



Edward Mountain MSP
Convener
Net Zero, Energy, and Transport
Committee
The Scottish Parliament
EH99 1SP

Monica Lennon MSP

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Dear Edward

Ecocide (Scotland) Bill

Defence of necessity (reverse burden) – compatibility with ECHR

I am writing to follow up on an issue raised during my evidence session on my Ecocide (Scotland) Bill on 9 December 2025 on the defence of necessity and compatibility with ECHR.

Section 2(3) provides a defence of necessity to ecocide where the defence can show that the behaviour that caused the severe environmental harm was carried out to prevent greater harm and was necessary and reasonable (described as a “reverse burden” defence). The statement I made at introduction indicates that in my view requiring the accused to establish the elements of the defence on a balance of probabilities is not incompatible with the right to a fair trial under the ECHR.

As was discussed in evidence I agree with the Scottish Government that, assessed on their particular facts and circumstances, reverse burdens are not incompatible with ECHR in principle. They occur in various areas of the criminal law. What is necessary is that they are considered to be a proportionate means of achieving the legitimate policy aim in the particular case. Proportionality may be achieved in different ways depending on the circumstances and views may differ on which solution within a range of options is preferred. It is for the Parliament to assess and consider where to strike that balance in this case as in any other case.

The Scottish Government takes the view that the proportionality balance may not have been struck appropriately in this case. As explained to the Committee, I am happy to work with the Scottish Government to address any concerns they may have by way of an amendment to replace the reverse legal burden with an express evidential burden. This would require the accused to lead at least some evidence to

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raise the defence as an issue but would not require them to prove the defence to a particular standard.

As I have said, there may be differing views on how a proportionate balance should be struck. Ultimately, should the offence be enacted and a challenge to compatibility brought in the course of a trial, it would be for the courts to determine the matter. However, as explained to the Committee the amendment suggested by the Scottish Government is a helpful and constructive alternative approach to achieving the policy and I am happy to work with the Government on this.

Yours sincerely,

Monica Lennon MSP