



**ENVIRONMENTAL PROTECTION SCOTLAND (EPS)
RESPONSE TO SCOTTISH GOVERNMENT CONSULTATION:
A HUMAN RIGHTS BILL FOR SCOTLAND
PART 5: RECOGNISING THE RIGHT TO A HEALTHY ENVIRONMENT**

5 OCTOBER 2023

Environmental Protection Scotland brings together individuals and organisations across the public, private, and voluntary sectors to discuss and promote ideas, knowledge, and solutions to achieve our aims of a cleaner, quieter, healthier, sustainable Scotland. We are a registered charity that informs debate, provides impartial advice, and policy updates, based on sound science and research in the fields of air quality, land quality, and noise.

Governed by a Board of Trustees and supported by Expert Advisory Groups (EAGs) our structure enables us to take a progressive and pragmatic approach to the issues which concern us, and on behalf of our wide and extensive cross sector membership, to promote integrated and effective policymaking which supports sensible and workable solutions to pressing environmental challenges. Our EAGs represent a wide spectrum of our members and are chaired by experts in their field, seeking to build stronger alliances and support better collaboration between government, practitioners, legal experts, and researchers.

COMMENTS

Q6. Do you agree or disagree with our proposed basis for defining the environment?

We want to recognise and include the right to a healthy environment in the Bill. This will help to ensure a healthy and sustainable environment in Scotland and provide a platform to tackle issues related to environment and human rights so that they are realised together. How we approach defining the right will be a key part of ensuring it is an effective and transformative human right for the people of Scotland. For the purposes of the Bill framework, we are considering our approach including whether to draw on the definition used within the Aarhus Convention, which includes specific reference to ecosystems and the biosphere.

Environmental Protection Scotland position: Agree

Q7. If you disagree, please explain why:

Environmental Protection Scotland views:

We agree that provisions and definitions outlined within the Aarhus Convention should be drawn upon in order to define the environment within the Human Rights Bill. However, further clarity and signposting is required to understand which provisions of the Convention the Scottish Government is concerned with for the purposes of drafting the Bill framework.

Nevertheless, we support the efforts made by the Scottish Government to adopt the UN Framework Principles on Human Rights and the Aarhus Convention, in order to develop a framework within the Human Rights Bill to fully recognise and implement the right to a healthy environment.

In particular, we agree that Article 2 of the Aarhus Convention must be reflected in the Bill: "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".

The above ensures that the environment is protected from a broad perspective, and it is important to recognise that any such harms committed to the environment are transboundary. Furthermore, Scotland has a particular landscape, ecosystem, and biodiversity unlike anywhere in the world, so is particularly important to safeguard.

Moreover, and in relation to defining the right to a healthy environment, we wish to point out that alternative definitions may refer to different forms of protection, and are therefore, open to misinterpretation.

Within Article 1 of the Aarhus Convention, the right to a healthy environment is defined as: “the right of every person of present and future generations to live in an environment adequate to his or her health and well-being”. Will the Human Rights Bill draw upon this variation of the right verbatim?

We also want to draw attention to the Preamble of the Convention, which provides another variation of this right: “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”.

It is important to note that an estimated two thirds of national constitutions refer to a *healthy environment*. This is not included within the Aarhus Convention, so what are the consequences of not using this exact phrase? For example, the potential risk of misinterpreting the right in a court of law?

Additionally, it should be acknowledged that the above variation within Article 1 of the Aarhus Convention only includes two gender pronouns, which some people, including those within the LGBTI community, may not identify with. If the Bill framework adopts the above definition verbatim from the Aarhus Convention, some redrafting will be necessary to secure greater inclusion.

Lastly, the right to a healthy environment has been criticised for its anthropocentric character as it has been highly influenced by the western conception of human rights that place humans at the centre of the world. There must be a concerted effort to incorporate a more eco-centric perspective to this right. Through this ideology, the environment will be treated as a priority and it is necessary for that to happen given the dire situation that we are in as a result of the climate and nature crises. Moreover, contemporary thinking reinforces the inextricable connections between healthy, biodiverse ecosystems, and human health and equity.

Q8. What are your views on the proposed formulation of the substantive and procedural aspects of the right to a healthy environment?

The right to a healthy environment is yet to be enshrined within an international treaty. Despite this, more than 100 countries have enacted legislation which includes the right to a healthy environment in some form and it was formally recognised by the UN General Assembly as a human right in July 2022. While Scotland currently has strong legal protections and policy initiatives for environmental protection, recognising the right to a healthy environment as a human right of everyone in Scotland will deliver a stronger framework from which to take further action and strengthen accountability.

The Taskforce recognised that the right to a healthy environment is linked to the realisation of other rights to be incorporated in the Bill, and they looked at standards such as the UN Framework Principles on Human Rights and the Environment (which sets out the basic obligations of States under human rights law), and the Aarhus Convention, as guiding frameworks for the development of this right.

Based on those international standards and following engagement with stakeholders, we think the right should be understood as having both substantive aspects and elements which set out a course of action (procedural aspects). Substantive aspects should be understood as including 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 should be understood as including 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. Including these procedural aspects in the framework of the Bill would support our 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 (the right to remedies that are fair, equitable, timely and not prohibitively expensive).

Environmental Protection Scotland views:

We welcome the substantive aspects of the right to include clean air, safe climate, safe and sufficient water, non-toxic environments, and healthy biodiversity and ecosystems. We particularly support the inclusion of clean air given that air quality is a key policy area within our organisational remit. However, greater clarity is required on how the procedural provisions of the right to a healthy environment will lead to positive substantive changes in domestic law. Moreover, we would like to see improved monitoring and reporting on clean air, particularly at a local level, which can then be better communicated to people and communities.

It is also important to recognise that the Aarhus Convention lacks specific commitments to help those who are financially disadvantaged utilise its formal public participation provisions. The Human Rights Bill should seek to fill this gap. Would Scottish legal aid fund this legal service? For example, and with reference to the right to clean air, air pollution has a disproportionate impact on deprived communities. They have a higher exposure to air pollution, an increased likelihood of being affected by air pollution, and an increased likelihood of poor health making them susceptible to harm. Therefore, we are keen to understand the Scottish Government position on inequalities related to income and deprivation.

Moreover, what is being presented to ensure that the Scottish legal system moves towards compliancy with Article 9(4) of the Aarhus Convention, as access to justice is not included as a procedural aspect above? Access to justice that is affordable does not only enforce the right to information and the right to participate in decision making, but can also enforce national law relating to the environment. Without this, there is potential for the law to be undermined. Perhaps this is why legal aid must be made available for this area of work.

Transparency and accountability within decision making should also be understood as procedural aspects of the right to a healthy environment as these key principles enable the public to prove whether environmental concerns have been rightfully considered.

Nevertheless, we welcome the acknowledgement from the Scottish Government that they are currently in breach of Article 9(4) of the Aarhus Convention, and we encourage them to meet the recommendations of the Aarhus Convention Compliance Committee.

Furthermore, will awareness raising and education also inform the Scottish public specifically on how they can exercise their Aarhus rights? Or is this intended for education on environmental matters only? Additionally, will this information be made available in different languages to increase accessibility of such, and will there be a separate body to disseminate this information?

Nevertheless, we agree that embedding substantive and procedural aspects of the right to a healthy environment in national legislation is essential given increasing pressures on governments to accelerate environmental decision making processes, running the risk of cutting corners and undermining the value of public participation. This is particularly significant in our current climate, where we are dealing with an energy crisis and the push for economic recovery post pandemic. A sustainable balance must be struck between development and environmental protection.

Q9. 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 International Covenant on Economic, Social and Cultural Rights (ICESCR), rather than inclusion as a substantive aspect of the right to a healthy environment?

After engaging with stakeholders, we are also reflecting on whether healthy and sustainable food should be understood as a substantive aspect of the right to a healthy environment as protected by the Bill. Internationally, healthy and sustainable food is recognised as a substantive aspect of the right. However, the right to adequate food is also captured as a social right under the right to an adequate standard of living in ICESCR – which the Bill will incorporate. Our current view is that the aspect of healthy and sustainable food can be better respected, protected and fulfilled via incorporation of the right to adequate food as provided for by International Covenant on Economic, Social and Cultural Rights (ICESCR) and that sustainability makes up a key element of the right to adequate food. Given that human rights are indivisible, interrelated, and interdependent, and should not be viewed in

isolation of one another, incorporation of the right to adequate food should provide adequate protection for the environmental aspects of food production.

Environmental Protection Scotland position: Disagree

Environmental Protection Scotland views:

The right to adequate food starts with its source. Climate change and biodiversity loss are contributing to the collapse in food systems; land animals, marine life, and plants are being overexploited; intensive farming is contributing to land use changes and impacts on water supplies; and chemicals from pesticides and fertilisers are detrimental to our human health, and the health of the environment.

Therefore, it must be more explicitly recognised that the right to adequate food will not be realised unless the dominant food system is challenged, and environmentally friendly farming practices are introduced and required by law. Extending beyond this Bill, more support should be given to sustainable Scottish farmers and fishermen to ensure the majority of the food we consume is local and ethically sourced, rather than being flown or shipped from elsewhere.

The adequate protection for the environmental aspects of food production must come first, or food insecurity and food poverty will not be resolved. We suggest that an eco-centric approach should be adopted to effectively integrate these rights. Given that both rights are mutually beneficial, the right to healthy and sustainable food must be recognised as a substantive element of the right to a healthy environment, and it must be incorporated comprehensively. Furthermore, if there is a recognition of safe and sufficient water as a substantive aspect of the right to a healthy environment, excluding the right to healthy and sustainable food as a substantive element is inconsistent.

Nevertheless, we agree that a distinction is necessary between the economic and social right to food relating to access, affordability, adequacy, culture, and nutrition, and the right to healthy and sustainable food that contributes to environmental health more generally.

Q10. 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?

In relation to safe and sufficient water, while this is also understood as a social right under the ICESCR right to an adequate standard of living, our current view is that this should also be understood as a substantive aspect of the right to a healthy environment. This is because it enables us to draw out a key distinction between ensuring there is safe and sufficient drinking water for human consumption and safe and sufficient water essential for the health of the wider environment. While overlaps exist, our approach aims to provide an adequate distinction between protection for water in both contexts.

Environmental Protection Scotland position: Agree

Environmental Protection Scotland views:

Agreed. However, and despite the necessary distinction, water use for human consumption and water for the health of the wider environment is interconnected and that cannot be lost in this distinction.

Humans also make use of water for more than consumption, and this has consequences for the water that is being returned back to the environment. For example, adequate sanitation. As we have seen in Scotland, there are persistent issues of sewage pollution, which impact the quality and availability of water that humans come in contact with, never mind the effects this has on local and wider ecosystems. Moreover, examining this issue from a global perspective, a school of thought has recently considered that the planetary boundary for freshwater has been breached. This means that there is a risk of irreversible and drastic changes in freshwater use, with increasing risks to people and the wider ecosystem that we are a part of.

Moreover, and as mentioned above, we agree with the reasons to include the right to safe and sufficient water as distinct from its conception as a social right, and this same approach should be taken to include the right to healthy and sustainable food as a substantive element.

Environmental Protection Scotland working for a cleaner, quieter, healthier and sustainable Scotland

Q11. Are there any other substantive or procedural elements you think should be understood as aspects of the right?

Environmental Protection Scotland position: Yes

Environmental Protection Scotland views:

Is the right to breathe clean air being recognised as a substantive element of the right to a healthy environment? Furthermore, what about the right to respect for private and family life, home and correspondence, in relation to excessive noise pollution? Noise pollution is often the forgotten pollutant but can have a detrimental impact on both human health and wildlife. Moreover, we would like to see the right to access transparent and clear information around air quality levels to be included, to ensure improved monitoring and recording of air pollutants in Scotland.

Furthermore, ecocentrism should also be included as a key principle within the right to a healthy environment jurisprudence, in order to expand the scope of environmental legal protection. For example, in cases where the right to a healthy environment requires environmental protection beyond the extent to which it is adequate for humans. Furthermore, if ecocentrism were to become a guiding principle to interpret this right, other principles in relation to the environment such as sustainable development, intergenerational equity, and the environmental minimum could be transformed and expanded to require the protection of nature as a whole?

Moreover, how will the right to a healthy environment be made fully enforceable and what institutions are necessary to deliver environmental justice for Scotland? The procedural element can only be realised if the above rights are enforceable in a court of law. Appropriate mechanisms must also be put in place to hold polluters and public bodies fully accountable. We suggest that a body (independent of the Scottish Government) is set up if there is not already one in existence, to look out for the interests of the environment in an impartial manner whilst also educating the public on how to exercise their rights.

Lastly, what other internationally recognised environmental principles will be recognised within the Bill to ensure that those causing environmental harm and destruction (and therefore, impeding on the right to a healthy environment) are held accountable? Principles such as the polluter pays and the precautionary principle (among others) must be considered for each of the substantive elements to avoid overlap and allow for policy coordination.

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Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Environmental Protection Scotland

Please tell us which of the following categories best describe you (select all that apply):

Third sector organisation

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

Publish response only (without name)

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

I confirm that I have read the privacy policy and consent to the data I provide being used as set out in the policy.

I consent