

## ERCS full response to the consultation on A Human Rights Bill for Scotland

The Environmental Rights Centre for Scotland (ERCS) assists the public and civil society to understand and exercise their rights in environmental law and to protect the environment. We provide free legal expertise in public interest environmental law, awareness raising and outreach to marginalised groups, and advocacy in policy and law reform.

The Scottish Government is gathering views to help inform the Human Rights Bill which will incorporate a range of economic, social and cultural rights into Scots law for the first time, within the limits of devolved competence. It will also include the right to a healthy environment (Part 5).

This is our full response to the [Human Rights Bill for Scotland](#) consultation. You can also refer to the [consultation guide](#) written by the Human Rights Consortium Scotland, or our standalone [guide to Part 5: Recognising the right to a healthy environment](#).

### Part 4 – Incorporating the Treaty Rights

#### 1. What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill?

ERCS believes that dignity is a fundamental principle underpinning the realisation of all human rights. It should be fully recognised in Scotland’s legal system, with a statutory requirement for Courts to consider dignity when interpreting the rights.

We identify dignity as an integral principle of the modern human rights regime, and agree with conclusions from Elaine Webster’s report to the National Taskforce for Human Rights Leadership, that the “inclusion of ‘human dignity’ as a value in the Bill will be a clear and symbolic demonstration of Scotland’s support for the UN’s international human rights law framework (and the EU’s Charter of Fundamental Rights), as well as the Sustainable Development Goals.” (Webster, 2023: 18).

In order to clarify the overall significance of dignity within Scotland’s statutory human rights framework, ERCS supports proposals for the Bill to include a purpose clause that includes dignity, universality, participation and other key human rights principles. This is necessary to provide a shared and consistent understanding and interpretation of the rights in the Bill and is also consistent with the principles enshrined in the UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention).

#### 2. What are your views on our proposal to allow for dignity to be a key threshold for defining the content of minimum core obligation (MCOs)?

ERCS believes that dignity is a fundamental principle for the realisation of all human rights and support its inclusion as a key threshold for defining Minimum Core Obligations (MCOs). The inclusion of dignity can help to cultivate a broader public understanding of how rights apply to our lives, and nurture the development of a human rights culture in Scotland. The inclusion of dignity within MCOs is important to ensure that rights are effectively exercised and fulfilled, and not conceived of by public bodies and other duty bearers in a narrow sense of duty compliance.

As an overarching principle, the application of dignity can translate into meaningful recognition and empowerment of marginalised individuals.



### 3. What are your views on the types of international law, materials and mechanisms to be included within the proposed interpretative provision?

ERCS advocates for extensive use of the reports, observations, and general comments issued by relevant UN Special Rapporteurs. These collate the best available evidence and insights globally, and provide greater coherence, clarity, and guidance to inform the implementation of each right. It is important that duty bearers adopt an intersectional approach, recognising the interrelationships between rights from different UN treaty bodies.

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

ERCS agrees that all four treaties should be reproduced in the Bill, removing any text that relates to areas that are reserved to the UK Parliament. We support direct copying and pasting of text from the treaties over a transposition approach. This will allow for greater consistency and continuity overall, as precedent has already been set interpreting the rights of each treaty in jurisdictions elsewhere, and will help to minimise ambiguity in the implementation phase.

We agree that the right to a healthy environment should be recognised and included in this Bill. This must include both substantive and procedural elements, including all six substantive features as recommended by the [National Taskforce on Human Rights Leadership Report](#) (2021) and the UN Special Rapporteur on Human Rights and the Environment in [Good practices on the right to a safe, clean, healthy and sustainable environment](#) (OHCHR/Boyd, 2020), and provide clarity over definitions, standards, and enforcement mechanisms that will be applied in the implementation of the right. In order to enshrine and enforce the procedural element of the right, requisite steps must be taken to comply with the Aarhus Convention's access to justice requirements – see ERCS's response to Part 5 for further details.

Where there are rights that include both devolved and reserved elements, there should be careful consideration of how to adopt a maximalist approach to having as many rights as possible within this Bill derived from the treaties. We back the children's rights organisation Together's emphasis on the need to conduct a legislative audit at an early stage, based on experience from the UNCRC Incorporation Bill shows the importance of conducting a legislative audit at an early stage. This would identify where acts of the Scottish and UK Parliament (that fall within devolved competence) fall short of human rights standards and enable amendments to be passed before incorporation takes effect.

Together's consultation guidance suggests that the Scottish Government to take a three-step approach to this work across each of the treaties that it seeks to incorporate:

- Identify Acts of the UK Parliament (and amendments to Acts of the UK Parliament) that are within devolved powers and impact on human rights. Make necessary amendments to bring them into the scope of the Human Rights Bill.
- Commission a comprehensive audit of the extent to which all devolved legislation complies with the relevant treaties/rights (to include Acts of both the UK and Scottish Parliament). This could look like a similar audit that took place in Jersey.
- Make amendments identified through the audit. Review and update the audit on an ongoing basis through the Bill's "Human Rights Scheme" taking into account evolving international standards, guidance and recommendations.

That audit will ensure that human rights protections are robustly applied to all areas of devolved policy.



## 5. Are there any rights in the equality treaties which you think should be treated differently?

In line with the position outlined by Together, it is crucial that this Bill incorporates all the rights in these treaties to the greatest extent possible within devolution, and as strongly as possible. The decision to not place a 'duty to comply' on the special protection treaties is a significant departure from full incorporation of these treaties. We accept that there are complex interactions with the equal opportunities reservation but consider that the consultation does not give sufficient assurance that the approach suggested is maximalist within devolution.

Importantly, the rights of disabled people risk being missed or lacking 'teeth'. The substantive rights in UNCRPD which are not featured in ICESCR must be incorporated fully and must have a duty to comply. ERCS endorses the recommendations made by Disabled People's Organisations including Inclusion Scotland on this matter.

## Part 5 – Recognising the Right to a Healthy Environment

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

We endorse use of the Aarhus definition of the environment, with specific reference to ecosystems and the biosphere. We draw attention to the Aarhus Convention's Preamble, and Article 1 and 2 and would want to see this reflected in the Bill.

Preamble:

*'Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.'*

Article 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.'*

Article 2:

*'The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.'*

Each substantive feature should also be clearly defined. ERCS/LINK have proposed further definitions for each of the substantive features of a healthy environment, drawing on scientific bodies such as the World Health Organisation, Intergovernmental Panel on Climate Change, and Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. For more detail, please consult ERCS/LINK (2023) [The Substantive Right to a Healthy Environment](#).

### 7. If you disagree please explain why.

Not applicable.



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

ERCS welcomes the formulation of substantive aspects of the right to include clean air, safe climate, safe and sufficient water, non-toxic environments, and healthy biodiversity and ecosystems, and applaud efforts to adopt standards such as the UN Framework Principles on Human Rights and the Environment and the Aarhus Convention, as guiding frameworks for the development of this right within the Bill.

We believe that it is important to identify and recognise the six substantive features as both interdependent, and in need of standalone protections as recommended by the UN Special Rapporteur on Human Rights and the Environment.

We question the exclusion of adequate sanitation under safe & sufficient water, given the systemic problems of sewage pollution and wastewater treatment in Scotland. We also disagree with the exclusion of the right to healthy and sustainably produced food because we believe it is a core feature of the substantive right to a healthy environment – see our response to Questions 9 and 10 for further detail.

The procedural element of the right should meet Aarhus requirements, including access to environmental information, public participation in environmental decision-making, access to justice and effective remedies. We welcome the Scottish Government's acknowledgment that they are currently in breach of Article 9(4) of the Aarhus Convention, and that Scotland requires a 'clear, transparent and consistent framework' to meet recommendations of the Aarhus Convention Compliance Committee (ACCC) by the deadline of 1 October 2024.

In September 2021, the governing institutions of the Aarhus Convention made their tenth consecutive finding that the UK is in breach of Article 9(4) of the Convention, which states that access to justice should be '*fair, equitable, timely, and not prohibitively expensive.*' In October 2021, the Convention's Meeting of the Parties (MoP) adopted Decision VII/8s6 – requiring the UK government to submit an action plan to the ACCC, detailing how it will, 'as a matter of urgency' address the findings and recommendations of the Decision.

The Scottish Government must now demonstrate how it will implement the MoP's recommendations to achieve compliance with Article 9(4) by the deadline of 1 October 2024. Proposed reforms currently falls short on this ambition – see our [Evaluation of Scotland's Action Plan](#) (2022). The Government must now present a clear timetable and route map to implement necessary reforms, including an overhaul of court costs regime (replacing Protective Expenses Orders with Qualified One-way Cost Shifting), the removal of court fees from Sherriff courts, amendments to Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, a review of retrospective planning permission, and the reform of procedures in Sherriff courts relating to litter.

## 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.

We strongly disagree with the Scottish Government's proposed approach. While the ICESCR definition (and subsequent elaborations including through General Comment 12) includes consideration of both health and sustainability there has been a tendency – given the severe, persistent and widespread household food



insecurity still affecting so many people across the world - to foreground the dimensions of availability and access.

The argument for including healthy and sustainably produced food as a substantive feature is underscored by UNCRC General Comment no.26 (2023) on children's rights and the environment, with a special focus on climate change, which includes all six substantive features of the right to a clean, healthy and sustainable environment (part III).

Over the last five decades the damage caused by the global food system to nature, climate and health has become more acute, widespread and visible. Adverse environmental impacts across the food supply chain include biodiversity loss/land use change from intensive farming, impacts on water supplies, use of harmful pesticides and fertilisers, emissions from transportation, waste from packaging, and wasted food. There is therefore value in restating as part of the right to a healthy environment the right to healthy sustainable food. The right to food was previously excluded from the Good Food Nation Act, on the grounds that it would be incorporated in the Human Rights Bill. It now needs to be comprehensive.

The reason to incorporate the right to food as a standalone feature is similar to water – while it is recognised under ICESCR, it is also a substantive part of the right to a healthy environment, since sustainable food production is essential for the health of the wider environment. We believe it is important to provide a distinction between the economic/social right to food as it relates to nutrition, access/affordability, adequacy, and culture, and the right to healthy and sustainably produced food as a constituent part of broader environmental health.

Please consult ERCS's briefing [The relationship between a healthy environment and the right to food](#) (2021), and section five of ERCS/LINK's report [The substantive right to a healthy environment](#) (July 2023) for further details.

**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.**

We agree with the need to include safe and sufficient water but believe this feature should also refer to the right to adequate sanitation given the widespread and persistent issues of sewage pollution in Scotland. 'Safe and sufficient' must be conceived of in broad terms, with the aim of restoring the ecosystem health of Scotland's inland waterways, rivers and lochs. It must address wastewater and pollution from sewage, agricultural discharge, and other sources, the impacts of climate change on water availability, and measures for enhanced water monitoring, testing, and enforcement against polluters.

We agree with the reasons provided for including the right to safe and sufficient water as distinct from its conception as a social right under ICESCR, and believe there are similar reasons for including the right to healthy and sustainably produced food. Please consult sections four of ERCS/ LINK's report [The substantive right to a healthy environment](#) (July 2023) for further details.

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

We need to see dedicated reforms with clear timelines to make the Right to a Healthy Environment fully enforceable. We welcome the proposal to incorporate the right to a healthy environment with a duty to comply for public bodies and private bodies delivering public functions, as outlined in Part 4 of the consultation.



ERCS believes that the substantive element includes six features outlined above, which are interdependent and require standalone protections. Each feature must be defined according to expert guidance and international best practice, and adhere to the highest standards, with appropriate enforcement mechanisms to ensure compliance – consult ERCS/ LINK’s report [The substantive right to a healthy environment](#) (July 2023) for further details.

The Scottish Government now has a duty to have due regard to the five environmental principles when developing policy as laid the [Statutory Guidance on the Environmental Principles](#) and required by the [UK Withdrawal from the European Union \(Scotland\) \(Continuity\) Act 2021](#). These are: that protecting the environment should be integrated into the making of policies, precaution, prevention, rectification at source, and the polluter should pay. These principles should be referred to and embedded when establishing the definitions and highest standards of the substantive features, to ensure policy coherence and coordination across all sectors.

For the procedural element to be fulfilled, rights must be enforceable in a court of law, with appropriate mechanisms in place to effectively hold public bodies and polluters to account. With regards to the procedural element, ERCS believes that this must ensure full compliance with Aarhus Conventions access to justice requirements, which include reform of legal aid (Regulation 15), reform of legal expenses and the court costs regime (replacement of Protective Expenses Orders with Qualified One-way Cost Shifting), and the establishment of a dedicated Scottish Environment Court with a comprehensive jurisdiction to increase access to justice, address the current fragmentation in routes to remedy, and develop judicial expertise to improve effectiveness and efficiency. Please consult ERCS briefing and reports including [Recommendations for a Plan of Action on Judicial Expenses](#), [Evaluation of UK Action Plan](#) and [Briefing on why Scotland needs a Scottish Environment Court](#) for further details.

## Part 6 – Incorporating the treaty rights and embedding equality

**12. Given that the Human Rights Act 1998 is protected from modification under the Scotland Act 1998, how do you think we can best signal that the Human Rights Act (and civil and political rights) form a core pillar of human rights law in Scotland?**

We accept the Scottish Government’s conclusions that it is not possible to restate rights included within the Human Rights Act 1998, however this should not preclude public bodies from implementing the duties and rights included in the 1998 Act. The rights enshrined in the HRA should be included as part of the guidance, public body training and capacity building, and information and awareness raising.

**13. How can we best embed participation in the framework of the Bill?**

Participation in decision-making is one of the three pillars of the Aarhus Convention. ERCS believes that participation should be embedded throughout the Bill, including in its purpose, in reporting on implementation of the Bill, and in monitoring and accountability. It is crucial to ensure the participation of underrepresented and marginalised groups, recognising the intersectionality with place-based deprivation and how many in these groups are disproportionately vulnerable to environmental harm.

Participation should be a core principle within the purpose clause, and the Human Rights Scheme should include a requirement on Scottish Ministers to consult people whose rights are at risk. We also support HRCS’s proposal that there should be a programme of participation of people whose rights are most at risk in determining MCOs.



Courts should be required to consider the complainants' views in determining appropriate remedies. We support adopting a citizens assembly model for participatory decision-making where appropriate.

#### **14-18. What are your views on the proposed approach to including an equality provision to ensure everyone is able to access rights, in the Bill?**

We agree that there should be an equality provision, and that LGBTI and older people should be specifically named. Consideration should also be given on how the guidance and interpretation of 'other status' so that other groups whose rights are at risk can be made visible in the Bill, for example Care Experienced people.

### **Part 7 – The Duties**

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

ERCS believes that the duties should apply to all public bodies, private bodies carrying out public functions, and in the case of the right to a healthy environment, business enterprises whose activities adversely impact the right.

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

ERCS understands that public bodies will need time to embed human rights in their decision-making and shift away from 'business as usual' towards addressing systemic discrimination, inequalities and environmental harm. However, the procedural duty must be the duty to have due regard and cannot be open-ended. The timescale for commencement should be no more than six months from Royal Assent. Applying the stronger duty to comply should be no more than two years later, and this date should be specified in the Bill. This gives public bodies time to increase their capacity to develop MCOs and gives rights-holders confidence that the Bill will bring meaningful change and the realisation of human rights in Scotland.

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

ERCS believes that all public bodies and private actors with public responsibilities should be given a duty to comply with rights in the Bill. This includes the delivery of the MCOs as progressive realisation of the rights. Guidance to public authorities should include detail on the definition of progressive realisation, including using maximum available resources, and we consider that this duty should apply after a specified time of no more than two years. This duty to comply should also accompany the duty to have due regard, rather than replace it.

#### **22. Do you think certain public authorities should be required to report on what actions they are planning to take, and what actions they have taken, to meet duties set out in the Bill?**

Yes. Greater information disclosure can enhance accountability and increase responsiveness to public concerns – especially in policy design relating to climate mitigation/adaptation, biodiversity and land use change, and pollution control. It will also motivate greater action from public authorities to uphold the six features of the substantive right to a healthy environment – currently, there is a tendency to act only when information is brought to light via FOI requests from media organisations or campaigners, and increased routine and transparent reporting practices can ensure a more proactive approach from duty bearers. See ERCS/LINK (2023) [The substantive right to a healthy environment](#) for further details.



### **23. How could the proposed duty to report best align with existing reporting obligations on public authorities?**

ERCS believes that the human right to a healthy environment should be disaggregated to focus on protection of the six substantive features of the right, with monitoring and reporting measures that replace the loss of oversight from EU bodies.

Reporting practices should also seek to incorporate learning from the Human Rights Bill Lived Experience Boards, ensuring the voices of those with lived expertise are recognised in public body reporting in order to better understand where there are gaps in upholding the rights of underrepresented and marginalised groups, as well as those most vulnerable to environmental hazards. People whose rights are at risk should shape what is reported on and the content of each report.

Reports should be legible and comprehensible to laypeople and not only those with specialist or technical knowledge. This will ensure reporting can enable rights-holders to use this information to hold public bodies and polluters to account. ERCS also supports publishing reports in a range of different formats and mediums, using an approach of inclusive communications. The Scottish Government should be required to consult with people whose rights are most at risk when developing guidance on reporting requirements.

We agree that it makes sense for these reporting requirements to complement and strengthen other public body reporting requirements.

### **24. What are your views on the need to demonstrate compliance with economic, social and cultural rights, as well as the right to a healthy environment, via MCOs and progressive realisation?**

ERCS believes that all duty bearers (including public bodies, private bodies that have public responsibilities, or act under the control of public bodies; and business enterprises whose activities adversely impact the right) should be obliged to comply with both ICESCR and the right to a healthy environment. This means that when any of them breach the right or fail to demonstrate compliance, an individual or representative body can hold them accountable.

MCOs set a basic floor of rights protections, and are non-negotiable. There must be enforcement mechanisms in place so that breaches of MCOs can be challenged in a court of law.

With regard to progressive realisation, public bodies must demonstrate how they are taking targeted, concrete steps to keep improving the realisation of people's rights, and use 'maximum available resources' to do so. For the right to a healthy environment, ERCS believes that it is important that the five environmental principles are embedded in all policymaking and that protections are non-discriminatory and non-retrogressive. Upholding the right and ensuring progressive realisation could be included within the duties of a Future Generations Commissioner, Wellbeing and Sustainable Development Commissioner or similar role in the future, to prevent backsliding and ensure public bodies understand the consequences of MCOs and progressive realisation in terms of how they design and implement policy.

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

ERCS believes that there should be a clearly articulated duty to comply with the right to a healthy environment – see our response to Part 5 for further details.





## 26. What is your view on the proposed duty to publish a Human Rights Scheme?

ERCS supports the duty to publish a Human Rights Scheme and proposes using the Children's Rights Scheme in the UNCRC Bill as a model template.

## Part 8-Ensuring Access to Justice for Rights-holders

### 27. What are your views on the most effective ways of supporting advocacy and/or advice services to help rights-holders realise their rights under the Bill?

Since 2021, ERCS has delivered its own free legal advice, assistance and representation service, supporting citizens to understand and exercise their environmental rights and hold public bodies and polluters to account. Acting as a 'citizen's advice bureau for environmental matters', we believe these are essential services to increase public participation in decision making and improve access to justice for rights-holders.

In order to ensure affordable access to justice on the environment, the Scottish Government must address its current breach of the Aarhus Convention's Article 9(4) access to justice requirements and deliver concrete reforms to make access to justice affordable by the deadline of 1 October 2024 given by the Convention's governing bodies. This includes increasing access to legal aid, and replacing the Protective Expenses Order regime with Qualified One-Way Cost Shifting (QOCS) – see ERCS (2022) [Evaluation of Scotland's Action Plan on access to Environmental Justice](#) for a full list of recommendations. In addition, in order to advance the procedural right to a healthy environment, the eNGO sector has strongly advocated for a dedicated Scottish Environment Court which would reduce fragmentation and bring expertise and specialism currently lacking in our judicial system, see ERCS (2023) [Briefing: The clear and urgent case for a Scottish Environment Court](#).

More generally, we fully support Human Rights Consortium Scotland's position that the Bill should include access for everyone to independent advocacy, and access to these services should be included in the Human Rights Scheme; and that there should be a step-change in the provision of rights advice in Scotland, including co-production and resourcing of a National Hub for Human Rights Education, Information and Advice.

We also fully support the Consortium's position that a more comprehensive programme of reforms are needed to ensure the right to remedy is affordable, accessible, timely and effective for all rights-holders.

### 28. What are your views on our proposals in relation to front-line complaints handling mechanisms of public bodies?

ERCS supports amending front-line complaints handling by public bodies such as the SPSO to fully recognise rights and duties in this Bill.

ERCS has made a number of representations to Environmental Standards Scotland (ESS) and support their role as an environmental watchdog scrutinising the enforcement of environmental laws and regulations. However, we believe that the existence of ESS is insufficient for addressing the gaps in environmental governance and that a judicial route to remedy must also be accessible, affordable, timely and effective – a dedicated Scottish Environment Court would provide this.

### 29. What are your views in relation to our proposed changes to the Scottish Public Services Ombudsman's remit?

ERCS supports proposals to expand the remit of the SPSO to consider rights issues within complaints. However, more consideration is needed around remedy through SPSO being accessible, effective, affordable, timely and supportive. ERCS has grave concerns about the capacity of SPSO, and reassurance is needed on how the SPSO would provide remedies in a timely manner, and to the SPSO interface with the SHRC. We are



also uncertain how the SPSO expanded remit aligns with the role and remit of Environmental Standards Scotland and further clarity is required on the powers and responsibilities between the two bodies.

We do not agree that SPSO recommendations should be non-binding, and do not believe that individuals should not have to raise a complaint with SPSO before taking a human rights case to court – individuals should have a degree of autonomy in determining the most appropriate course of action.

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

ERCS supports proposals to add human rights to the remit of Scottish scrutiny bodies, so that they assess public bodies on how they are doing in meeting their human rights duties, and what they could do better. Specifically, we support explicit recognition of the right to a healthy environment when Environmental Standards Scotland undertakes investigations. We believe scrutiny bodies should be required to share information with each other, and with the SHRC, CYPCS and others on human rights issues.

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

ERCS believes that the SHRC's mandate should be expanded to accommodate for the provisions of the Bill, with new enforcement powers, additional resource capabilities, and the participation of people whose rights are most at risk.

### **32. What are your views on potentially mirroring these powers for the Children and Young People's Commissioner for Scotland where needed?**

We support endowing the CYPCS with the same or similar powers as those outlined above for the SHRC.

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

ERCS believes a much broader approach to 'standing' must be applied in response to the incorporation of new legal rights, in order to allow NGOs and civil society groups to more easily pursue public interest litigation. This is particularly the case for cases relating to the right to a healthy environment, where violations of the right are more likely to be manifested at the community or national level rather than impacting individuals. Further consideration is needed on court rules that clearly define 'sufficient interest' so that this is clear for courts and for NGOs who are considering taking a case.

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

ERCS believes that the Wednesbury Standard sets an unreasonably high bar in determining whether or not a public body has acted lawfully, reducing the capacity of individuals and civil society to seek accountability or redress for grievances. We therefore fully support a lower threshold than the Wednesbury test for duties under this Bill and wider.

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

ERCS welcomes consideration of extending the remedies available to bring justice for different people and on different rights, including structural interdicts. We endorse proposals for courts to consult the person taking the rights case in deciding what remedies are granted. Consideration should be given to the level of compensation that is available as a rights remedy, ensuring that this is commensurate with the seriousness of rights violations.



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?

See above.

Question 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 ERCS's view, human rights and environmental rights are non-negotiable. Courts should be able to 'strike down' laws or issue declarators of incompatibility for any part of Scottish Parliament law that is not compatible with rights included in the Bill.

## Part 9 – Implementing the new Scottish Human Rights Act

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

Whilst ERCS accepts that public bodies cannot put in place the infrastructure they need for compliance and implementation overnight, it is imperative that a clear timetable is introduced to enact provisions of the Bill at the earliest opportunity.

With regards to the right to a healthy environment, there should be no delay to comply with procedural elements of the right, since the Aarhus Convention Compliance Committee has already made clear what reforms are required to comply with access to justice requirements before a deadline of October 2024. This includes making Aarhus cases affordable by reform of legal aid, replacing the 'loser pays' rule with qualified one way costs shifting, and removal of court fees outwith the Court of Session— see our [evaluation](#) of Scotland's action plan for further details. With regards to the substantive element of the right, the urgency for radical action to address the climate and nature emergencies, and the foundational status of a healthy environment in underpinning all other rights, means that enforcing this aspect of the right must be of utmost priority for public bodies. As we have outlined above, due regard should be enacted no later than six months after Royal Assent, and the duty to comply within two years. This gives reasonable timescales to increase capacity for duty bearers and allow the development of guidance and MCOs.

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

ERCS supports proposals to establish MCOs through a participatory process, and this should be particularly with groups whose rights are most at risk. With regard to the right to a healthy environment, this must include members of impacted communities, who have been exposed to environmental harm, and children and young people, who will experience future impacts of the climate and nature emergencies. It should also include environmental NGOs and scientific bodies who have expertise on the environmental determinants to inequalities in health.

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

We agree with the proposal to have a Human Rights Scheme. Scottish Ministers should have to consult with people whose rights are most at risk when developing the Scheme and reporting against it, and report against it annually.



#### 41. What are your views on enhancing the assessment and scrutiny of legislation introduced to the Scottish Parliament in relation to the rights in the Human Rights Bill?

ERCS supports proposals to enhance scrutiny of legislation in relation to rights included in the Bill. Statements of compatibility should include a requirement to demonstrate that consultation with people whose rights are at risk has been undertaken in order to assess a Bill's compatibility with human rights. We also support replicating best practice from the UNCRC Bill, whereby Ministers are required to carry out Human Rights Impact Assessments for any Bill or SI introduced to the Scottish Parliament. Parliamentarians should directly engage with individuals who have experienced rights violations before determining how best to enhance scrutiny.

#### 42. How can the Scottish Government and partners effectively build capacity across the public sector to ensure the rights in the Bill are delivered?

ERCS agrees with the National Human Rights Taskforce recommendation on guidance – that is, there should be statutory and non-statutory guidance, and it should be developed through consultation, including with rights-holders.

#### 43. How can the Scottish Government and partners provide effective information and raise awareness of the rights for rights-holders?

ERCS supports a public awareness campaign to ensure that people in Scotland understand the new human rights framework. We fully endorse HRCS's proposal to co-produce and fund a National Network for Human Rights Information, Education, Legal Services and Advice. Resources should be available in public institutions such as schools, libraries, hospitals providing guidance on how people can exercise and enforce their rights. Awareness raising must be done in collaboration with trusted community leaders to reach underrepresented and marginalised communities, in a range of languages and catering to accessibility requirements.

#### 44. What are your views on monitoring and reporting?

For the rights in this Bill to be effective, they need clarity and teeth. An accurate record of information is essential to determine whether public bodies have met their duty to comply, and seek remedy in cases where they have not.

We note the views of the Human Rights Bill Lived Experience Boards who emphasised that government and public bodies should not be able to 'mark their own homework' when it comes to rights. Transparent monitoring reporting practices can ensure their fears are not confirmed.

### For more information contact

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