

Submitted to A Human Rights Bill for Scotland: Consultation
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Part 5: Recognising the Right to a Healthy Environment

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

Agree

7. If you disagree, please explain why:

Lawyers for Nature broadly agrees with your approach for defining the environment which includes specific reference to ecosystems and the biosphere and drawing on notions in the Aarhus Convention to do so. In particular, the Aarhus Convention's Preamble, and Article 1 and 2. We also support the point made in the submission by ERCS/LINK that definitions for substantive features of a healthy environment would strengthen the Bill (ERCS/LINK (2023) The Substantive Right to a Healthy Environment). However, we urge the Scottish Government to ensure that an ecocentric approach is taken to defining both the environment and a 'healthy environment', as this foundation is essential to securing a healthy environment for humans.

In short, the core of Lawyers for Nature's submission on the matter is that it is vital to take a broader 'ecocentric' approach to the Right to a Healthy Environment (RtHE) instead of a purely anthropocentric one. 'Ecocentric' thinking takes an 'interconnected' approach to understanding the world. While it is well recognised scientifically that humans are both interconnected and interdependent with the wider ecological world, ecosystems, planetary systems and other species, our legal systems and approaches in human rights are still catching up to modern science.

The ecocentric approach recognises that humans exist in a wider ecological world and finds intrinsic value in non-human nature. In the words of former President of the European Court of Human Rights Linos-Alexander Sicilianos, "the so-called ecocentric approach is the one centred on the protection of our common home, our environment, our planet." ['Human Rights for the Planet' [Proceedings of the High-level International Conference on Human Rights and Environmental Protection, Strasbourg, 5 October 2020, p10]. This is a 'paradigm shift' from a traditional anthropocentric approach that views humans as superior to the rest of nature and, the world humans inhabit as just resources, materials and space for humans to use and abuse.

Human rights and the anthropocentric view of the environment certainly have a role in securing human interests, but a broader ecocentric approach is vital. Otherwise, human rights approaches are at best unlikely to succeed in realising the right to a healthy environment for humans, and at worst will do nothing to avert the course of serious ecological degradation which both undermines the conditions humans need to survive and flourish and causes serious harm and mass extinctions for huge numbers of other beings.

The Aarhus Convention recognises in its preamble the vital foundation 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" and establishes the purpose of contributing "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" (Article 1).

This framing recognises that humans live in an ecological world and that the environment must be protected for future generations. It is therefore a good basis for defining the environment, which we support. However, while this framing does allow for an ecocentric approach, it could also allow for a short-sighted anthropocentric approach which would fail to secure a healthy environment for humans, or which protects some humans but does not foster flourishing across the board.

In our view, it is crucial that the Bill understands the environment in an ecologically holistic way, and we suggest that the Scottish Government provides a robust definition along these lines. If all we do is see the natural world as something which provides services to humans, we fail to recognise the interconnected and interdependent reality of the world we live in. Thinking ecologically means that we must protect nature in a holistic way, with the ecological integrity of planetary, national, and local systems secured and ecosystems kept balanced and healthy in themselves. If the environment is understood in a way primarily about the services it provides to humans, such as sustainable food, clean air and clean water, this will not necessarily safeguard an environment which is healthy for all humans.

One final point: the notion of a 'healthy environment' should be understood collectively for all life, meaning that the environment should be healthy in an ecological sense, not prioritising one species over all others. An approach to a 'healthy environment' which is premised on whether the environment is healthy to humans is shorted-sighted and will undermine what it seeks to achieve. Ecosystems which are imbalanced and degrading, even if not currently unhealthy with regard to humans, are likely to become so for humans in the future. Only by keeping the environment healthy as a whole will we provide the necessary foundation of a healthy environment which supports human well-being and flourishing.

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

Please give us your views:

Lawyers for Nature supports the formulation of the Right which includes specific substantive elements of clean air, safe climate, safe and sufficient water, non-toxic environments, and healthy biodiversity and ecosystems. We further support the inclusion of the multiple proposed procedural aspects, as these are necessary for the Right to be meaningful and actionable. In particular, ensuring that there is funding available for environmental interest cases so that there is access to justice to secure a healthy environment is key.

The specific mention of six substantive aspects to the Right is an important step to make it more detailed, concrete and focused. The features are interdependent yet in need of standalone protections, and including them will be more effective than leaving the Right without this level of detail (and mean that reference can be made directly to domestic statutory provision instead of based on international norms). This should be kept as a

non-exhaustive list to allow for further development and other features of the Right which do not come under one of these six limbs.

In particular, we welcome the component of 'healthy biodiversity and ecosystems'. This is in line with an ecocentric approach for recognising the importance of protecting the environment directly. It is vitally important for humans that the environment itself is healthy, not only 'healthy' for our short-term benefit. The inclusion of this element should aid in fostering an ecocentric approach to environmental protection, instead of just seeking to secure an anthropocentric outcome or service from the environment. We will expand on this in response to question 11.

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

Disagree

Please provide your reasons why:

No answer – due to resource constraints we focused on our core areas of expertise.

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?

Agree

Please give us your views:

We agree that safe and sufficient water should be included as a substantive aspect of the Right.

However we would echo our replies to previous questions here: the concept of safe and sufficient water must be looked at more widely than just the short-term human perspective and approached in an ecocentric manner. What may be sufficient for human use and consumption may not be sufficient to maintain the full ecosystem that humans are dependant on. The implementation should recognise tensions between short-term access to water, long-term sustainable water access for future generations, and safe and sufficient water for a healthy environment itself, and not be used to perpetuate unsustainable practices.

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

Yes

If yes, please specify what substantive or procedural elements and explain how this could be achieved :

In general, we would like to invite the Scottish Government to take an ecocentric approach to implementing and realising the Right to a Healthy Environment. This would follow the approach taken by various courts in Latin America and develops the Right beyond the more limited approach which is currently taken in the European Convention jurisprudence.

An ecocentric approach means protecting the environment as a whole. This means securing ecological safety at the systemic level – or in other words, the environment being ecologically healthy in and of itself – instead of only seeking to secure particular outcomes or services in relation to humans, which are only one species. This covers both the general approach to understanding and implementing the Right in general and the substantive feature of 'healthy biodiversity and ecosystems'.

An ecocentric approach to defining and implementing this right includes: an ecocentric definition of the environment (as in response to Question 6); the substantive element of "healthy biodiversity and ecosystems" (as in response to Question 8); an 'autonomous' dimension of the right which recognises the need to protect the environment in general, absent particular violations of human rights; and a collective dimension to the Right, which also serves to protect the interests of future generations. It is the latter two elements of an ecocentric approach to the Right in general which we will cover in the response to this question.

It is now generally recognised that it is vital that the environment itself must be in a healthy state, instead of only in terms of the 'ecosystem services' provided to humans. Multiple reports of the two Special Rapporteurs have emphasised this approach. For example:

"All human rights ultimately depend on a healthy biosphere. Without healthy, functioning ecosystems, which depend on healthy biodiversity, there would be no clean air to breathe, safe water to drink or nutritious food to eat." [Boyd, A/75/161, paragraph 3]

"The full enjoyment of human rights, including the rights to life, health, food and water, depends on the services provided by ecosystems. The provision of ecosystem services depends on the health and sustainability of ecosystems, which in turn depend on biodiversity. The full enjoyment of human rights thus depends on biodiversity, and the degradation and loss of biodiversity undermine the ability of human beings to enjoy their human rights." [Boyd, A/75/161, paragraph 5]

While this is recognised by the substantive element of 'healthy biodiversity and ecosystems' as part of the Right to a Healthy Environment, it is imperative that an ecocentric approach not just confined to this one limb but taken to the right in general. In other words, the focus of the Right to a Healthy Environment must be on the healthy environment and protecting nature in general, instead of on particular ecosystem services provided to humans and only protecting the environment when there is a direct effect on humans. This ecocentric approach is also in line with the precautionary principle, a principle recognised in various international treaties and domestic law, which requires protective measures to prevent actions which may cause harm without having to wait until the harm materialises.

One useful resource for the distinction between anthropocentric and ecocentric approaches to the Right is the report 'Human Rights for the Planet' [Proceedings of the High-level International Conference on Human Rights and Environmental Protection, Strasbourg, 5 October 2020]. That European jurisprudence remains in the anthropocentric paradigm is not a marginal critique but recognised from within the ECtHR, and unlikely to develop absent a change to the Convention. Another useful report on the ecocentric approach to the Right to a Healthy Environment in Europe is 'The Environment and Human Rights' by Elisabeth Lambert, which was prepared for the High-Level Conference on Environmental Protection and Human Rights in Strasbourg in February 2020, which both maps out trends in recent decades and makes the argument for an ecocentric approach to the Right to a Healthy Environment in Europe.

The two approaches are not in conflict as such: rather, the ecocentric approach goes further by recognising the Right as being broader and covering multiple strands. They are described in the Human Rights for the Planet report by former President of the ECtHR Linos-Alexander Sicilianos as "mutually reinforcing". An anthropocentric-only approach will fail to secure the Right to a Healthy Environment. Without protecting the environment as a whole, it will be much harder, if not impossible, to realise a healthy environment for humans to live in.

In this Bill, the Scottish Government have an opportunity to draw from global best practice in developing Scottish jurisprudence. We submit that the Scottish Government should take the opportunity to implement the Right to a Healthy Environment in this broader ecocentric way, which also includes a collective approach to the right and the interests of 'future generations'. This would be based on the jurisprudence of the Inter-American Court on Human Rights (IACtHR), the Colombian Constitutional and Supreme Courts, the Mexican Constitutional Court, and the Ecuadorian Constitutional Court, which have pioneered these developments in interpreting the Right. We will provide an overview of this jurisprudence.

In a 2017 advisory opinion which asked about state obligations in relation to the environment, the Inter-American Court on Human Rights interpreted the Right to a Healthy Environment as having an 'autonomous' dimension, saying:

"59. The human right to a healthy environment has been understood as a right that has both individual and also collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life. Environmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind."

"62. The Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitutions, to recognize legal personality and rights of nature."

The Court is clear that both the collective and autonomous elements are 'in addition to' the individual dimension. This Advisory Opinion was followed by the Court in the 2020 Lhaka Honhat case [Case of the Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v. Argentina, Inter-American Court of Human Rights, judgment of 6 February 2020].

In Colombia, the Right to a Healthy Environment has been developed and applied as a collective right and an ecocentric right. In the Atrato River case (Colombia Constitutional Court Ruling T-622 of 2016), the Court explicitly adopted an ecocentric approach to interpreting the Right to a Healthy Environment in the Colombian Constitution. Saying that in this approach "the land does not belong to man and, on the contrary, assumes that man is the one who belongs to the earth, like any other species." The Court also described a healthy environment as a necessary prerequisite to the constitutional right to life. In the Amazon Rainforest case [Supreme Court of Colombia, STC4360-2018, radicación no. 11001-22-03-000-2018-00319-01 (Apr. 5, 2018)], the Supreme Court applied the RtHE as a collective right, finding that Amazon deforestation and the government's approach to climate change violated the Right to a Healthy Environment in a collective sense even when there had not yet been any violation of an individual right. Notably, in these cases and others in Colombia, the Court has developed a Rights of Nature approach rooted in the Right to a Healthy Environment and the ecological constitution, taking the view that explicitly recognising Rights of Nature, and various elements of nature (such as rivers) as having legal personality, as being the most effective way of legally expressing an ecocentric approach and securing a healthy environment.

Similar developments have occurred in Mexico, where the Right to a Healthy Environment has also been interpreted in both the collective and the autonomous dimension. Quoting from Jorge Calderon Gamboa, former senior lawyer at the IACtHR:

"Mexico's constitutional jurisprudence recognizes that the right to a healthy environment is an autonomous right that seeks, on one hand, to guarantee the broadest protection to persons and, on the other hand, to protect the natural environment, understood as the set of ecosystems in the which the person develops and on which his or her integral development depends. In view of this, it is not necessary to prove that environmental damage violates other rights (for example, the right to access the highest possible levels of health); instead natural resources, ecosystems and environmental services can be protected autonomously, due to their intrinsic value. ... These judgments have not been limited to cases where a person has been impacted, but have also included cases with diffuse interests, which requires finding mechanisms that allow for environmental protection as a matter of collective interest." [from the 'Human Rights for the Planet' report, full ref above, p34]

Lawyers for Nature submits that, based on the fundamental interconnection and interdependence of humans with the wider ecological world and of ecosystems with each other, the environment must be protected holistically and directly in and of itself, not only when there is immediate harm to humans (or otherwise violations of human rights). Such an ecocentric approach to the Right to a Healthy Environment is necessary to realise the conditions needed for human life and well-being at a fundamental level. This approach recognises that humans also have a responsibility to both our own future generations and other species.

Beyond the Right to a Healthy Environment, we would also like to draw the Scottish Government's attention to the idea of Rights of Nature. While it is, of course, beyond the scope of this Bill to introduce Rights of Nature into the Scottish legal system, there is an interesting overlap and intersection to

consider between the Right to a Healthy Environment and Rights of Nature which we believe it is important to take note of.

As is widely recognised, “States have obligations to adopt legal and institutional frameworks that effectively protect against environmental harm that interferes with the enjoyment of human rights.” [Knox, 2017, A/HRC/34/49 para 33]. While there are different legal and regulatory mechanisms available to states, it is argued that a Rights of Nature approach is likely to be one of the most effective legal approaches for protecting the natural world, and therefore an option which States should seriously consider for meeting their obligations regarding the Right to a Healthy Environment. Proponents of Earth Jurisprudence point out that existing regulatory approaches have failed to prevent the continued degradation of multiple ecosystems and the worsening of the biodiversity crisis and argue that a radically different approach is needed.

‘Rights of Nature’ is based in an ecocentric paradigm and on a different relationship with nature than anthropocentric approaches. Instead of humans dominating nature, it recognises humans as just one part of a wider Earth Community and seeks to reorient the legal system to work towards harmonious relations with the rest of nature based on respect, care, responsibility and interdependency. Giving rights to non-human species, ecosystems and even ‘nature’ as a whole means that the legal system would give nature-based parties a direct role in our legal system and function to protect ecological integrity directly.

Before his appointment as Special Rapporteur, David Boyd wrote a book entitled ‘Rights of Nature: A legal revolution that could save the world’ (ECW Press, 2017). In this, he says that “Today’s dominant culture and the legal system that supports it are self-destructive. We need a new approach rooted in ecology and ethics.”. After describing one of the objectives of Rights of Nature as being “protecting the planet’s life-support systems”, he says, “To achieve these objectives, we urgently need to establish and enforce a new set of rights and responsibilities. These rights belong to non-human animals, other species, and ecosystems. Science and values have evolved – now our laws, institutions, cultures, economies and behaviours need to do the same.” (p xxxiv-xxxv).

In the 2020 Report by the Special Rapporteur, ‘Right to a healthy environment: good practices’, Rights of Nature provisions in legal systems are described positively, with the Special Rapporteur saying, “Recognizing the rights of Nature could reduce environmental harm, potentially benefitting human rights.” (at 105).

In Ecuador, which has both the Right to a Healthy Environment (Article 14) and Rights of Nature (Articles 71-73) in its constitution, the Constitutional Court has found government actions which simultaneously violate the Right to a Healthy Environment and Rights of Nature [Los Cedros case, Constitutional Court of Ecuador – Case No. 1149-19-JP]. As stated above, Colombian courts developed Rights of Nature out of the constitutional Right to a Healthy Environment, recognising that ecosystems must be kept healthy for humans to flourish and that a Rights of Nature approach which protected ecosystems directly would be a good way of safeguarding this. Closer to home, the same thinking has been proposed in Ireland. In 2022 Ireland established a Citizens’ Assembly on Biodiversity Loss to deliberate on how the issue of biodiversity loss could be better responded to. Following a submission by the Environmental Justice Network Ireland [“Rights of Nature in Ireland: Towards a Living Island of Rights-Bearing Communities’, September 2022], the Assembly did indeed recommend (Recommendation 31) a constitutional amendment which included both the Right to a Healthy Environment (both substantive and procedural elements) and Rights of Nature. These examples highlight the close connection between the two, and that the Assembly thought that this joint approach was the best way to address the biodiversity crisis.

Lawyers for Nature agrees with this approach and sees Rights of Nature and the Right to a Healthy Environment as being inherently connected and having a mutually supportive relationship. Among other necessary social changes, our legal systems need radical change if they are to secure a healthy environment and reverse the current trends of ecological degradation which have dire consequences for humans and non-human nature alike. Rights of Nature would therefore function to safeguard the healthy environment and ecological conditions which are necessary to support human life and flourishing. Despite the way the Colombian judiciary developed Rights of Nature jurisprudence out of the Right to a Healthy Environment, implementing Rights of Nature would be beyond the scope of the Bill currently being considered. Nonetheless, given that there is little difference between securing a healthy environment for humans and securing ecological integrity for a healthy natural world, we would like to draw the Scottish Government’s attention to the idea of Rights of Nature’s laws and suggest further development in this direction in the future.

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Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Organisation:

Lawyers for Nature

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

Legal profession

If other, please specify:

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

Publish response with 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.

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Very satisfied

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Very satisfied

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