient guidance on how to implement it and the absence of any monitoring or reporting system to enforce it.'

The powers to make Nature Conservation Orders and Land Management Orders are understood not to have been used since the legislation was adopted.

Many respondents, both within and beyond Scottish Environment LINK, were of the view that the Government does not want Scottish Natural Heritage (SNH) to be a 'critical friend', but an adviser whose advice appears to be secondary to the 'public' (often seen as the 'economic') interest. There was also felt to be very little political support for designation of new protected sites, hence SNH is not taking these forward.

Many respondents expressed concern about damage to important designated sites. While this is not strictly an issue related to how the measures introduced in the NCSA have been implemented, it is nevertheless relevant as this is seen to undermine the principles behind the legislation, as outlined by the Minister when introducing the bill to the Parliament. Various examples were given of developments going ahead despite damage to a designated site, including a number of housing developments in the Cairngorms National Park; the Trump/Menie complex; the new Forth crossing. There was a concern that the value of designations and enhanced protection under the NCSA is being eroded by such decisions. (See also further comments in relation to the Planning Act in section 2.7 below).

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<sup>9</sup> DEFRA CTX 0811, May 2010

<http://www.defra.gov.uk/evidence/science/funding/recent.htm>

<sup>10</sup> [http://www.audit-](http://www.audit-scotland.gov.uk/docs/central/2010/nr_100114_environment_overview.pdf)

[scotland.gov.uk/docs/central/2010/nr\\_100114\\_environment\\_overview.pdf](http://www.audit-scotland.gov.uk/docs/central/2010/nr_100114_environment_overview.pdf)

Other examples were given of where a failure to prosecute those who cause damage to SSSIs is seen as sending a signal to landowners that they can 'get away with it' e.g. in the case of an unconsented track which damaged a SSSI in north west Highland. The local authority advised the landowner was to apply for retrospective planning permission rather than to attempt restoration.

Poorly targeted monitoring of SSSIs (ie where all relevant species are not listed on the citation and are not therefore monitored) was also identified as a problem in relation to the protection of designated sites. The monitoring system itself is regarded as leading the way across the UK. However, the value of sites cannot be safeguarded if monitoring does not cover all relevant species. For example, there are a number of sites where the citation does not include key species - these include lichens at Glen Shire and a Red data list bryophyte in the Touch Hills. Since they are not included in the citation, these species are not monitored, and deterioration of the sites is not therefore identified. Progress in amending citations to include all relevant species is patchy.

Looking beyond the designated sites, there were concerns that SNH's focus in casework on SSSIs has left the wider countryside exposed. This means that areas which are not designated, but are nonetheless locally valuable, are being damaged or lost altogether. This perhaps reflects the failure to 'hardwire' biodiversity into the wider thinking of planning authorities, referred to above. Furthermore, the shift of funding mechanisms from SNH to the Scotland Rural Development Programme, or directly to local authorities, was identified as a further challenge since funds for management and restoration of non-designated sites are drawing on an ever-decreasing pool of resources.

It was noted that the custodial sentences and larger fines (up to £10,000) introduced in 2007 for certain wildlife crime offences have not been used in cases involving the killing of birds of prey. Killing an adult bird has a greater ecological impact than the removal of a clutch of eggs, so there is disappointment that these more draconian sentences have not been used in bird of prey persecution cases to date, as the smaller fines do not have the same deterrent effect.

## **Ways forward**

Clearer statutory guidance for public bodies, especially local authorities, on the meaning and implications of the biodiversity duty, and how they can fulfill it, needs to be provided - as noted in the Audit Scotland report. Guidance exists, but it is not sufficiently clear or given sufficient weight. The guidance needs to be aimed at those tasked with integrating biodiversity into other areas of work - such as transport, planning, environmental health etc. This also needs to be backed up with enforcement: where insufficient account is taken of biodiversity, or damage is caused, some sanction must follow.

Biodiversity and sustainable development need to be mainstreamed, so that they are reflected in the work of all departments e.g. in a local authority (better guidance would assist with this). A number of respondents suggested that focusing on ecosystem goods and services may help to place biodiversity higher up the order of priorities for local authorities and other bodies. This should include a clear assessment of the future value of biodiversity, ensuring that future unknown ecosystem services are protected as well as current ones.

It was suggested that the role of local authorities as delivery agents is not sufficiently well recognised by those charged with delivery of biodiversity at the national level. Yet local authorities have the skills and manpower to deliver habitat networks, for example. Biodiversity is often delegated to Local Biodiversity Action Plan (LBAP) Officers within councils, who are often in no position to influence wider local authority action. The role of LBAP Officers should in future focus on enabling local authorities to embed biodiversity in all their functions.

What is being achieved at the local level might be better recognised if reporting mechanisms captured information about what is being done on the ground better than at present (i.e. by reporting on the actions and biological outcomes rather than on the amount of land designated within the local authority area).

A similar comment was made in relation to reporting to the Parliament on what is being achieved. This should, it was suggested, be more systematic rather than presenting a sample of case studies, which may not be representative of wider delivery.

The draft Land Use Strategy is seen as an important opportunity to move to a more strategic approach to managing the terrestrial environment. Scottish Environment LINK believes that a Sustainable Land Use Strategy is vital to:

- ensure that all land use contributes to the fight against climate change;
- set out an overarching vision for land use in Scotland;
- ensure more co-ordinated planning and delivery between the various agencies;
- reward multi-benefit land use; and
- resolve conflicts between different land uses<sup>11</sup>.

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<sup>11</sup> *Living with the Land - Proposals for Scotland's first Sustainable Land Use Strategy* (Scottish Environment LINK 2009)

<http://www.scotlink.org/files/publication/LINKReports/LINKReportLivingwithLand.pdf>

## 2.6 Environmental Assessment (Scotland) Act 2005 (EASA)

**The main point arising in relation to SEA was that the legislation has not yet had a major influence on the content of plans and policies - although there is evidence of some impact.**

The EASA transposes into law in Scotland the requirements of EU Directive 2001/42/EC 'on the assessment of the effects of certain plans and programmes on the environment', known as the Strategic Environmental Assessment or SEA Directive. The legislation is a key means for delivering sustainable development - ensuring that environmental impacts are taken into account at all levels of public sector decision-making.

The Explanatory Notes to the Act state that: 'Through the Act the aim is to improve protection of the environment, to improve public decision making and in particular to implement the commitment in 'A Partnership for a Better Scotland' to legislate to introduce Strategic Environmental Assessment across the range of all new strategies, plans and programmes developed by the public sector in Scotland.'

In transposing the Directive, Scotland went beyond the EU requirements by requiring SEA of 'strategies' as well as plans and programmes. This was designed to ensure that policies as well as programmes which influence how resources are allocated and spent should take account of environmental impacts.

SEPA is currently undertaking a detailed review of implementation of the SEA legislation, on behalf of the Consultation Authorities (SEPA and SNH) and the Scottish Government, which is due to report draft findings in Spring 2011.

### **Positive outcomes**

The requirement to undertake an SEA requires policy-makers to consider and address environmental impacts systematically. Previously they might have done this informally or internally within their organisation, but they are now required to report on and explain environmental impacts in a far more detailed way.

While many of the plans subjected to SEA would have undergone an environmental assessment previously (42% of plans subjected to SEA are land use plans), there are a large number of plans, notably the higher level policy documents such as the SEPA Climate Change Plan, which would not previously have undergone such an assessment.

Some respondents noted that the content of some plans and strategies had been influenced by the SEA. Examples included the Scottish Water Resource Plan, the

Strategic Transport Projects Review and the consolidated Scottish Planning Policy (SPP).

A specific example was given in relation to the SPP. It was initially proposed that the requirement for certain types of development to comply with national maximum parking standards should be removed from the policy. The SEA highlighted the potential adverse effects (on health, air quality etc) of removing the national maximum parking standards for some developments, and some consultees argued that removal of the requirement would run counter to wider Scottish Government commitments to sustainability and expressed concern that this could result in an increase in car travel. The maximum parking standards were reinstated in the final SPP as a consequence.

Scotland's approach to SEA is regarded in other countries as a best practice example - not just in terms of the legislation going further than the Directive, but also in terms of the support for the process provided through e.g. the SEA Gateway. The original toolkit is in need of review after 5 years (and a review is being led by the Scottish Government), but nevertheless is seen as a leading example of how the SEA process can be effectively supported.

## **Disappointments**

The overall view might be summed up with this comment from one respondent: "The SEA process has not caused the seismic shift in decision-making in Scotland which we might have hoped". The legislation is still relatively new, but there is scant evidence of a significant shift in thinking and approach. Those who believe that SEA has had some impact on the nature of plan making in Scotland also note that there is not yet evidence that this has resulted in different environmental outcomes.

The Strategic Transport Projects Review (STPR) 2008 was cited as an example. The SEA made modest impacts on STPR - for example highlighting mitigation measures. However, no proposed road scheme was blocked, even when significant adverse effects were highlighted. The SEA did not address the cumulative impacts of all of the schemes outlined in the STPR, which would lead to greatly increased traffic levels and therefore higher climate change emissions as well as noise and air pollution impacts on existing roads. It was suggested that EIAs of the individual schemes would have identified similar mitigation measures to those identified in the SEA, and this brings into question whether there was any clear benefit from the 'strategic' approach.

Some observed that SEA is still seen as a separate process - an 'add-on' to plan and policy development, rather than integral to the process of developing the plan or policy. The SEA carried out in relation to the draft Land Use Strategy (proposed under Section 57 of the Climate Change (Scotland) Act 2009), for example, has been described as "an exercise in support of the Government's

proposals” rather than a critical assessment of its impacts which informed the shape of the document, as it should have been.

Some argued that a weakness in the system is the inconsistency in determining which plans and policies are subjected to assessment. The Consultation Authorities do not have the authority to require a given policy or plan to be subjected to SEA. Particular concern was expressed that many plans - such as local authority Single Outcome Agreements - are not subjected to SEA, despite having a significant influence over allocation of resources. The definition of a ‘significant environmental effect’ triggering an SEA is still evolving, and there is not yet a body of case law to establish where the line falls.

There was a suggestion that currently, when an SEA identifies significant impacts, the focus is on mitigation, but enhancement is rarely considered, although the legislation provides for this. To achieve the goals of the legislation, it was recommended that greater emphasis is put on enhancement (see further ‘ways forward’ below).

## **Ways forward**

While the SESA was congratulated for going beyond the scope of the Directive, this has created an issue, in that the current guidance is difficult to apply to the more strategic policy documents. It was suggested that two approaches needed: one for plans and programmes such as land use plans, for which the Directive envisaged SEAs; and another for other ‘strategies and plans’ which fall within the scope of the Scottish legislation but not the Directive. These latter documents require a different and more flexible approach. This could be addressed through the current review of the SEA Toolkit.

To make SEA effective as a means of reducing negative environmental impacts and improving environmental protection, it was recommended that there must be an effective feedback mechanism to track what the impacts of policies and programmes really are, and whether measures recommended to mitigate their effects are succeeding. SEA may identify certain policies or practices as having no significant impact, when in fact the impacts are substantial (for example the impact of road building on emissions growth). All plans, programmes and strategies which undergo an SEA should therefore be monitored to assess their impacts in practice; and where action is taken to mitigate impacts identified, there should also be monitoring to assess whether the mitigation is succeeding, which feeds into future decisions on further mitigation and/or enhancement measures.

In this context, it was suggested that SEAs should take account of the resilience of ecosystems. A specific impact identified through the SEA may be minor, but it could trigger a tipping point, so that the overall impact is far greater. This again suggests a need to monitor measures taken to address impacts identified through the SEA, and could be particularly relevant in the context of cumulative

impacts. There was concern that there is currently a failure to consider cumulative impacts effectively - for example, where impacts arise from a document such as a corporate plan, which leads to delivery by a number of departments acting separately from one another.

With regard to the reporting mechanisms under the Act, it was suggested that more could be done to report on evidence of outcomes, rather than simply on the process - i.e. the numbers of SEAs carried out and the level of activity.

## **2.7 Planning etc (Scotland) Act 2006 (The Planning Act)**

**The overall view in relation to the Planning Act was that Scotland does not yet have a transparent, participative planning system in which communities feel they can influence decisions which affect their future.**

The Planning Act heralded the first major overhaul of Scotland's planning system for 60 years. It was claimed that the changes would make the planning system more 'inclusive' and 'efficient', improve community involvement, and support sustainable growth of the economy.

Introducing the Bill in the Parliament at Stage 1 Malcolm Chisholm, then Minister for Communities, described it as "the most fundamental and comprehensive reform of the planning system in Scotland since its creation in the immediate post-war period". He went on to note that the "modernisation will establish a new planning system that is quicker and more efficient and which has community involvement at its heart....A key aim of our modernisation proposals is to reinforce the central role of development plans in the planning system, guiding and shaping the future development of our localities, and to ensure that local people and other stakeholders have a wide range of opportunities to influence change in their communities...Development plans can ensure transparency and predictability in the system, which will benefit applicants and communities alike."

The Act provided for the adoption of a national spatial plan - the National Planning Framework (NPF) - which could include details of 'national developments'. This aspect of the legislation has proved highly controversial, due to the way in which the NPF was consulted upon and adopted.

The Act also introduced a new system for the preparation of strategic development plans, and of local development plans. It introduced a duty on authorities to contribute to sustainable development when exercising their functions in relation to planning. There were a number of changes to 'development management', notably new arrangements for public scrutiny of



certain developments, in particular those which are contrary to development plans; and provisions aimed at making information more publicly accessible.

## Positive outcomes

Many respondents felt that the building blocks are in place for the creation of a plan-led system (provided planning authorities adhere to the plans!). A great deal of work has gone into the preparation of new-style development plans, but none has been adopted so far and so development management decisions are not yet being made within the framework of these new plans, so it is too early to judge whether the Act will deliver a 'plan-led' system.

Engaging the public with development planning was widely acknowledged to be difficult, as people tend to engage more readily when specific development proposals are under consideration. Some good practice examples were cited. The work of Planning Aid Scotland to assist community groups was welcomed (although communities often want support to express their views rather than impartial advice on how the planning system works). Development Plans are still technical documents and progress is slow. This can be frustrating for people in a community who may contribute and then see very little progress for months.

Another positive example was the Scottish Sustainable Communities Initiative (SSCI), which trialled a Charette process - described as an intensive form of community engagement, which aims to capture the vision, values and ideas of the community. A series of workshops were held to explore design options for three SSCI projects - at Ladyfield in Dumfries, Lochgelly in Fife and Grandhome in Aberdeen.<sup>12</sup> These were seen as a positive - but costly - means of engaging communities effectively, but also as sometimes undermining the local planning authorities and pre-empting the plan-led system by appearing to bestow Scottish Government approval on some proposed developments.

The principle of the NPF is seen as sound, in that it identifies key projects and has enabled decision-makers and local authorities to develop a shared vision for how Scotland's infrastructure needs should be met. However, there was concern about the overall focus on centralised development projects (see further Disappointments below).

The Central Scotland Green Network was cited by various people as an example of an excellent initiative supported by the NPF, which as a result has attracted £450,000 of funding from SNH and FCS. However, there were fundamental flaws in the process of adopting the second NPF which many believe mean that the wrong projects have been identified in some cases (see below).

Some praised the guidance on sustainable development in the Scottish Planning Policy adopted earlier this year - which had been much improved and strengthened through the consultation process (although others considered it a

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<sup>12</sup> <http://www.scotland.gov.uk/Topics/Built-Environment/AandP/Projects/SSCI/SSCICharretteSeries>

retrograde step for the complex and challenging issues of environment and sustainability). The 'proof of the pudding' will be in how this guidance translates into decisions on individual developments.

## **Disappointments**

The planned transformation of Scotland's planning system has yet to take effect. This is about long-term culture and behavioral change, and it will take more than a single piece of legislation to deliver it.

Creating the first round of new development plans has taken four years and none is yet adopted. At this pace, they may suffer from the problems of the past, with plans becoming out-of-date and then being ignored.

Meantime, planning authorities continue to take decisions contrary to their plan (albeit an out-of-date one) and sometimes also against the professional advice of their planners. Some authorities still invite developers to identify development sites, rather than identifying the sites themselves through the planning process, which implies a developer-led rather than a plan-led system.

While it was claimed that the legislation would result in more people being engaged with the planning system, in reality communities still feel excluded. The system is still seen as unbalanced in favour of developers. It was suggested that this is exacerbated by some council policies - for example, taking the view that the councillors' code prevents councillors from meeting with or hearing the views of communities, although they continue to meet with private developers. Plans for the Dundee biomass plant were cited as an example of where this approach has been taken.

Some argue that the public are still left "disillusioned, frustrated and cynical" by the system. It was suggested that the system fails to give any weight to ideas put forward by the public, regardless of how well informed and well argued they are. The process was described as one of information rather than genuine consultation.

Specific concerns were raised about how the pre-application consultation process works for major developments. There was a suggestion that the requirement to consult 12 weeks in advance of applications for major developments has made the process more complicated, without necessarily resulting in higher quality or a better type of application. There is a perception that responsible developers who would previously have consulted in good time previously still do so, but the provisions of the Act have not ensured that those who did not consult effectively before are doing so now. Some local authorities seem to treat the early consultation requirement as a 'tick box' exercise, rather than using it as a lever to encourage developers to improve their proposals by addressing community concerns. Some also consider that 12 weeks is a fairly short time and that this does not really allow time for developers to reconsider and change their

application in response to the input they receive from community groups and others.

There was a strongly and widely held view that the NPF, while welcome in principle, focused too much on centralised developments rather than on strategic priorities which would influence the design of all developments (such as a priority for active travel, or for strengthening the electricity grid to renewable energy, or for improving the carbon balance of the building stock). It was argued that this makes NPF2 a poor tool for delivering sustainable development.

Further, the risk was highlighted that the NPF bypassed consultation and proper investigation of the need for development. In particular, there was concern about the number of developments introduced into the NPF for consideration once the initial consultation had closed. In many cases, the projects included in the NPF had been extensively debated and consulted on over a number of years. However, there is a concern that, for private developer-led proposals, the NPF could be seen as a 'fast track' process which bypasses the normal process of scrutiny and detailed assessment of need which the planning system would require. National Development 9 'New Power Station and Transshipment Hub at Hunterston' was cited as an example - this had not been subject to the same level of consultation as other developments identified in the Framework. This is being challenged through a Judicial Review application and a ruling is awaited at the time of publication

There is also a concern about how the developments will be taken forward in practice. How well they ultimately deliver against the aspirations set out in the NPF will depend on the quality of the developments, and it is unclear how developers will be held to the 'letter and spirit' of the NPF. It is hoped that, through effective development planning and master planning, the mistakes of the past can be avoided - where e.g. private housing developments created huge social and economic burdens for the public sector and have to be pulled down within 20 - 30 years.

The duty on planning authorities to contribute to sustainable development in exercising their functions is considered to have had little measurable impact on how public bodies exercise their functions - to date. However, the existence of the duty was welcomed as part of the process of embedding sustainable development in all aspects of public life.

Many respondents expressed alarm at damage to designated sites from development. While not directly an issue associated with implementation of the Planning Act, this came across as a major issue, with a growing sense that "it is left to NGOs to defend these sites, spending charitable resources where the sites should be protected by the law". A range of examples were given, including the proposed Muaitheabhal wind farm which would have encroached on a National Scenic Area in Lewis (see also comments in relation to the Nature Conservation Act in Section 2.5 above).

## **Ways forward**

The overall view in relation to the Planning Act seemed to be: “Watch this space”. If planning authorities adhere to their plans; and effective early consultation on developments is secured, the desired transformation of how the planning system operates in practice could yet be achieved. However, it seems unlikely that the Planning Act alone will achieve this change, which may require further changes in secondary legislation and policy.

## **2.8 Environmental Liability (Scotland) Regulations 2009 (the Regulations)**

**The main issue is that the Regulations have not been - and are unlikely to be - used as their scope is so narrow and the cost of taking action so high.**

The Regulations were introduced to transpose the requirements of EU Directive 2004/35/EC into law in Scotland. In contrast to Scotland’s approach to transposing the Environmental Assessment Directive, these Regulations introduced only the minimum EU requirements. The Directive was designed to introduce a civil law remedy which would ensure that the ‘polluter pays’. Where there is a risk of ‘significant’ damage to land, water or biodiversity, the operator has a duty to avert damage from occurring or, where damage does occur, to reinstate the environment.

Most LINK respondents were only vaguely aware of the Regulations. Those who were familiar with them considered it would be too costly to take any action under the Regulations.

### **Positive outcomes**

No positive outcomes were identified as the Regulations have been adopted, but the provisions have not yet been used in relation to a pollution incident.

### **Disappointments**

See above! As one respondent put it, “the damage has to be so significant and to have damaged such an important (EU designated) site” that the scope for using the Regulations is very limited and would be too costly for most.

### **Ways forward**

It remains to be seen whether the Regulations, as drafted, will truly enable polluters to be brought to account, in anything but the most catastrophic circumstances.

## 2.9 Marine (Scotland) Act 2010

**Most respondents were of the view that it is too early to judge implementation of this legislation.**

### Positive outcomes so far

The process for identifying Marine Protected Areas (MPAs) is considered overall to be progressing well. There are specific issues related to the definition of Priority Marine Features - notably concerns about whether there will be adequate protection for nationally important species of cetacean and seabirds - but the issue may yet be addressed through the consultation process, which is ongoing.

There are positive signs that development of ecosystem objectives is heading in the right direction, recognising the need for a healthy marine ecosystem as underpinning the social and economic benefits which arise from exploitation of the seas.

### Disappointments

No specific concerns were raised, although a potential issue was identified if Marine Scotland is unable to recruit sufficient staff to take forward implementation due to the public sector austerity measures.

### Ways forward

The development of renewables was raised as a concern by a number of respondents in relation to various pieces of legislation, including the Marine Act. There was a recommendation that, in relation to marine renewables, a close eye should be kept on how the 'deploy and monitor' approach to development proceeds. It will be important to ensure that the findings of monitoring are fed back and taken into account when considering how deployment should be rolled out in future. Scottish Environment LINK has made a number of specific recommendations which aim to support the promotion, development and regulation of the nascent marine renewable energy industry in a way which is truly sustainable in its report *Avoiding conflicts in the marine environment - Effective planning for marine renewable energy in Scotland*<sup>13</sup>.

The appointment of two LINK Marine Officers was widely welcomed as having enabled LINK to engage effectively with the multiple consultations in relation to implementation of this piece of legislation.

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<sup>13</sup> *Avoiding conflicts in the marine environment - Effective planning for marine renewable energy in Scotland* Scottish Environment LINK (June 2010)  
[http://www.scotlink.org/files/publication/LINKReports/LINK\\_ACME\\_Report0610web.pdf](http://www.scotlink.org/files/publication/LINKReports/LINK_ACME_Report0610web.pdf)

### 3. CONCLUSIONS

In tough economic times, there is widespread concern that the environment is still seen as one of a number of issues to be 'balanced' against economic development, rather than as the context for economic and social advancement.

Despite the rhetoric about sustainable development, public bodies have not yet integrated environmental protection and conservation of biodiversity into their thinking and how they approach delivery of their wider functions. This risks undermining effective delivery of the laudable goals which 10 years of environmental legislation set out to achieve.

There is therefore a need to continue campaigning for protection of the environment to be at the heart of decision-making and not on the sidelines; and to focus on making sure existing laws work better, as well as adopting new legislation where necessary.

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Scottish Environment LINK,  
2 Grosvenor House,  
Shore Road,  
PERTH  
PH2 8BD

[www.scotlink.org](http://www.scotlink.org)

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## Appendix: Table of Respondents

LINK MEMBERS	NPSA	WEWS	LRSA	NCSA	EASA	Planning	Marine	ELR
APRS	x		x			x		
BSCG	x							
Buglife	x			x				
FoES					x	x		x
JMT	x		x		x	x		
Living Streets					x			
Marine Conservation Society							x	
MCoFS	x	x	x	x		x		
Plantlife				x				
RAFTS		x						
Ramblers			x					
RSPB	x	x	x	x	x	x	x	x
SCRA			x					x
Soil Association	x							x
SWT			x	x	x	x		x
WWFS					x	x		
WTS	x		x	x		x		
OTHER								
Academics		x		x	x	x		x
SEPA		x			x			
SNH	x		x	x	x	x	x	
Third parties*	x	x	x	x	x	x	x	

\*includes representatives from local authority, NP Boards.