

## Parliamentary Briefing

# A Human Right to a Healthy Environment must be included in a new Human Rights (Scotland) Act

February 2021



## Introduction

This paper supports [LINK's Election Manifesto](#) ask to 'enshrine the right to a healthy and safe environment in a Human Rights (Scotland) Bill'.<sup>1</sup>

It feeds in to the National Taskforce for Human Rights Leadership, and endorses the recommendation by the Advisory Group on Human Rights Leadership to include within a new human rights framework a human right to a healthy environment, comprising both substantive and procedural dimensions in line with international standards.<sup>2</sup> This right is important for Scotland's efforts to deliver the UN Sustainable Development Goals through the Scottish Government's National Performance Framework, which includes an outcome to 'protect and enhance the environment'.<sup>3</sup>

This paper argues that securing this right underpins all environmental objectives, supports existing human rights, and is fundamental to combating the climate and biodiversity crises.

## The case for a human right to a healthy environment

We all have basic needs which are fundamental to our humanity. Human rights law emerged to protect these needs as legal rights, at a time when civil and political rights and social, economic and cultural rights were in jeopardy. We are now at a tipping point when, again, our humanity is in jeopardy, this time because of environmental damage.

Greta Thunberg's famous warning that 'our house is on fire' was a sharp reminder that without a healthy environment, we cannot survive. The rule of law is the ultimate safeguard that protects citizens. It guarantees our fundamental rights against intrusions by government and polluters. Our need for a healthy environment must therefore now be protected in law as a human right.

Here in Scotland, **climate change** is leading to increased coastal erosion and landslides, most recently seen in August with the fatal Stonehaven train derailment.<sup>4</sup> Our **biodiversity** is under threat, with one in nine species at risk of extinction, which is having impacts on our wellbeing.<sup>5</sup> **Air pollution** in many parts of Scotland is at levels which are damaging to human health.<sup>6</sup>

People living in areas of high deprivation, children, the elderly, and those suffering ill health are more negatively affected by environmental health hazards, but are often least responsible for causing environmental damage. In this way, an unhealthy environment exacerbates existing health inequalities.<sup>7</sup> Moreover, the COVID-19 pandemic has demonstrated the inextricable links between human and ecosystems health.<sup>8</sup> The unequal

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<sup>1</sup> [A Manifesto for Nature and Climate Holyrood 2021 Election](#) (Scottish Environment LINK, 2020)

<sup>2</sup> [Recommendations for a new human rights framework to improve people's lives: Report to the First Minister](#) (Advisory Group on Human Rights Leadership, 2018), Recommendation 1, p. 31, and p. 32

<sup>3</sup> [National Outcomes: Environment](#) (Scottish Government, 2021).

<sup>4</sup> [Stonehaven derailment: Report says climate change impact on railways 'accelerating'](#) (BBC News Online, 10 September 2020).

<sup>5</sup> [Fight for Scotland's Nature](#) (Scottish Environment LINK, 2020), also see [State of Nature Report Scotland](#) (eNGO Collaboration, 2019).

<sup>6</sup> [Local Air Quality Management, and Standards](#) (Scottish Government Website).

<sup>7</sup> [Healthy environment, healthy lives: how the environment influences health and wellbeing in Europe](#) (European Environment Agency, 2020).

<sup>8</sup> [COVID-19, Environmental Protection & Human Rights Leadership](#) (Morgera and Miller, 2020).



impacts of the pandemic have put important aspects of environmental issues in the spotlight: from global biodiversity loss to the importance of local access to good quality greenspace.

Human rights are founded in the belief of our equal worth and protection before the law, irrespective of ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’<sup>9</sup> Given that environmental damage is distributed unevenly, a rights-based approach towards environmental protection is a necessary first step to address systemic inequality.

### The current legal status of the human right to a healthy environment in Scotland

The United Nations Framework Principles on Human Rights and the Environment (2018) affirms that ‘States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.’<sup>10</sup>

The human right to a healthy environment is considered to have two dimensions: the actual substantive right to a healthy environment, and the procedural right, which grants citizens democratic tools to act on behalf of the environment.

#### Substantive right

There is no distinct express protection of a substantive human right to a healthy environment in Scotland, and as such human rights law and environmental law have hitherto been treated as separate bodies of law.

The strongest legal **human rights** protections in Scotland stem from the European Convention on Human Rights (ECHR). In certain instances, the European Court of Human Rights has indirectly protected the human right to a healthy environment, but in a limited way which affords large discretion to States, and is contingent on breaches of the rights expressed in the Convention (most usually, Article 8 on the respect for private and family life).<sup>11</sup>

Most **environmental laws** are derived from EU law.<sup>12</sup> However, Scottish courts are currently limited in how they apply and uphold environmental law. Judicial review is the main route in Scotland for environmental laws and decisions to be challenged by individuals. The Scottish courts have repeatedly made it clear that they cannot review the substance of public authorities’ decisions.<sup>13</sup> Therefore, environmental issues that have been raised in judicial reviews have often been deemed to be out of the courts’ scope.<sup>14</sup> The inclusion of a human

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<sup>9</sup> [Universal Declaration on Human Rights](#) (United Nations, 1948), Art. 2.

<sup>10</sup> [Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment](#) (United Nations, 2018), Framework principles on human rights and the environment, Framework Principle 1.

<sup>11</sup> European Court HR, *Apanasewicz v. Poland*, No. 6854/07, 3 May 2011, § 94, although the court accepted that an environmental issue might arise under Art. 8, *Hatton and Others v. the United Kingdom* 36022/97 [2003] ECHR 338 (8 July 2003) § 96; A recent report to the Council of Europe, found that the Court’s judgments demonstrate ‘a very cautious stance, restricted to environmental health protection, and reflecting a now outmoded anthropocentric approach with too large a margin of appreciation allowed to states for economic interests.’ [The Environment and Human Rights: Introductory Report to the High-Level Conference Environmental Protection and Human Rights](#) (E Lambert for the Steering Committee for Human Rights, Feb 2020), p 1; also see commentary in *The European Court of Human Rights and International Environmental Law* (O Pedersen, cited in [J Knox and R Pejanv](#), 2018).

<sup>12</sup> The Scottish Government has made clear its intention to preserve environmental laws that stemmed from Europe following Brexit via the Continuity Bill and Scottish Environment LINK is inputting to that process.

<sup>13</sup> *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345 at 347-348; for commentary see [Communication to Aarhus Compliance Committee ACCC/C/2017/156](#) (RSPB, Friends of the Earth England, Wales, and Northern Ireland, Friends of the Earth Scotland, and Leigh Day, 2015), esp pp 7-10.

<sup>14</sup> [The Case for a Substantive Right to a Healthy Environment](#) (Environmental Rights Centre for Scotland, Nov 2020), p 6-11.



right to a healthy environment in Scots law offers a legislative steer to the courts to examine the substance and process of environmental cases with stronger scrutiny.

## Procedural right

In contrast to the substantive right, the procedural human right to a healthy environment is part of Scotland's obligations through the UK's ratification of the Aarhus Convention. The Aarhus Convention legally protects procedural human rights relating to the enjoyment of the environment – however, Scotland has not properly implemented it.<sup>15</sup>

The Convention recognises that members of the public have three categories of procedural rights in relation to environmental matters: (1) access to information; (2) the right to participate in decision making; and (3) the right of access to justice - so that acts and omissions by private persons and public authorities that are considered to contravene provisions of environmental law can be reviewed.

Despite the Scottish Government's assertions of compliance with the Convention, barriers to public interest litigation are significant,<sup>16</sup> and the Aarhus Convention's decision-making bodies have consistently found the Scottish legal system to be in breach of the Convention on the third category on access to justice.<sup>17</sup> The Convention specifies that costs must not be 'prohibitively expensive'.<sup>18</sup> However, in Scotland, access to justice is mainly carried out through judicial review, where costs can run into the hundreds of thousands of pounds and legal aid for environmental cases is extremely unlikely.<sup>19</sup> It is also reviewing a complaint regarding alleged breach relating to the lack of substantive review (discussed above) in the Scottish and UK courts.<sup>20</sup>

## Timeline

Prior to the referendum on exiting the EU, the Conservative Party signalled its intention to repeal and replace the Human Rights Act with a British Bill of Rights. Subsequently, First Minister Nicola Sturgeon declared Scotland would look to establish its own human rights framework. As a result, an Advisory Group on Human

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<sup>15</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (United Nations Economic Commission for Europe, 1998), Art. 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'.

<sup>16</sup> Overcoming Barriers to Public Interest Litigation in Scotland (Scottish NGO Report, 2018), p. 11.

<sup>17</sup> Decision V/9n on compliance by the United Kingdom of Great Britain and Northern Ireland (Aarhus Meeting of the Parties, 2014), § 2(a): 'By not taking sufficient measures to ensure that the costs for all court procedures subject to Art. 9 in England and Wales, Scotland and Northern Ireland are not prohibitively expensive and, in particular, by not providing clear legally binding directions from the legislature or the judiciary to this effect, the Party concerned continues to fail to comply with Art. 9, § 4, of the Convention'; Decision VI/8k concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention (Aarhus Meeting of the Parties, 2017), § 1(a)(ii): 'Concerning Scotland, the Party concerned has not yet fulfilled the requirements ... of decision V/9n'; First progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention (Aarhus Compliance Committee, 2015), § 33; Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention (Aarhus Compliance Committee, 2017), § 117; First progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention (Aarhus Compliance Committee, 2019), § 132; the Scottish Parliament Equalities and Human Rights Committee has reopened a petition in relation to Scotland's compliance: Petition PE1372.

<sup>18</sup> *Ibid.*, Art. 9(4).

<sup>19</sup> Civil Legal Aid (Scotland) Regulations 2002, Regulation 15.

<sup>20</sup> Communication concerning a general failure by the UK to provide an adequate review of the "substantive legality" of certain decisions, acts and omissions in accordance with Articles 3(1) and 9(2), (3) and (4) of the Aarhus Convention (RSPB, Friends of the Earth, Leigh Day)



Rights Leadership was established to make recommendations on the future of human rights in Scotland. Scottish Environment LINK and members were among 50 civil society organisations which contributed to the Advisory Group's work.

The Advisory Group made a total of seven recommendations in late 2018, including the following two on legislation:

- 'An Act of the Scottish Parliament which provides human rights leadership.'<sup>21</sup> Explaining this recommendation, the leadership group advised, 'The Act will restate those rights already provided under the Human Rights Act 1998. The Act will provide further rights drawn from UN human rights treaties ratified by the UK but not yet incorporated, including economic, social and cultural, *as well as environmental rights*.'<sup>22</sup> It suggested that the Act could be legislated at the start of the next Parliamentary Term (2021). The report states, 'This Act will establish a new framework of human rights to improve people's lives. It will set out for the first time and in the one place the rights belonging to everyone in Scotland.'<sup>23</sup> It adds, 'Following this Act, the Scottish Parliament would give further effect to these rights through subsequent primary legislation.'<sup>24</sup>
- 'Integration of any further devolved powers into the framework proposed in Recommendation 1 and, if independence, a written constitution including a Bill of Rights for Scotland.'<sup>25</sup>

On the human right to a healthy environment, the Leadership group recommended: 'This overall right will include the right of everyone to benefit from healthy ecosystems which sustain human well-being as well the rights of access to information, participation in decision-making and access to justice. The content of this right will be provided within a schedule in the Act with reference to international standards such as the Framework Principles on Human Rights and Environment developed by the UN Special Rapporteur on Human Rights and the Environment, and the Aarhus Convention.'<sup>26</sup>

In early 2020 the Scottish Government set up the National Taskforce for Human Rights Leadership to 'establish a statutory framework for human rights that can bring internationally recognised human rights into domestic law and protect the human rights of every member of Scottish Society'.<sup>27</sup> Continuing from the Advisory Group, the Taskforce aims to work with civil society stakeholders - and LINK members are participating in roundtables on the human right to a healthy environment. The Taskforce is expected to make its recommendations to the Scottish Government in March 2021.

In its Programme for Government 2020-21, the Scottish Government stated, 'We will continue work on the First Minister's National Taskforce for Human Rights Leadership, to deliver a radical blueprint for human rights legislation covering all areas of devolved responsibility.'<sup>28</sup>

The next Scottish parliamentary election is scheduled for 6 May 2021 and, given the significant groundswell of demands to address environmental issues, together with the attention of COP26 hosted in Glasgow, there is

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<sup>21</sup> [Recommendations for a new human rights framework to improve people's lives: Report to the First Minister](#) (Advisory Group on Human Rights Leadership, 2018), Recommendation 1, p. 31.

<sup>22</sup> Ibid. (italics added).

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid., Recommendation 7, p. 46.

<sup>26</sup> Ibid., page 32

<sup>27</sup> [National Taskforce for Human Rights Leadership](#) (Scottish Government Website).

<sup>28</sup> [Protecting Scotland, Renewing Scotland: The Government's Programme for Scotland 2020-2021](#) (Scottish Government, 2020), p. 107.



an opportunity for all parties to support a Human Rights (Scotland) Act with the express inclusion of a human right to a healthy environment.

### Key features for inclusion in a human right to a healthy environment

For a human right to a healthy environment to make a real difference to the lives of people and our natural environment in Scotland, it must include the following three key features:

1. **Definition:** The right must be defined according to best practice. The human right to a healthy environment has been articulated in various ways in different international and regional legal instruments since the 1970s.<sup>29</sup> In 2018, the United Nations Special Rapporteur for human rights and environmental protection collated this existing body of law, and distilled the human right to a healthy environment into 16 Framework Principles.<sup>30</sup> These principles provide a useful starting point for the expression of the right in Scotland. Importantly, the principles:
  - articulate a **substantive** and **procedural** right;
  - acknowledge that with the human **right** to a healthy environment comes a **duty** to protect the environment;
  - articulate principles around distributive and intergenerational **justice**.

A well-defined right to a healthy environment would help to achieve all other environmental objectives, including those outlined in the LINK Manifesto.<sup>31</sup> For example, a substantive right to a healthy environment could support public rights of access to our land, water and air for the enjoyment of nature and the outdoors. It could support access to nature for everyone via the Scottish Nature Network. It could support a plan for ocean recovery and funding to address the nature and climate emergency. It would enable better decision making for the environment and **everyday accountability**, with litigation only being used as a last resort.

2. **Enforceability:**
  - The right must be **justiciable**, which means that it can be invoked before the courts. It should allow any person in Scotland to challenge a decision by a public authority or law on the grounds of being incompatible with their human right to a healthy environment. Public bodies would have to act compatibly with the right, every new law in Scotland would have to comply with it, and the courts would have to uphold it.<sup>32</sup>
  - A **specialist environmental court** should be created to develop expertise, reduce costs, increase the speed of dispute resolution, and achieve better outcomes for the environment. Crucially, a

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<sup>29</sup> Declaration of the United Nations Conference on the Human Environment ('Stockholm Declaration') (United Nations, 1972) Principle 1; African Charter on Human and Peoples' Rights (African Commission on Human and Peoples' Rights, 1981), Art. 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol Of San Salvador') (Organization of American States, 1988), Rio Declaration on Environment and Development (United Nations, 1992), Principle 1; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('Aarhus Convention') (United Nations Economic Commission for Europe, 1998) Art. 1 (for interpretation, see The Human Right to a Healthy Environment (J. Knox and R Pejan, 2018), p 8); and Art. 11 Paris Agreement (United Nations, 2015), Preamble.

<sup>30</sup> Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (United Nations, 2018), Framework principles on human rights and the environment.

<sup>31</sup> A Manifesto for Nature and Climate: Holyrood 2021 Election (Scottish Environment LINK, 2020)

<sup>32</sup> The features of the Human Rights Act 1998, Art. 6, could be drawn on and adapted for a new Human Right to a Healthy Environment.



court with environmental specialism would be equipped consider the substance of environmental cases, bringing Scotland into compliance with the Aarhus Convention.

3. **Capacity building:** It must be supported by capacity-building programme to inform public sector duty bearers of their obligations, and citizens of their rights and access to justice in environmental matters.

## Conclusion

A guaranteed human right to a healthy environment underpins all environmental objectives, supports existing human rights, and gives the correct mandate to our governing institutions to support our collective task of tackling climate change, biodiversity loss and protecting the environment.

Against the backdrop of a legacy of environmental injustices in Scotland; the need to ensure continued environmental protections following Brexit; and recent momentum created on environmental and human rights, now is the time for Scotland to fully enshrine a human right to a healthy environment.

**This briefing has been prepared by the Environmental Rights Centre for Scotland on behalf of Scottish Environment LINK members. Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 35 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.**

### **This response is supported by the following LINK member organisations:**

Badenoch and Strathspey Conservation Group  
Environmental Rights Centre for Scotland  
Friends of the Earth Scotland  
Keep Scotland Beautiful  
RSPB Scotland  
Scottish Wild Land Group  
Scottish Wildlife Trust  
Woodland Trust Scotland  
WWF Scotland.

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LINK is a Scottish Charity (SC000296) and a Scottish Company Limited by guarantee (SC250899), core funded by Membership Subscriptions and by grants from Scottish Natural Heritage, Scottish Government and Charitable Trusts.  
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ERCS is a Scottish Charitable Incorporated Organisation (SC050257) currently funded by grants from Esmée Fairbairn Foundation, Joseph Rowntree Charitable Trust and Polden Puckham Charitable Foundation.  
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