

ERCS consultation response Proposed Ecocide (Prevention) (Scotland) Bill



9 February 2024

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 carry out advocacy in policy and law reform to improve environmental rights and compliance with the Aarhus Convention on access to information, public participation in decision-making, and access to justice on environmental matters.

This is ERCS's response to Monica Lennon MSP's consultation on the proposed Ecocide (Prevention) (Scotland) Bill.

Aim and approach

1. Which of the following best expresses your view of the proposed Ecocide Prevention (Scotland) Bill?

- Fully supportive
- Partially supportive**
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

ERCS fully supports the principle of robust criminal sanctions for ecocide-level crimes. These sanctions should punish actors responsible for the most serious environmental harm and act as a deterrent to avoid such damage. Establishing these sanctions in Scots law aligns with the Scottish Government's duty to have due regard of [the guiding principles on the environment](#) when considering proposals for legislation. In protecting the environment from ecocide-level damage, such sanctions apply the integration, prevention, polluter pays, and precautionary principles.

However, greater clarity is needed as to the purpose of the Bill. ERCS has commissioned research on the feasibility and options of incorporating ecocide into Scots law, which will be published by the end of March 2024. In January 2024, we convened a roundtable with 44 participants from eNGOs, legal and academic interests to inform the research. This

consultation response refers to the some of the points raised at the roundtable discussion and questions that require further consideration.

ERCS does not see this proposal as a replacement for addressing the significant gaps in environmental governance and enforcement of existing environmental laws. For greater detail on these issues, please see our [consultation response to the Review of the Effectiveness of Environmental Governance](#).

The aims included in the [Consultation Document](#) ('Consultation') address a broad scale of environmental damage as well as keeping pace with environmental law developments in other jurisdictions. Some of these aims exceed what we would consider the remit of an ecocide law, while others give rise to questions around the Bill's practical implementation.

Ecocide law is not designed to address all environmental crimes, but strictly those which meet the specific impact threshold of causing severe and either widespread or long-term damage to the environment. We disagree with the Consultation's view of the Bill as providing 'a singular, overarching piece of legislation that covers all aspects of harm against the environment in an integrated fashion'. On the contrary, as also stated in the Consultation, ecocide is an 'offence to punish the most serious environmental crimes' and is therefore better understood as sitting at the top of a regulatory pyramid ([Braithwaite, 2016](#)).

It is important to recognise that the majority of environmental harm and degradation in Scotland is due to the cumulative impact of relatively minor harmful actions and insufficient regulatory enforcement. This broader failure of the environmental governance regime in Scotland is beyond the scope of the proposed Bill. It must instead be addressed through measures including improved oversight of comprehensive environmental data monitoring, increased resources and assertive commitment from regulators to hold polluters to account.

We do not believe that criminal law can address 'all aspects of harm against the environment' as the Consultation claims, or that this Bill, alone, will sufficiently improve the law enforcement rates. There are gaps in both civil and criminal law, and both need to be improved in tandem to protect Scotland's environment 'in an integrated fashion'.

On the content of the proposed Bill, there are a number of questions and points for clarification which will need to be addressed to determine its effectiveness against ecocide-level environmental damage. These include:

- how to account for cumulative damage, e.g. diffuse pollution;
- how to determine culpability;
- how this legislation would impact on existing legislation including the [Regulatory Reform \(Scotland\) Act 2014](#);
- how this legislation would impact on the powers of existing enforcement agencies and whether there would be additional resources for investigations and prosecutions;

- how this legislation would account for the transboundary nature of environmental harm and coordination across jurisdictions on such cases;
- whether this legislation would apply to Scottish entities causing ecocide-level damage outside of Scotland;
- whether this legislation is intended to cover licenced activities which cause cumulative harm and, if so, how.

2. Do you think legislation is required, or are there other ways in which the proposed Bill's aims could be achieved more effectively?

- Yes, legislation is required**
 No, legislation is not required
 Do not wish to express a view

Criminalising ecocide in Scots law would add an additional threshold of penalties for severe and widespread environmental damage. Specific environmental offences already exist in Scots law, including wildlife crime under the Wildlife and Countryside Act 1981, or water pollution under the Water Environment (Controlled Activities) (Scotland) Regulations 2011. Acts of significant environmental harm are addressed in the [Regulatory Reform \(Scotland\) Act 2014](#) (s. 40), and the proposed Bill would incorporate additional sanctions for cases where the scale and severity of environmental damage is comparable to ecocide. However, the Bill's provisions in relation to s.40 of the Regulatory Reform (Scotland) Act 2014 require further consideration.

Legislating to criminalise ecocide would align with the Scottish Government's commitment that Scottish laws 'keep pace' with European Union ('EU') law under the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. In November 2023, the European Council and European Parliament provisionally agreed to include 'an offence comparable to ecocide' in the proposed replacement of Directive 2008/99/EC on the protection of the environment through criminal law (the revised EU Environmental Crime Directive). Paragraph 2a in Article 3(2) of [the final compromise text](#) defines that any particularly destructive criminal conduct as listed in Article 3(2) should be considered a 'qualified offence'. These 'cases comparable to ecocide' should be 'punished with more severe penalties' than other environmental crimes (paragraph 9fa, preamble).

ERCS also acknowledges that by incorporating ecocide into Scots law, Scotland would join the growing number of jurisdictions – including the EU – in criminalising ecocide-level environmental damage. This momentum includes Baroness Rosie Boycott's Private Members' [Ecocide Bill](#) (introduced in November 2023 in the House of Lords) in the United Kingdom, and the international campaign to incorporate ecocide into the Rome Statute of the International Criminal Court. While it remains unclear whether Scotland currently has an example ecocide-level case, we recognise the interdependence of domestic and international criminalisation.

Legislating for ecocide in Scots law would strengthen the call for universal jurisdiction over the crime as the ultimate sanction and deterrent.

3. Do you think that creating an offence of ecocide would have a deterrent effect against damage to the environment?

Yes, there would be a deterrent effect

No, there would not be a deterrent effect

Do not wish to express a view

ERCS considers that creating an offence of ecocide could contribute to a robust framework around preventing ecocide-level environmental damage. Adding to the existing body of criminal law, it would strengthen the law's capacity to sanction this kind of damage to Scotland's nature and society with the requisite seriousness. Criminalisation of ecocide must encourage increased checks and balances in how Scotland's enforcement agencies are responsible for protecting the environment from harm, and the tools they have available to fulfil this purpose.

However, clearly defining what constitutes ecocide and the Bill's jurisdiction are essential to the extent of a deterrent effect because they determine what entities it applies to. As an example, the current draft of the revised Environmental Crime Directive would apply to both crimes committed fully or in part within the EU member state's territory and by its nationals, and gives further options for extending jurisdiction (Article 12).

Any deterrent effect also depends on whether the penalties are proportionate to the severity of the crime. For example, if the fines for ecocide are perceived by corporations to be less than the profits arising from it, it is unlikely that the law will be preventative. In addition, the law needs to be enforceable in practice for a realistic deterrent. Given the low level of detection and prosecution of current environmental offences, more consideration of the Bill's practical implementation is required, including the willingness and resources to investigate and prosecute, as well as being able to prove culpability.

4. Do you have any views on the proposed legal definition of ecocide as unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the Scottish environment being caused by those acts?

Yes, I support the proposed definition

No, I do not support the proposed definition

X Prefer another definition

ERCS considers that more consideration on the legal definition of ecocide in the Scottish context is required before we can take a definitive view on any proposals. For this purpose, ERCS has commissioned research by [Dr Rachel Killean](#) and [Professor Damien Short](#) which will consider potential domestic definition of ecocide, its *actus reus*, appropriate gravity threshold, fault standard/*mens rea*, and causation, as well as the potential overlap or conflicts with existing environmental and/or criminal laws in Scotland.

ERCS supports learning from the current EU work on defining ecocide, including the European Law Institute's ('ELI') [Report on Ecocide](#). While the proposed legal definition draws from some of this work, [the draft of the revised Environmental Crime Directive](#) has evolved after the Consultation was lodged in November 2023. Further revisions may be expected along the legislative procedures and EU member states' adoption of the Directive. The EU process both highlights the importance of further analysis to shape the legal definition and represents an opportunity to learn from.

The legal definition of qualified offences or 'cases comparable to ecocide' used by the European Council and European Parliament in the current draft of the revised Environmental Crime Directive is:

'offences referred to in Article 3(2), are considered a qualified offence if they cause destruction of, or widespread and substantial damage, which is either irreversible or long-lasting, to an ecosystem of considerable size or environmental value, or to a habitat within a protected site, or to the quality of air, the quality of soil, or the quality of water' (Article 3(2a)).

The draft Directive then includes a list of environmental crimes in Article 3(2), which this definition of a 'qualified offence' applies to if they cross the impact threshold. When investigating a suitable legal definition for Scotland, elements to draw on include:

- Because an exhaustive list of acts of ecocide is difficult to create, defining ecocide qualitatively through its ecological impacts may be most appropriate. However, providing as guidance a list of serious illegal acts which may be added to could be useful in identifying typical behaviours ([ELI, 2023, p.24](#)).
- Expanding the notion of a victim beyond individual beings to systems of life, which could be useful for holistically capturing the damage caused by ecocide.
- The definition recognises 'death or serious injury to any person' as an element of acts that may be considered ecocide (Article 3(2)).
- The formulation of *mens rea* and its impact on the burden of proof, specifically in the context of corporate structures for the purposes of holding corporations accountable.

- Its unlawfulness requirement, which does not absolve licenced activities if the permit was acquired criminally or the act is 'in manifest breach of relevant substantive legal requirements' (Article 3(1)).

5. Which of the following best expresses your view of the proposed sanction of imprisonment up to a maximum of 20 years for individuals, including responsible officials such as company directors?

- Fully supportive**
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Do not wish to express a view

ERCS supports the proposed sanction in principle. Given that an ecocide-level offence would cover severe environmental damage, it should be met by corresponding criminal sanctions. In the context of the sanctions in existing environmental law in Scotland, where the maximum term of imprisonment is currently five years (for example, the Regulatory Reform (Scotland) Act 2014), imprisonment up to a maximum of 20 years for ecocide appears appropriate. This maximum term is also aligned with the evolving criminalisation of ecocide in other jurisdictions, where it carries imprisonment up to 10-20 years (for example, the proposed revision to Belgian Penal Code, or Article 231-3 of the French Climate and Resilience Law).

We agree that both individuals and the responsible officials of legal bodies such as company directors should be held liable and be equally subject to imprisonment penalties for ecocide. However, we consider that more analysis on how to identify liability for ecocide is required, particularly on the unlawfulness requirement and timescales for taking action. The current draft of the revised EU Environmental Crime Directive provides useful examples in response to these questions.

6. Which of the following best expresses your view of the proposed financial sanctions worth 10% of worldwide turnover for companies over three years?

- Fully supportive
- Partially supportive**
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Do not wish to express a view

ERCS is partially supportive of the proposed financial sanctions. In line with the polluter pays principle, we support establishing financial sanctions that correspond to the severity of ecocide both for individuals and companies. For this fine to be a deterrent, however, increasing the maximum penalty or removing the limit altogether may be needed depending on how fines for ecocide evolve in other jurisdictions.

In determining appropriate financial sanctions, we encourage consideration of the financial benefits resulting from the crime of ecocide. For example, the current draft of the revised EU Environmental Crime Directive proposes that Member States could confiscate proceeds from the criminal offence (Article 10).

Further, we support investigating the adoption of additional punitive measures. The current draft Environmental Crime Directive provides non-exhaustive lists of additional measures for natural and legal persons in Articles 5 and 7 respectively that may be appropriate for establishing proportionate and effective sanctions. We encourage consideration of how these additional measures could contribute to the restoration of the environment insofar as possible.

Given the gravity of ecocide-level crimes, it is critical to the efficiency and dissuasiveness of the law that regulatory and judicial bodies should have access to commensurate criminal penalties.

Resource implications

7. Taking into account all those likely to be affected (including public sector bodies, businesses and individuals etc), is the proposed Bill likely to lead to:

- A significant increase in costs
- Some increase in costs**
- No overall change in costs
- Some reduction in costs
- A significant reduction in costs

Given that the legislation will only apply to the most severe environmental crimes, it is hoped that there will only be some increase in costs, such as the investigation of ecocide by relevant public bodies and hearing of cases by courts. A proportion of the fines collected from those charged with ecocide could be used to underwrite any additional costs of enforcement in line with the polluter pays principle.

Human rights

8. The Human Rights Act 1998 incorporated the European Convention on Human Rights (ECHR) into UK law. It means that public authorities, must not act in a way that is incompatible with the rights set out on the ECHR. Do you have any views on potential impacts of the proposals in this consultation on human rights?

Legislating for ecocide in Scots law is compatible with [the United Nations \('UN'\) resolution on the human right to a healthy environment](#), as it will provide punishment and/or deterrent in upholding the substantive right to a healthy environment. The Scottish Government has committed to incorporating the right to a healthy environment in the Human Rights (Scotland) Bill in this parliamentary session.

Equalities

9. Any new law can have an impact on different individuals in society, for example as a result of their age, disability, gender re-assignment, marriage and civil partnership status, pregnancy and maternity, race, religion or belief, sex or sexual orientation. What impact could this proposal have on particular people if it became law?

ERCS recognises that the impact of environmental harm is disproportionately felt by the most marginalised people and places both globally and in Scotland. Legislating for ecocide would advance environmental justice by building the law's capacity to hold polluters to account.

Sustainability

10. Any new law can impact on work to protect and enhance the environment, achieve a sustainable economy, and create a strong, healthy, and just society for future generations. Do you think the proposal could impact in any of these areas?

By criminalising financial gain from severe destruction of nature, the law could contribute to ensuring that the economic decisions of individuals and corporations are in line with sustainable development of Scotland, including the UN Sustainable Development Goals and with the Scottish Government's [ambition to develop a wellbeing economy](#), which aims to deliver 'a just transition to a net zero, nature-positive economy based on the principles of equality, prosperity and resilience'.

For more information contact

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