

October 2023

**ESS response to the Scottish Government's A Human Rights Bill for Scotland:
Consultation**

Introduction

1. ESS is a non-ministerial office directly accountable to the Scottish Parliament. Since 1 October 2021, it has been part of the system of environmental governance in Scotland following the UK's exit from the European Union and the end of oversight of implementation of European Union environmental law by the European Commission and the European Court of Justice. ESS' remit is to:
 - ensure public authorities, including the Scottish Government, public bodies and local authorities, comply with environmental law
 - monitor and take action to improve the effectiveness of environmental law and its implementation
2. The Scottish Government has published *A Human Rights Bill for Scotland: Consultation* seeking views on their proposals establishing a framework of rights, including a right to a healthy environment, and duties for public bodies. ESS has responded to specific questions in this consultation and our response is included below.

Response

4. What are your views on the proposed model of incorporation?

ESS welcomes the recognition and inclusion of the right to a healthy environment as a core right within the Bill. The proposed model of placing an initial procedural duty on public bodies (and private actors) in relation to this right and others, then moving to a duty to comply appears to be a pragmatic transitional approach. It is important that this model and the specific provisions that apply to the rights are supported by appropriate guidance and enable duty-bearers to ensure effective and consistent implementation. This should be over an appropriate and clearly defined timescale with adequate resource for duty-bearers. This is supported by recognised good practice identified by the UN Special Rapporteur in various reports including the [A/HRC/43/53: Good practices on the right to a safe, clean, healthy and sustainable environment | OHCHR](#). It is helpful to consider how this right is expressed in both legislation and guidance. An integrative approach that describes the human right and environmental protection as explicitly linked and indivisible will be more effective than framing as one delivering the other.

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

It is helpful that the proposals explicitly make the link to the Aarhus Convention and it is important that recognising a right to a healthy environment should lead to more effective implementation of the rights set out in the Aarhus Convention in Scotland. It is also positive to see the distinction between the provision of drinking water and the wider water environment as aspects of the right to a healthy environment. The definition of the environment and the elements included within should be supported by clear and unambiguous guidance for duty-bearers and for the wider public to fully explain what is meant by the terms used and how they should be applied.

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

The substantive aspects of the right to a healthy environment provide a framework for understanding and implementing the right. ESS welcomes the introduction of a right to a healthy environment. This will be an additional and overarching component to an already complex system of environmental governance. It will be important to ensure that

implementation of the right is integrated with this system in a way that supports and enables stakeholders.

There must be clear and unambiguous guidance for duty-bearers and for the wider public to fully explain what the duties mean and how they should be applied, both individually and as part of a suite of substantive elements of the right. It is positive that the procedural elements explicitly include the rights set out in the Aarhus Convention. As the consultation document notes, the Aarhus Convention Compliance Committee has found that Scotland (and the UK) is not fully compliant with the Convention. There is an opportunity for these proposals to substantially improve Scotland's implementation of the Convention and these rights. Scottish Government (SG) should seek to ensure full compliance by demonstrably meeting the requirements of the Convention and ensuring that the Scottish legislative and judicial framework fully embeds implementation of the rights as set out in the Convention.

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.

It is important that however these rights are framed and established, they are complementary and function effectively as a whole. A healthy environment includes land and water managed for food being managed in a sustainable way. The protection of healthy and sustainable food and the right to adequate food should not negatively impact on a right to a healthy environment, however this may be phrased, whether the rights are incorporated separately or with a right to a healthy environment.

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.

Water and the aquatic environment are a fundamental part of the wider environment, both in terms of ecosystem function and how the environment is managed. The provision of safe and sufficient drinking water and the sustainable management of wastewater and the wider water environment are clearly fundamentally linked together. ESS has undertaken a range of work on topics related to marine and terrestrial water environments, highlighting the

pressures and challenges for this environment, and welcome that these are presented as a substantive aspect of the right to a healthy environment.

19. What is your view on who the duties in the Bill should apply to?

ESS welcomes the principle that these duties will apply to all bodies carrying out functions of a public nature, as described in the consultation. It is important that this model and the specific provisions that apply to the rights are supported by appropriate guidance and adequate resource to duty-bearers to ensure effective and consistent implementation.

20. What is your view on the proposed initial procedural duty intended to embed rights in decision making?

The proposed model of placing an initial procedural duty on public bodies (and private actors) in relation to this right and others, then moving to a duty to comply appears to be a pragmatic transitional approach. It is important that this model and the specific provisions that apply to the rights are supported by appropriate guidance and support to duty-bearers to ensure effective and consistent implementation. This should be over an appropriate and clearly defined timescale with adequate resource for duty-bearers to support the transition to full implementation.

21. What is your view on the proposed duty to comply?

ESS welcomes the proposed approach of having a duty to comply that seeks to ensure duty-bearers fully consider and apply these rights in their activities. It is important that this model and the specific provisions that apply to the rights are supported by appropriate guidance and support to duty-bearers to ensure effective and consistent implementation. It is also important that there is appropriate monitoring and reporting of this duty and its implementation by duty-bearers.

25. What are your views on the right to a healthy environment falling under the same duties as economic, social and cultural rights?

It is beneficial to consider these rights together, as it helps to ensure the rights are considered holistically and equally, with the environment being fundamentally linked to the other elements. It is important that the rights are supported by appropriate compliance and enforcement, a clear requirement is for them to be effective and justiciable in practice.

30. What are your views on our proposals in relation to scrutiny bodies?

ESS' remit is to monitor the effectiveness of environmental law in Scotland, and public authorities' compliance with it. A new right to a healthy environment, would likely fit within the definition of environmental law under The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (or Continuity Act) in section 44, and therefore comes under ESS' remit. The Continuity Act which established ESS includes co-operation duties for public authorities in relation to the exercise of ESS' functions in section 23. The proposals to enable scrutiny bodies to work more closely and ensure that relevant organisations are informed are welcome and will complement our existing functions and powers.

It is important that SG agree with scrutiny bodies how to implement the proposed requirements to assess bodies that they oversee in light of the obligations in the Bill and consider how they can mainstream the rights. This should be supported by adequate resources for scrutiny bodies to deliver new functions. ESS looks forward to further engagement on this topic following the consultation.

31. What are your views on additional powers for the Scottish Human Rights Commission?

It is important that any new powers or functions for SHRC that relate to the right to a healthy environment recognise ESS' remit to monitor the effectiveness of environmental law in Scotland, and public authorities' compliance with it. ESS would welcome detailed engagement with SG and SHRC on respective roles and remits and how systemic issues related to the right to a healthy environment should be considered.

33. What are your views on our proposed approach to 'standing' under the Human Rights Bill? Please explain.

As noted in response to previous questions, ESS welcomes that this consultation explicitly recognises the rights set out in the Aarhus Convention, which include access to justice in relation to environmental law. The [Aarhus Convention implementation guide](#) states that criteria on standing used in domestic law should not unreasonably prevent access to the public. It also states that NGOs as well as individuals should have standing to represent their rights and interests in court. There are also examples of UK court decisions that support this position such as AXA General Insurance Ltd v HM Advocate [2011] UKSC 46.

34. What should the approach be to assessing 'reasonableness' under the Human Rights Bill?

ESS welcomes a review of judicial remedies and their approach to assessing reasonableness. Any test used should ensure that, in line with the Aarhus Convention, members of the public have access to timely, effective and affordable judicial mechanisms that ensure that their legitimate interests are protected and that the law is enforced.

As noted in response to previous questions and in our submission to SG's *Review of the Effectiveness of Environmental Governance*, there is an opportunity for these proposals to substantially improve Scotland's implementation of the Convention and the rights that it sets out. SG should seek to ensure full compliance by demonstrably meeting the requirements of the Convention and ensuring that the Scottish legislative and judicial framework fully embeds the rights as set out in the Convention.

35. Do you agree or disagree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders?

As noted in response to previous questions and in our submission to SG's *Review of the Effectiveness of Environmental Governance*, judicial remedies should be timely, effective and affordable to ensure that members of the public have appropriate access to justice. Scotland's legal system has been found to be in breach of the Aarhus Convention in ten consecutive findings since 2014 by the UNECE Aarhus Convention Compliance Committee and other institutions. The Compliance Committee have stated that the costs of legal action to protect and uphold environmental laws in Scotland (and the rest of the UK) are considered prohibitively expensive which does not meet the Convention's Article 9(4) and have called for reform 'as a matter of urgency'. Concerns have also been referred to the Compliance Committee in 2017 that judicial review in the Court of Session does not allow for challenge to the substantive legality of decisions, acts, or omissions subject to the provisions of the Convention (i.e. the Court of Session allows for procedural legality review, but not merit-based review, contrary to the Convention requirements that both types of review be made available for eligible challenges). This is a live issue awaiting a decision by the Compliance Committee.

It is positive that the range of tools available through judicial remedies could be reviewed and it is important that the inter-related issues of cost, merit and standing are also considered in combination. SG should seek to ensure full compliance with the Aarhus Convention by demonstrably meeting the requirements and ensuring that the Scottish legislative and judicial framework fully embeds the rights as set out in the Convention.

36. If you do not agree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders, what additional remedies would help to do this?

As noted in response to previous questions, judicial remedies should be timely, effective and affordable to ensure that members of the public have appropriate access to justice. Scotland's legal system has been found to be in breach of the Aarhus Convention in ten consecutive findings since 2014 by the UNECE Aarhus Convention Compliance Committee and other institutions. The Compliance Committee have stated that the costs of legal action to protect and uphold environmental laws in Scotland (and the rest of the UK) are considered prohibitively expensive which does not meet the Convention's Article 9(4) and have called for reform 'as a matter of urgency'. Concerns have also been referred to the Compliance Committee in 2017 that judicial review in the Court of Session does not allow for challenge to the substantive legality of decisions, acts, or omissions subject to the provisions of the Convention (i.e. the Court of Session allows for procedural legality review, but not merit-based review, contrary to the Convention requirements that both types of review be made available for eligible challenges). This is a live issue awaiting a decision by the Compliance Committee.

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37. What are your views on the most appropriate remedy in the event a court finds legislation is incompatible with the rights in the Bill?

In relation to environmental law and the right to a healthy environment in particular, it is helpful that the proposals will consider a provision to ensure legislation is interpreted and implemented in a way that is compatible with and complementary to the rights in this Bill. As

noted in response to previous questions, it is also important that members of the public should be able to effectively and affordably raise concerns where they have them about incompatibilities in legislation, with appropriate judicial tools, in a timely way.

38. What are your views on our proposals for bringing the legislation into force?

The phased approach outlined in the consultation supported by engagement with stakeholders and appropriate guidance for duty-bearers is welcome. ESS looks forward to further engagement on this topic following the consultation.

39. What are your views on our proposals to establish Minimum Core Obligations through a participatory process?

ESS welcomes the proposed approach of setting Minimum Core Obligations (MCOs) linked to progressive realisation of the right to encourage duty-bearers to exceed the minimum floor established through the MCOs. The principle of a participatory process is positive.

40. What are your views on our proposals for a Human Rights Scheme?

ESS welcomes the proposal for a duty on Scottish Ministers to produce a Human Rights Scheme and in particular, the elements on plans for implementation and the proposals for improvements to access to justice. It is also helpful to see an explicit inclusion of information and awareness for the public and guidance for duty-bearers.

44. What are your views on monitoring and reporting?

Effective monitoring and reporting that evaluates the establishment of these rights and the activity of duty-holders is a key part of implementing the rights and duties set out in this legislation. In relation to the right to a healthy environment, ESS would welcome further engagement on how a proportionate and responsive framework of monitoring and reporting can be developed and implemented.