



An enforceable human right to a healthy environment

Environmental Rights Centre for Scotland

Advocacy Manifesto
December 2021

Who we are

The Environmental Rights Centre for Scotland (ERCS) was registered as a Scottish Charitable Incorporated Organisation (SC050257) on 3 July 2020.

Our vision is of a Scotland where every person's right to live in a healthy environment is fully realised.

Our mission is to assist members of the public and civil society to understand and exercise their rights in environmental law and to protect the environment.

We will do this through:

- Public education to increase awareness of legal rights and remedies in environmental matters
- Advice, assistance and representation to improve public participation in environmental decision-making
- Advocacy in policy and law reform to improve environmental law and access to justice on the environment
- Strategic public interest litigation to enforce progress on key environmental issues and tackle systemic environmental problems.

ERCS understands environmental law to include law relating to land-use planning, climate change, pollution control, environmental health, the conservation of biodiversity, and any other field (e.g. cultural heritage, transport, energy) to the extent that it impacts on the natural environment in Scotland.

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A note on the term 'polluters'

We have used the term 'polluters' as a generic term to refer to privatised bodies that have public responsibilities or act under the control of public bodies and business enterprises who damage the environment. This may be because their actions directly cause air, water or land pollution or because of the broader harmful impacts of their land or marine activities.

Front Cover Photo: **Silwick, Shetland** photographed by **Cailean Hall-Gardiner**

Executive Summary

Everyone in Scotland deserves to live in a healthy environment

To achieve this, we must be able to hold public bodies and polluters to account.

But in Scotland it is incredibly difficult to use our legal system to stand up for our health and our planet. It is complicated, expensive, and intimidating.

The Scottish Government wants to include the human right to a healthy environment in law. The task now is to make sure the right is enforceable, so that public bodies and polluters respect it and we can take them to court if they do not.

Scotland must urgently tackle its own environmental problems including air, water and land pollution, flooding due to climate change, and a biodiversity crisis. These problems are part of the global climate and nature emergencies.

People living in Scotland's areas of high disadvantage are the worst affected by environmental problems and also have the least access to green spaces. Children, older people, disabled people and people with health conditions are the hardest hit.

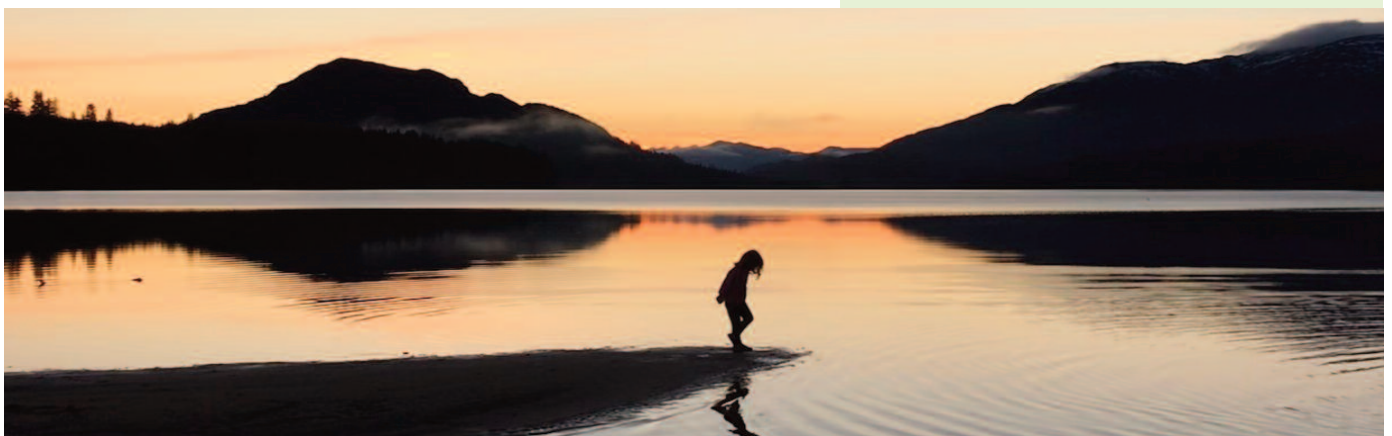
This manifesto sets out the legal reforms that are needed to implement an enforceable human right to a healthy environment. Our recommendations are summarised in the online petition to the Scottish Government, and we look forward to working on these priorities during this parliamentary session.

Now is the time for Scotland to act. An enforceable human right to a healthy environment will lead to better compliance with environmental regulations, and greener and healthier policies for everyone.

Online petition www.ercs.scot

We call on the Scottish Government to

- > **Ensure our right to a healthy environment is enforceable in a court of law against public bodies and polluters, with effective remedies**
- > **Ensure our right to a healthy environment guarantees the highest standards for clean air, a safe climate, safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments to live, work, study and play, and healthy biodiversity and ecosystems**
- > **Reform legal expenses so that it is affordable for all of us to uphold environmental laws in a court or tribunal**
- > **Create a specialist environmental court or tribunal which is affordable and accessible for everyone, fair, timely and effective**



Girl playing by Loch Laggan on the Ardverikie Estate near Newtownmore photographed by Kris Frampton

Introduction

Our environmental crisis is a human rights crisis

Without a healthy environment, humanity cannot survive or thrive. A healthy environment is fundamental to the enjoyment of other human rights including the right to life itself.

Environmental damage and human suffering are two sides of the same coin.¹ Globally and here in Scotland, we are facing a climate emergency² a sharp decline in biodiversity,³ unsafe levels of air pollution⁴ and food insecurity.⁵

People living in areas of high disadvantage, children, older people, disabled people, and people with health conditions are often disproportionately affected by environmental problems and are often least responsible for causing environmental damage.⁶ They also often have fewer resources to challenge these environmental burdens. This contributes to systemic discrimination.

COVID-19 has emphasised the links between human and ecosystems health.⁷ It has highlighted environmental concerns from global biodiversity loss to the importance of equal access to biodiverse and multipurpose green spaces.⁸

Now more than ever we need our basic human rights to be protected, including an enforceable human right to a healthy environment.



Flaring at Mossmorran photographed by Mary Mackenzie

“I work nightshifts and often look in disgust seeing what is coming from Mossmorran. As a grandparent I want a safe world for future generations.”

Lochgelly resident Mary Mackenzie

For more information on how the human right to a healthy environment intersects with other human rights, read our briefings, commissioned by the Human Rights Consortium for Scotland:

How the human right to a healthy environment advances the rights of disabled people
(joint briefing with Inclusion Scotland)

How the human right to a healthy environment advances our right to health

The relationship between the human right to a healthy environment and the right to food

Progress towards the human right to a healthy environment in Scotland

In October 2021, the United Nations Human Rights Council recognised a safe, clean, healthy and sustainable environment as a human right.⁹ 156 countries have already recognised this right,¹⁰ and there is evidence that incorporating the right to a healthy environment is linked with improved outcomes for the environment.¹¹ Moreover, international environmental law is evolving, with a growing movement to make ecocide an international crime.¹²

The Environmental Rights Centre for Scotland welcomes the positive progress on advancing the human right to a healthy environment in Scotland. The Scottish Government will consult on a new Human Rights (Scotland) Bill within the coming year.¹³

This Bill will protect a range of rights, including reaffirming our existing rights in the Human Rights Act and incorporation of: the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Rights of Persons with Disabilities; a right of older people to a life of dignity and independence; and equality rights for LGBTI people. **It will also include the human right to a healthy environment 'with substantive and procedural elements'.**¹⁴

The substantive and procedural elements of the right to a healthy environment are equally important and together provide, for the first time, the opportunity to fully address the causes and impacts of environmental damage.

The substantive part includes 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 specifies the processes and mechanisms for people to exercise their environmental rights and ensure environmental laws are enforced. These rights include access to information, public participation in decision-making, access to justice and effective remedies.

The task now is to ensure that both the substantive and procedural parts of the right to a healthy environment are delivered with 'teeth'. That is, our right needs to be enforceable to make a real difference to the environment and to the lives of people most affected by environmental problems in Scotland.

The substantive part should be created through the new Human Rights (Scotland) Bill. But some of the procedural reforms should happen alongside and ahead of the Bill. These include reforming legal expenses and the creation of a specialist environmental court or tribunal.

Scotland has the potential to be a world leader in advancing the human right to a healthy environment. The Environmental Rights Centre for Scotland looks forward to working with stakeholders to fulfill this ambition.

A new Human Rights Bill is coming to Scotland. It will include the human right to a healthy environment. The task now is to ensure it is delivered with 'teeth' and is enforceable

The substantive part of the right to a healthy environment – new for Scotland

The substantive part of the right to a healthy environment creates a standalone right to a safe, clean and healthy environment. The UN Special Rapporteur on Human Rights and the Environment¹⁵ has identified six features:

- > **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**
- > **Healthy biodiversity and ecosystems**

The substantive part of the right to a healthy environment would be new for Scotland. Our strongest human rights protections stem from the European Convention on Human Rights, which does not directly protect a human right to a healthy environment.¹⁶

However, most human rights are not 'absolute'. This means that a public authority may sometimes be allowed to restrict or interfere with a right if it is in the interest of the wider community, or to protect other human rights. For this reason, more detail is needed to ensure the substantive part is enforceable and works in practice.

Five environmental principles are provided for by the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021,¹⁷ and these should be applied by the courts to interpret the right.

- > **The principle that protecting the environment should be integrated into the making of policies**
- > **The precautionary principle as it relates to the environment**
- > **The principle that preventative action should be taken to avert environmental damage**
- > **The principle that environmental damage should as a priority be rectified at source**
- > **The principle that the polluter should pay**



Recommendations

As a member of the Scottish Government's Human Rights Advisory Board¹⁸ ERCS will work to refine and deliver the following recommendations for the substantive part of the right to a healthy environment

- **The six features should be defined according to the highest standards. For example, 'clean air' should mean air quality that complies with the Scottish statutory air quality standards, which are based on World Health Organisation Guidelines¹⁹**
- **The right should be enforceable against public bodies; privatised bodies that have public responsibilities, or act under the control of public bodies; and business enterprises whose activities adversely impact the right**
- **These duty bearers should be obliged to respect the right at all times. This means that when any of them breach the right, an individual or representative body would be able to mount a challenge invoking their right to a healthy environment**
- **Environmental principles should be applied by the courts to interpret the right**
- **Effective remedies which are appropriate for breaches must be developed**

The procedural part of the right to a healthy environment – protected by the Aarhus Convention

The procedural part of the right to a healthy environment is enshrined in the UNECE Aarhus Convention, which the United Kingdom has participated in since 2005.²⁰

The Convention gives every person human rights to use democratic processes to stand up for the environment. There are three parts to this:

- **Access to environmental information**
- **Participation in decision-making relating to the environment**
- **Access to justice**

The right of access to justice secures the ability to go before a court or tribunal to challenge decisions, developments or policies which may breach environmental laws or rights.

Access to justice is the ultimate guarantee of the rule of law, ensuring that there is a route to hold duty-bearing organisations to account.

As well as being important for individuals, access to justice is crucial to the public interest, because court judgments shape how laws are enforced and how rights are experienced.²¹

Environmental ‘public interest litigation’ involves challenges to protect the environment and secure a shared goal. The credible threat of legal action also adds pressure to comply with the law, so that any action taken is only as a last resort.

The Convention gives every person human rights to use democratic processes to stand up for the environment

The Aarhus Convention states that access to justice must be ‘fair, equitable, timely and not prohibitively expensive’.²²

However, in October 2021, the Aarhus Convention’s governing institutions made its tenth consecutive finding that Scotland’s legal system does not comply with the ‘not prohibitively expensive’ requirement of the Convention.²³ This is why urgent reforms are needed to protect the procedural part of our right to a healthy environment.

Affordable access to justice: Scotland's non-compliance and the urgent need for reform

Article 9 of the Aarhus Convention requires parties to ensure that everyone, whatever their financial circumstances, can afford to go before a court or tribunal to challenge breaches of environmental law.

In Scotland, the main way to use the law to try to protect the environment is by raising judicial review proceedings in the Court of Session.

This incurs a huge financial risk and is unaffordable, both for environmental organisations and the communities most affected by environmental problems.

The Aarhus Convention's governing institutions have called for reform 'as a matter of urgency' and an action plan by July 2022.²⁴ To become affordable, all legal expenses need reform.

In Scotland, going to court to try to protect the environment incurs a huge financial risk. Costs can run into the tens or hundreds of thousands of pounds

There are three key sources of expenses:

- 1 The individual's costs of paying their own legal team**
- 2 The individual's liability for the other side's costs if they lose**
- 3 Court fees**

1 The individual raising the legal challenge has to pay their own side's legal fees if they lose. This can be tens or hundreds of thousands of pounds. Legal aid is the help that is available to help cover an individual's expenses, but a legal clause means it is unlikely to be granted for environmental public interest litigation.²⁵

2 The individual can expect to pay the expenses of the opposing side if they lose because of the 'loser pays' rule. These expenses can also be tens or hundreds of thousands of pounds.

A Protective Expenses Order (PEO) regime was introduced in 2013 with the intention of capping these costs for environmental cases. However, PEOs are rarely granted and the Aarhus Convention's governing institutions have found that they introduce 'legal uncertainty' and create a 'chilling effect' which deter people from using legal processes.²⁶

A fairer approach is used in personal injury claims. This system is called 'qualified one-way costs shifting'. It has replaced the loser pays rule with a general rule that individuals will not be liable for the expenses of their opponent if their action fails.²⁷ This was introduced by the Scottish Government specifically to improve access to justice in the context of personal injury²⁸ and should be considered for environmental cases.

3 Court fees are currently paid by the individuals raising the legal challenge. These fees are also expensive. The Faculty of Advocates has explained that 'as a matter of principle the civil justice system should be funded by the state' and has noted that this situation may be illegal.²⁹

Rainbow Joy, Gadloch, Lockdown January 2021 photographed by Emma Donaldson

Recommendations

ERCS recommends the following reforms on legal expenses so that it is affordable for all of us to uphold environmental laws in a court or tribunal

- **Legal aid should be made available for individuals, community groups and organisations pursuing environmental public interest litigation**
- **The 'loser pays' rule and associated PEO regime should be replaced with qualified one way costs shifting for environmental cases**
- **Court fees should be removed**

For more information, read our **Recommendations for a plan of action on judicial expenses**



Full access to justice: the need for a specialist environmental court or tribunal

The Scottish Government will consult on whether to establish an environmental court by Spring 2023 at the latest.³⁰ Internationally there has been increasing recognition of the value of specialist environmental courts or tribunals³¹ with over 1500 examples by 2018.³²

There is widespread support from the environmental sector for a specialist environmental court or tribunal (ECT) in Scotland.³³

The creation of an ECT would be the most cost effective and efficient way to secure full compliance with the access to justice requirement of the Aarhus Convention. This is because high costs are not the only barrier to accessing justice in environmental matters. These are four of the additional barriers.

1 Lack of merits review

Judicial reviews only look at whether the right procedures were followed in environmental decisions. They do not consider whether the full substance of a law has been violated. This prevents the full consideration of environmental issues (the 'merits' of the case) and legal application of environmental principles.

The Aarhus Convention governing institutions are currently investigating whether this is in contravention of Article 9(2) of the Convention.³⁴

A specialist ECT could be given the power to scrutinise the merits of environmental cases in full.

2 Lack of fairness

Article 9(4) of the Aarhus Convention requires that review procedures must be 'fair'. However, only developers have the right to appeal planning decisions in Scotland. The main way for people who are not developers to challenge planning decisions is through the courts using judicial review. But, as outlined above, courts do not consider the merits of a planning decision and going to court carries financial risk.

In contrast, developers' right of appeal provides access to a relatively low-cost appeal mechanism where the merits of a planning decision can be reconsidered.

A specialist ECT could be given the power to hear appeal cases from communities, providing an equal right of appeal. Planning Democracy and Friends of the Earth Scotland have campaigned for an equal right of appeal for many years.³⁵

There is widespread support from the environmental sector for a specialist environmental court or tribunal (ECT) in Scotland

3 A fragmented system

Environmental litigation is carried out in several different courts and tribunals in Scotland, resulting in a system which is fragmented and inefficient. Forums include the Court of Session, Sheriff Courts, Scottish Land Court, the Department for Planning and Environmental Appeals, Lands Tribunal for Scotland, and the Scottish Information Commissioner.

A single specialist ECT could achieve efficiency benefits.

4 Lack of specialism and expertise

Effectively resolving environmental disputes requires legal and scientific expertise. Judges in Scotland may not be exposed to environmental disputes on a regular enough basis to allow them to develop expertise in this area.

A specialist ECT could appoint technical or scientific members to sit alongside judges, and would allow for judges to develop specialist expertise.

A specialist ECT could be established in several different ways: it could be a new institution or an adaptation to an existing one. The Government is due to merge the Scottish Land Court and the Lands Tribunal for Scotland to create an 'expanded Scottish Land Court'.³⁶ ERCS could support this amalgamated court being given extended powers to create a new specialist 'Scottish Land and Environmental Court'. But this extension must fulfill the key features outlined in the following recommendations.

Recommendations

To achieve full access to justice, ERCS recommends the creation of a specialist environmental court or tribunal which is affordable and accessible for everyone, fair, timely and effective. It should be designed to include the following key features

- **An institutional purpose to promote access to justice, democracy, the rule of law and the human right to a healthy environment**
- **The ability to appoint judges and expert members with technical and scientific expertise**
- **A comprehensive environmental jurisdiction**
- **The powers to set its own rules and procedures**
- **Act as a one-stop shop to hear all environmental cases**

For more information, read our report on [Why Scotland needs an environmental court or tribunal](#)

Summary of recommendations

An enforceable human right to a healthy environment

The substantive part:

- > 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
- > Healthy biodiversity and ecosystems

Recommendations

Guarantee the highest standards for the six features

- > Define to the highest standards
- > Enforce against public bodies and polluters
- > Oblige duty bearers to comply
- > Courts to apply environmental principles
- > Provide effective remedies

Key legislative processes in 2022/3

- > Human Rights (Scotland) Bill
- > Consultation on environmental principles

The procedural part:

- > Access to information
- > Participation in decision making
- > Access to justice

Recommendations

Reform legal expenses so that it is affordable for all of us to uphold environmental laws in a court or tribunal

- > Reform legal aid
- > Replace loser pays rule with qualified one way costs shifting
- > Remove court fees

Key legislative processes in 2022/3

- > Legal Aid Reform Bill
- > Consultation on court fees

Recommendations

Create a specialist environmental court or tribunal which is affordable and accessible for everyone, fair, timely and effective

- > An institutional purpose to promote access to justice
- > Ability to appoint judges and experts
- > Comprehensive jurisdiction
- > Powers to set rules and procedures
- > Act as a one-stop shop

Key legislative processes in 2022/3

- > Consultation on environmental court

Learning from people's struggles to use the law

The lived experiences of people trying to use the law emphasise the need for an enforceable human right to a healthy environment

Ann Coleman – community campaigner

No access to justice to challenge landfill, opencast coal mines and an incinerator

Ann has been fighting environmental injustice for over twenty years. She lives in Greengairs, just a few hundred yards away from Scotland's largest capacity landfill, and reportedly the largest in Europe. There were previously two opencast coal mines nearby. In 2009 planning permission was given to a waste incinerator near to the landfill.

Ann had evidence to show that the polluting incinerator would further damage the environment and the health of the community. She engaged in the planning process and sought legal advice, which gave her confidence that she had a strong case.

But Ann and her community could not afford to go to court to challenge the incinerator development because it would have cost tens of thousands of pounds.

'We have no voice. We have no rights. We cannot protect ourselves. It's impossible to get justice. An environmental court would give us the power to bring harmful developments to the attention of the government in a way that they would have to listen.'

John Muir Trust

'David versus Goliath' when charities take legal action against corporations

In 2014 the John Muir Trust sought to mount a judicial review against a planning development. The Trust won the case in the first instance but lost on appeal, and separately was refused a Protective Expenses Order that would have limited its liability for costs. As a result, the Trust faced costs of £189,000 to the respondent (the Scottish Government), plus £350,000 to the intervener (energy company SSE). The Trust also had to pay its legal team around £150,000, so the combined bill was for £689,000. The Trust eventually reached a settlement to pay the Scottish Government £75,000 and the energy company SSE £50,000, totalling a final bill of £275,000.³⁷

'Justice should be available to all regardless of financial ability. The 'David versus Goliath' nature of charities taking on multinational corporations and the associated financial risks is a major disincentive against taking legal action on environmental grounds and therefore a potential injustice that the Environmental Court should right.'

Mike Daniels, Head of Policy and Land Management for the John Muir Trust



Overflowing rubbish, Cairn o' Mount, Aberdeenshire by George Niblock

George Niblock – Aberdeenshire Environmental Forum

Costs of legal action forced group's closure

George Niblock is a public health and environmental professional with over 50 years' experience advising government and statutory bodies. In his spare time, George was the the Chair of the volunteer-led Aberdeenshire Environmental Forum. For ten years, the forum engaged with Aberdeenshire Council to address major street cleansing concerns, but with little success. The impact of rubbish on the streets led the forum to use its statutory right to apply for a Litter Abatement Order.

The process took several years and the group's own legal costs were estimated at £40,000. This was funded by a mix of the forum's funds, donations and free legal services. The forum lost its case. After settling out of court for £9,000 they had no funds left to appeal the decision and the forum was forced to close after operating for 30 years.

'The law and court procedures in Scotland are complex and intimidating. The potential financial implications are without limit, as are the consequences for the individual applicant. We felt the council's claims for legal expenses was punitive and it led to the closure of our group.'



Torry incinerator under construction by Simon McLean

Simon McLean – community campaigner

Legal challenge against incinerator was unaffordable

Simon McLean, a resident of Torry in Aberdeen, was concerned about a proposed incinerator which was granted planning permission in 2016.

During the planning process, he and a group of other residents were able to access legal advice and were informed that they had strong grounds for a legal challenge due to alleged planning irregularities. However, they were warned that if unsuccessful, their likely costs liability could be up to £65,000. Because of this threat of costs liability, they were unable to pursue the challenge.

'I had good grounds to challenge the incinerator but when it came to it, I had no assets to pursue a legal challenge – so where was my human right of access to justice?'



Conclusion

We need an enforceable human right to a healthy environment to stand up for our health and our planet.

Faced with the climate and nature emergencies, now is the time to act. The Scottish Government will be drafting the Human Rights (Scotland) Bill and considering whether to set up an environmental court in 2022.

This manifesto has outlined the key legal reforms that are required in this parliamentary session to help tackle the causes and impacts of environmental damage.

Enforcing the substantive and procedural parts of the human right to a healthy environment has the potential to transform policy choices and make our spaces greener and healthier for all of us.

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