

# ERCS draft response to the consultation on the Scottish Human Rights Bill - Part 5: Recognising the Right to a Healthy Environment

## 1. Introduction

On 15 June, the Scottish Government published their [Report](#) and Consultation on [A Human Rights Bill for Scotland, which will incorporate the right to a healthy environment into Scots law for the first time](#). The Bill follows the passage of a landmark resolution by the UN General Assembly in July 2022, which declared access to a clean, healthy and sustainable environment as a universal human right. The UN recognised that environmental damage has negative implications for the effective enjoyment of all human rights, for present and future generations, building on decades of interpretation by binding human rights tribunals and authoritative human rights bodies.

The Environmental Rights Centre for Scotland (ERCS) assist the public and civil society to understand and exercise their rights in environmental law and to protect the environment. We carry out advocacy in policy and law reform to improve environmental rights and compliance with the Aarhus Convention on access to information, public participation in decision-making, and access to justice on environmental matters.

ERCS is working collaboratively with Human Rights Consortium Scotland (HRCS) and the Civil Society Working Group (CSWG) to develop a response to the full consultation. This is ERCS's draft response to Part 5: Recognising the Right to a Healthy Environment, assembling key points to help inform responses prepared by other individuals and organisations. Our approach draws on reports and guidance published by UN Special Rapporteurs on Human Rights and the Environment Prof. John Knox and Prof. David Boyd.

## 2. ERCS response to the consultation

### Part 5 – Recognising the Right to a Healthy Environment

#### Questions

#### *6. Do you agree or disagree with our proposed basis for defining the environment?*

##### **What this question is all about**

How the Scottish Government approaches defining the right will determine the scope and implementation of the right, as well as interpretations about how it can be exercised by people in Scotland. For the purposes of the Bill framework, The Scottish Government are considering their approach including whether to draw on the definition used within the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention). The UK is a signatory to the Aarhus Convention, which enshrines the procedural element of our environmental rights.

##### **You might want to think about...**

- How a definition influences interpretation of the right – broad scope vs. precision and clarity.
- How protection of the environment is fundamental to the right to life.
- The importance of referencing healthy ecosystems and the biosphere.

##### **In short: What the Scottish Government is proposing**

- The Scottish Government proposes to use the Aarhus definition of the environment, with specific reference to ecosystems and the biosphere.



## In short: the ERCS response

- ERCS endorse using the Aarhus definition of the environment, highlighting the relevance of the Convention's Preamble, Article 1, and Article 2.
- We provide further guidance on definitions for each feature of a healthy environment in the ERCS/LINK report '[The Substantive Right to a Healthy Environment](#).'

## More on the ERCS response

We endorse use of the Aarhus definition of the environment, which makes specific reference to ecosystems and the biosphere. We draw attention to the Aarhus Convention's Preamble, and Article 1 and 2 and would want to see this reflected in the Bill.

Preamble:

*'Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.'*

Article 1:

*'In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.'*

Article 2:

*'The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.'*

ERCS/LINK have proposed further definitions for each of the substantive features of a healthy environment, drawing on scientific bodies such as the World Health Organisation, Intergovernmental Panel on Climate Change, and Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. For more detail, please consult ERCS/LINK (2023) '[The Substantive Right to a Healthy Environment](#)'.

## 7. If you disagree please explain why.

Not applicable.

## 8. What are your views on the proposed formulation of the substantive and procedural aspects of the right to a healthy environment?

### What this question is all about

The right to a healthy environment includes substantive and procedural parts. The substantive part creates standalone rights. According to the UN Special Rapporteur on Human Rights and the Environment, these are: clean air; a safe climate; access to safe water and adequate sanitation; healthy and sustainably produced food; non-toxic environments in which to live, work, study and play; and healthy biodiversity and ecosystems. The procedural part refers to how we can exercise our right and it has three features: access to information; participation in decision-making; and access to legal justice. This is already protected under the Aarhus



Convention, but Scotland is not compliant and must improve access to justice to meet Article 9(4) of the Aarhus Convention (the right to remedies that are fair, equitable, timely and not prohibitively expensive).

### **You might want to think about...**

- How the right can be exercised by rights holders and responded to by duty bearers.
- What is most appropriate to the Scottish context and how the right can be comprehensive.
- How the right to a healthy environment interacts with other rights and duties in the Bill.
- Whether the Scottish Government's formulation is consistent with guidance from UN Special Rapporteurs on Human Rights and the Environment.

### **In short: what the Scottish Government is proposing**

- The Scottish Government proposes to understand the right as having both substantive aspects, and elements which set out a course of action (procedural aspects).
- Substantive aspects are understood to include clean air; safe and sufficient water; non-toxic environments (in which to live, work, study and play); healthy ecosystems and biodiversity; and safe climate.
- Procedural aspects are understood to include awareness-raising, promoting education and capacity building; access to information; public participation in decision-making; ensuring effective, affordable and timely remedies; and suitable policies, planning and action.
- The government identifies the inclusion of procedural elements in the framework of the Bill as supporting efforts to meet the recommendations of the Aarhus Convention Compliance Committee – in particular to establish a clear, transparent and consistent framework to implement Article 9(4) of the Aarhus Convention.

### **In short: the ERCS response**

- ERCS welcome the formulation of substantive aspects of the right to include clean air, safe climate, safe and sufficient water, non-toxic environments, and healthy biodiversity and ecosystems.
- It is important to identify and recognise the six substantive features as both interdependent, and in need of standalone protections.
- We question the exclusion of adequate sanitation under safe & sufficient water, given the systemic problems of sewage pollution and wastewater treatment in Scotland.
- **We disagree with the exclusion of the right to healthy and sustainably produced food because we believe it is a core feature of the substantive right to a healthy environment.**
- The procedural element of the right should meet Aarhus requirements, including access to environmental information, public participation in environmental decision-making, access to justice and effective remedies.
- We welcome the Scottish Government's acknowledgment that they are currently in breach of Article 9(4) of the Aarhus Convention. It must now set out a clear timetable for access to justice reforms as specified in ERCS's [Action Plan evaluation](#).

### **More on the ERCS response**

ERCS welcome the formulation of substantive aspects of the right to include clean air, safe climate, safe and sufficient water, non-toxic environments, and healthy biodiversity and ecosystems, and applaud efforts to adopt standards such as the UN Framework Principles on Human Rights and the Environment and the Aarhus Convention, as guiding frameworks for the development of this right within the Bill.



We believe that it is important to identify and recognise the six substantive features as both interdependent, and in need of standalone protections as recommended by the UN Special Rapporteur on Human Rights and the Environment.

We question the exclusion of adequate sanitation under safe & sufficient water, given the systemic problems of sewage pollution and wastewater treatment in Scotland. We also disagree with the exclusion of the right to healthy and sustainably produced food because we believe it is a core feature of the substantive right to a healthy environment – see our response to Questions 9 and 10 for further detail.

The procedural element of the right should meet Aarhus requirements, including access to environmental information, public participation in environmental decision-making, access to justice and effective remedies. We welcome the Scottish Government's acknowledgment that they are currently in breach of Article 9(4) of the Aarhus Convention, and that Scotland requires a 'clear, transparent and consistent framework' to meet recommendations of the Aarhus Convention Compliance Committee (ACCC) by the deadline of 1 October 2024.

In September 2021, the governing institutions of the Aarhus Convention made their tenth consecutive finding that the UK is in breach of Article 9(4) of the Convention, which states that access to justice should be '*fair, equitable, timely, and not prohibitively expensive.*' In October 2021, the Convention's Meeting of the Parties (MoP) adopted Decision VII/8s6 – requiring the UK government to submit an action plan to the ACCC, detailing how it will, 'as a matter of urgency' address the findings and recommendations of the Decision.

The Scottish Government must now demonstrate how it will implement the MoP's recommendations to achieve compliance with Article 9(4) by the deadline of 1 October 2024. Proposed reforms currently falls short on this ambition – see our [Evaluation of Scotland's Action Plan](#) (July 2022). The Government must now present a clear timetable and route map to implement necessary reforms, including an overhaul of court costs regime (replacing Protective Expenses Orders with Qualified One-way Cost Shifting), the removal of court fees from Sherriff courts, amendments to Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, a review of retrospective planning permission, and the reform of procedures in Sherriff courts relating to litter.

**9. Do you agree or disagree with our proposed approach to the protection of healthy and sustainable food as part of the incorporation of the right to adequate food in ICESCR, rather than inclusion as a substantive aspect of the right to a healthy environment? Please give reasons for your answer.**

#### **What this question is all about**

The right to healthy and sustainably produced food has previously been identified as a core substantive feature of the right to a healthy environment by UN Special Rapporteurs. However, the Scottish Government proposes not to recognise it as part of this right on the basis that it will receive protection elsewhere in the Bill. The Government aims to protect healthy and sustainable food through incorporation of the International Convention on Economic, Social and Cultural Rights (ICESCR), which under Article 11 guarantees the right to adequate, culturally appropriate, accessible and available food.

#### **You might want to think about...**

- Definitions of the right to food under ICESCR, and subsequent elaborations including General Comment 12.



- The implications of not formally recognising food as a constituent feature of the right to a healthy environment.
- How to best provide clarity to duty bearers, rights holders, and legal authorities in exercising the right.

#### **In short: what the Scottish Government is proposing**

- Incorporating the right to food under Article 11 of ICESCR, which guarantees the right to adequate, culturally appropriate, accessible and available food.
- Excluding it as a substantive feature of the right to a healthy environment, on the basis that it can be better respected, protected and fulfilled through ICESCR and sustainability is a key element of the right to adequate food.

#### **In short: the ERCS response**

- While the ICESCR definition (and subsequent elaborations including through General Comment 12) includes consideration of both health and sustainability there has been a tendency – given the severe, persistent and widespread household food insecurity still affecting so many people across the world - to foreground the dimensions of availability and access.
- The argument for including healthy and sustainably produced food as a substantive feature is underscored by UNCRC General Comment no.26 (2023) on children’s rights and the environment, which identifies all six substantive features.
- **Over the last five decades the damage caused by the global food system to nature, climate and health has become more acute, widespread and visible. Adverse environmental impacts across the food supply chain include biodiversity loss/land use change from intensive farming, impacts on water supplies, use of harmful pesticides and fertilisers, emissions from transportation, waste from packaging, and wasted food. There is therefore value in restating as part of the right to a healthy environment the right to healthy sustainable food.**
- The right to food must be recognised as a standalone feature, that underpins and interacts with other substantive features of the right.
- It is important to distinguish between the economic/social right to food as it relates to nutrition, access/affordability, adequacy, and culture, and the right to healthy and sustainably produced food as a constituent part of broader environmental health.
- Both interpretations are necessary but distinct elements of the right to food, and since the consultation report has recognised the merit in defining the right to water under both ICESCR and the right to a healthy environment, it is inconsistent to then exclude the right to food. Both are essential to a healthy environment.

#### **More on the ERCS response**

We strongly disagree with the Scottish Government’s proposed approach. While the ICESCR definition (and subsequent elaborations including through General Comment 12) includes consideration of both health and sustainability there has been a tendency – given the severe, persistent and widespread household food insecurity still affecting so many people across the world - to foreground the dimensions of availability and access.

The argument for including healthy and sustainably produced food as a substantive feature is underscored by UNCRC General Comment no.26 (2023) on children’s rights and the environment, with a special focus on climate change, which includes all six substantive features of the right to a clean, healthy and sustainable environment (part III).



Over the last five decades the damage caused by the global food system to nature, climate and health has become more acute, widespread and visible. Adverse environmental impacts across the food supply chain include biodiversity loss/land use change from intensive farming, impacts on water supplies, use of harmful pesticides and fertilisers, emissions from transportation, waste from packaging, and wasted food. There is therefore value in restating as part of the right to a healthy environment the right to healthy sustainable food. The right to food was previously excluded from the Good Food Nation Act, on the grounds that it would be incorporated in the Human Rights Bill. It now needs to be comprehensive.

The reason to incorporate the right to food as a standalone feature is similar to water – while it is recognised under ICESCR, it is also a substantive part of the right to a healthy environment, since sustainable food production is essential for the health of the wider environment. We believe it is important to provide a distinction between the economic/social right to food as it relates to nutrition, access/affordability, adequacy, and culture, and the right to healthy and sustainably produced food as a constituent part of broader environmental health.

Please consult ERCS's briefing '[The relationship between a healthy environment and the right to food](#)', and section five of ERCS/Scottish Environment LINK's report '[The substantive right to a healthy environment](#)' for further details.

**10. Do you agree or disagree with our proposed approach to including safe and sufficient water as a substantive aspect of the right to a healthy environment? Please give reasons for your answer.**

#### **What this question is all about**

The Scottish Government propose to distinguish between the right to water for human consumption under ICESCR, and the importance of safe and sufficient water as an essential part of the wider environment.

#### **You might want to think about...**

- Whether the proposed approach will strengthen, dilute, or have no impact on exercising the right.
- Whether this definition is comprehensive.
- The exclusion of 'adequate sanitation' from the proposed definition.

#### **In short: what the Scottish Government is proposing**

- Recognising 'safe and sufficient water' as a substantive feature of the right to a healthy environment, in addition to incorporating the human right to water through ICESCR.
- Distinguishing between the right to water for human consumption, and safe and sufficient water as a component of environmental health.

#### **In short: the ERCS response**

- ERCS agree with the proposed approach, and advocate extending the definition to recognise adequate sanitation.
- The logic applied here – that the inclusion of water as a social right under ICESCR does not preclude its inclusion as a distinct feature of a healthy environment – should also be applied to the right to food.

#### **More on the ERCS response**



We agree with the need to include safe and sufficient water but believe this feature should also refer to the right to adequate sanitation given the widespread and persistent issues of sewage pollution in Scotland. ‘Safe and sufficient’ must be conceived of in broad terms, with the aim of restoring the ecosystem health of Scotland’s inland waterways, rivers and lochs. It must address wastewater and pollution from sewage, agricultural discharge, and other sources, the impacts of climate change on water availability, and measures for enhanced water monitoring, testing, and enforcement against polluters.

We agree with the reasons provided for including the right to safe and sufficient water as distinct from its conception as a social right under ICESCR, and believe there are similar reasons for including the right to healthy and sustainably produced food. Please consult sections four of ERCS/Scottish Environment LINK’s report ‘[The substantive right to a healthy environment](#)’ (July 2023) for further details.

## 11. Are there any other substantive or procedural elements you think should be understood as aspects of the right?

### What this question is all about

This is a space to add any other comments about substantive or procedural elements and how they could be achieved.

### You might want to think about...

- The institutions necessary to deliver environmental justice.
- Environmental principles.
- Enforcement mechanisms and legal remedies.

### In short: the ERCS response

- We welcome the proposal to incorporate the right to a healthy environment with a duty to comply for public bodies and private actors delivering public functions – see Part 4 of the consultation.
- We need to see dedicated reforms with clear timelines to make the Right to a Healthy Environment fully enforceable.
- The substantive features of the right are interdependent and require standalone protections.
- Each feature must be defined according to expert guidance and international best practice, and adhere to the highest standards, with appropriate enforcement mechanisms to ensure compliance.
- The Scottish Government now has a duty to have due regard to the five environmental principles when developing policy as laid the [Statutory Guidance on the Environmental Principles](#) and required by the [UK Withdrawal from the European Union \(Scotland\) \(Continuity\) Act 2021](#). It must apply this in relation to the six substantive features, to ensure policy coherence and coordination across all sectors.
- Rights must be enforceable in a court of law, with appropriate mechanisms in place to effectively hold public bodies and polluters to account.
- The establishment of a dedicated environmental court with a comprehensive jurisdiction would increase access to justice, address the current fragmentation in routes to remedy, and develop judicial expertise to improve effectiveness and efficiency.

### More on the ERCS response

We need to see dedicated reforms with clear timelines to make the Right to a Healthy Environment fully enforceable. We welcome the proposal to incorporate the right to a healthy environment with a duty to



comply for public bodies and private bodies delivering public functions, as outlined in Part 4 of the consultation.

ERCS believe that the substantive element includes six features outlined above, which are interdependent and require standalone protections. Each feature must be defined according to expert guidance and international best practice, and adhere to the highest standards, with appropriate enforcement mechanisms to ensure compliance – consult ERCS/Scottish Environment LINK’s report ‘[The substantive right to a healthy environment](#)’ (July 2023) for further details.

The Scottish Government now has a duty to have due regard to the five environmental principles when developing policy as laid the [Statutory Guidance on the Environmental Principles](#) and required by the [UK Withdrawal from the European Union \(Scotland\) \(Continuity\) Act 2021](#). These are: that protecting the environment should be integrated into the making of policies, precaution, prevention, rectification at source, and the polluter should pay. These principles should be referred to and embedded when establishing the definitions and highest standards of the substantive features, to ensure policy coherence and coordination across all sectors.

For the procedural element to be fulfilled, rights must be enforceable in a court of law, with appropriate mechanisms in place to effectively hold public bodies and polluters to account. With regards to the procedural element, ERCS believe that this must ensure full compliance with Aarhus Conventions access to justice requirements, which include reform of legal aid (Regulation 15), reform of legal expenses and the court costs regime (replacement of Protective Expenses Orders with Qualified One-way Cost Shifting), and the establishment of a dedicated Scottish Environment Court with a comprehensive jurisdiction to increase access to justice, address the current fragmentation in routes to remedy, and develop judicial expertise to improve effectiveness and efficiency. Please consult ‘[Recommendations for a Plan of Action on Judicial Expenses](#)’, ‘[Evaluation of UK Action Plan](#)’ and ‘[Briefing on why Scotland needs a Scottish Environment Court](#)’ for further details.

### For more information contact

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