

Scottish Government consultation on a Human Rights Bill for Scotland

Response from Obesity Action Scotland

Closing date: 5th October 2023

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

Disagree

Question 7 – If you disagree, please explain why

We disagree with the proposed basis for defining the environment as this appears to be based solely on understanding the environment in the natural sense, such as clean air, clean water, biodiversity etc. We agree these are key parts of the environment and should of course be protected in human rights, however, it should not be limited to only these aspects.

Access to healthy and sustainable food, and built environments which actively promote and facilitate health, are also important, and should be included in any definition of the environment. Food is not currently mentioned in the information on page 21 of the consultation document where this is discussed, which is a significant omission.

We will discuss this further in our response to question 9.

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

At the outset, there is a need to clearly define what we mean by a healthy environment. As acknowledged in the consultation paper, the right to a healthy environment has yet to be enshrined within an international treaty, so this provides an opportunity to lay out how we want to define this in Scotland.

As outlined in our response to question 8, we disagree with the currently proposed basis for defining a healthy environment as it doesn't reference access to healthy food. It is outlined within the consultation that the Right to Food will be incorporated into law in Scotland through the incorporation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is imperative that this right is incorporated if we want to deliver many of the other rights discussed/outlined in the consultation, including the right to a healthy environment. We and many other organisations have been advocating for the right to food to be incorporated into law in Scotland for a number of years¹, including via the recently passed Good Food Nation (Scotland) Act. We were reassured that it would be incorporated via this Bill, and therefore it is imperative this happens and is as far reaching as possible.

In Scotland we face a significant challenge in achieving health-based dietary goals. Changing our food system is the best way to achieve those goals and the Good Food Nation (Scotland) Act

¹ <https://www.obesityactionscotland.org/campaigns-and-policy/consultation-responses/our-response-to-the-scottish-parliament-rural-affairs-islands-and-natural-environment-committees-call-for-views-on-good-food-nation-bill-december-2021/>

combined with a meaningful right to food could help enable an improved food system. We wish to ensure that between both pieces of legislation we create robust and meaningful change in the food system that ensures the population of Scotland have both the right and the ability to access and afford healthy food to support and enable their health.

Question 9 – Do you agree or disagree with our proposed approach to the protection of healthy and sustainable food as part of 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 disagree with the proposed approach.

As previously stated, it is welcome that the right to food will be incorporated through this Bill. However, this cannot be separated from the right to a healthy environment.

In a recent resolution, the United Nations Human Rights Council² and Environment Programme³ declared the right to a clean, healthy and sustainable environment as a human right, and that this includes food. They list healthy and sustainable food as one of six central substantive elements of the right to a healthy environment⁴. The substantive elements of the right to a healthy environment makes important linkages between environmental sustainability and food, and how providing healthy and sustainable food is a core component of improving the health of our environment, as well as people. This is supported by findings from the EAT Lancet Commission in 2019 which coined the term ‘global syndemic’ which recognised the core linkages between obesity, malnutrition in all its forms, and climate change⁵. It outlines that by bringing them together, there is increased potential to strengthen action and also accountabilities on all three challenges. This demonstrates how food and the environment are determinants of each other, and that they therefore cannot be separated. If we want to deliver the right to a healthy environment, this must include provision of healthy and sustainable food.

Evidence shows that what’s around us, shapes us. The food environment experienced on a daily basis by individuals is a primary influence on their diet, health and weight outcomes. Availability of healthy and sustainable food is often determined by the environment people live in and evidence in Scotland shows that these environments are highly unequal, and further drive inequalities in health and dietary outcomes. Evidence shows that outlets selling unhealthy food are more heavily clustered in more deprived areas and that essential healthy and sustainable food can cost up to three times as much⁶.

The planning system has a key role to play in determining what outlets are located within local areas, through planning and licensing decisions taken by local authority planning teams. The recently published National Planning Framework 4 (NPF4) provides some important opportunities in this regard. For example, policies within NPF4 have introduced a presumption against drive through takeaways, and that development proposals likely to have a positive impact on health should be supported, alongside not supporting those that are likely to have a significant adverse impact on health⁷. The presumption against drive throughs was premised on reducing the environmental

² <https://www.ohchr.org/en/statements-and-speeches/2022/04/right-healthy-environment#:~:text=Human%20Rights%20Council%20resolution%2048,at%20the%20UN%20General%20Assembly>

³ <https://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right>

⁴ Environmental Rights Centre for Scotland (2023) The Substantive Right to a Healthy Environment: A review of definitions, standards and enforcement mechanisms https://www.ercs.scot/wp/wp-content/uploads/2023/07/The-Substantive-Right-to-a-Healthy-Environment_June-23_online.pdf

⁵ Swinburn B, Kraak VI, Allender S, et al (2019) The Global Syndemic of Obesity, Undernutrition and Climate Change: The Lancet Commission report, *Lancet* 393(10173):791-846

⁶ Macdonald, L, Olsen J. R, Shortt, N. K and Ellaway, A (2018) Do ‘environmental bads’ such as alcohol, fast food, tobacco, and gambling outlets cluster and co-locate more in deprived areas in Glasgow City, Scotland? *Health and Place* 51, 224 – 231

⁷ Scottish Government (2023) National Planning Framework 4 (NPF4)

<https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2023/02/national-planning-framework-4/documents/national-planning-framework-4-revised-draft/national-planning-framework-4-revised-draft/govscot%3Adocument/national-planning-framework-4.pdf>

impact of traffic/vehicles travelling to these outlets, but would also likely have a positive health impact too, demonstrating the interlinkages between policies designed to protect planetary and human health. Including healthy and sustainable food in the right to a healthy environment could provide an opportunity to further strengthen and utilise these policies (and others) with NPF4, as local authority planning teams, as public bodies, would be rights duty holders and so would therefore be required by law to fulfil this right for all citizens.

Page 22 of the consultation document states “...the aspect of healthy and sustainable food can be better respected, protected and fulfilled via the incorporation of the right to adequate food as provided for by ICESCR and that sustainability makes up a key element of the right to adequate food”. We have some concerns regarding this. Although sustainability is mentioned in the above quote, given that ICESCR only refers to adequate food, it is not clear how it will be guaranteed that the food provided is also sustainable and healthy. This is not made explicit in the consultation which creates the potential to leave this open to interpretation. The Scottish Human Rights Commission outlines that the right to the food can be broken down into three elements – in addition to adequate, it also includes available and accessible⁸. This is further supported by Scotland’s second National Human Rights Action Plan (SNAP2) which outlines these three elements as essential components of the right to food. SNAP2 goes further to also include sustainability as an essential component⁹. This suggests that defining the right to food as adequate food is unlikely to be sufficient, and a much broader definition is required. If sustainability is being considered as making up a key element of the right to adequate food, which the quote above appears to suggest, this needs to be explicitly defined and outlined in the Bill.

There is also the potential for conflict and contradiction with other areas of ICESCR which need to be considered. Another right being incorporated via ICESCR is the right to the highest attainable standard of physical and mental health. However, we do not feel the right to adequate food is sufficient to meet this highest attainable standard. To achieve this, the standard needs to be healthy and sustainable food, rather than just adequate food. Therefore, given the current wording within ICESCR, this further emphasises the need for healthy and sustainable food to be included within the right to a healthy environment.

It is also unclear what is meant by adequate food or how this will be defined. We will discuss this further in our response to question 24 on Minimum Core Obligations (MCOs) and progressive realisation of rights. If the right to adequate food is the standard that is going to be incorporated, it is important that the definition of adequate is as strong as possible, in relation to the types of food and level of nutrition it covers.

Ultimately, incorporating the right to food into law in Scotland needs to be seen as a whole systems approach to improving the food system to tackle interlinked challenges of poverty, diet-related ill health, and climate change. It is in the interest of this Bill to join up policy making by recognising these connections and tackling them in progressive ways. By including the right to food under both ICESCR and the right to a healthy environment, it will not only help to deliver improved outcomes for people, but will also support the realisation of other rights in the Bill.

Question 19 – What is your view on who the duties in the Bill should apply to?

We agree that the duties in the Bill should apply to as many public bodies as possible, as well as private organisations delivering public functions.

We note the duties will not apply to private organisations who do not deliver public functions. The actions and activities of many private actors, such as large multinational food corporations, can

⁸ Scottish Human Rights Commission. The Right to Food <https://www.scottishhumanrights.com/our-law-and-policy-work/right-to-food/>

⁹ Scotland’s second National Human Rights Action Plan (SNAP2) (2023) <https://www.snaprights.info/wp-content/uploads/2023/03/SNAP-2-March-2023-FINAL-PDF.pdf>

undermine many of the rights to be incorporated as part of the Bill, and therefore, duties should also apply to them. As such duties cannot be directly applied to these private actors, the duty to protect citizens from the actions and activities of these actors should lie with the government, who can deliver necessary protections through implementation of effective regulations and regulatory practices.

The UN Committee on Economic, Social and Cultural Rights, which monitors the implementation of ICESCR¹⁰ (which will be incorporated via this Bill) states that in order to fulfil the right to health, the state has a duty to protect individuals from infringement of their right to health by external third parties, including corporations. Additionally, the UN Guiding Principles on Business and Human Rights outline that states have a responsibility to regulate harmful business practices, and commercial and business actors have a responsibility to protect and respect human rights, including the right to health¹¹. However, in many areas, such as advertising and marketing practices of large food and drink companies, the Scottish and UK governments have delegated regulation of this advertising and marketing to these corporate actors, through self-regulation practices and voluntary codes. Evidence shows that these voluntary self-regulatory practices are ineffective at protecting adults and particularly children from exposure to and harm from these corporate actors and the health harming commodities they produce¹². Therefore, we need to see implementation by the government of effective regulation and regulatory practices. In such instances, the government should become the duty holder and has a duty to fulfil this obligation to protect its citizens through the implementation of regulations and regulatory regimes, to protect individuals from private actors who manufacture, sell and distribute health harming products, such as through regulations on promotions and advertising of food and drink products high in fat, salt and sugar (HFSS).

Questions 21 – What is your view on the proposed duty to comply?

We agree that all public bodies should be given a duty to comply with the rights in the Bill. We agree that this duty to comply should include delivering Minimum Core Obligations (MCOs) and demonstrating progressively realising rights. Guidance to public authorities should include detail on the definition of progressive realisation, including using maximum available resources. For the duty to comply to operate effectively, there needs to be a clear set of workable, outcomes-based requirements for each right, including the development of measurement metrics. We support Nourish Scotland and other's position in calling for this.

Question 23 – How could the proposed duty to report best align with existing reporting obligations on public authorities?

We agree that public authorities should have reporting requirements, and this should largely mirror the UNCRC reporting requirements. Public bodies should have to consult with people whose rights are most at risk when developing these reports, including to ensure that the content is accessible.

There is a need to map all existing reporting obligations and requirements on duty holders with the aim of streamlining reporting to make it more transparent, consistent and accountable. We support Nourish Scotland's suggestion that an effective way to do this would be through the Good Food Nation Pans and the reporting duties these will place on actors.

¹⁰ <https://www.ohchr.org/en/treaty-bodies/cescr>

¹¹ Alcohol Focus Scotland (2022) Realising our Rights: How to protect people from alcohol marketing <https://www.alcohol-focus-scotland.org.uk/media/440171/realising-our-rights-how-to-protect-people-from-alcohol-marketing.pdf>

¹² World Health Organisation (2023) Policies to protect children from the harmful impact of food marketing: WHO Guidelines <https://www.who.int/publications/i/item/9789240075412>

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

We support the need to demonstrate compliance with economic, social and cultural rights, as well as the right to a healthy environment through minimum core obligations (MCOs) and progressive realisation. MCOs and progressive realisation are particularly important with regards to rights under ISESCR, as they set the core minimum under which protections cannot fall and are useful in crisis situations, for example, where emergency action has previously resulted in erosion of some rights.

Page 32 of the consultation document outlines that the following should be considered within the scope of the MCO: “*minimum essential and nutritionally adequate food to ensure freedom from hunger for all*”. However, this does not make it clear what the MCO actually is. For example, it is unclear how both essential and nutritionally adequate are being defined. These are both subjective and neither are currently defined in the consultation.

Food is essential to sustain life and promote health. Poor diets are a leading contributor to non-communicable diseases (NCDs) and other poor health outcomes¹³. This impacts on the right to health, and for this right to be realised, individuals need access to a diet which promotes and sustains health, rather than a diet which simply ensures freedom from hunger.

We believe the minimum core in relation to the right to food should go beyond nutritionally adequate and should instead align with the Scottish Dietary Goals. These goals already exist in policy and practice in Scotland, and enshrining them in law as the minimum core would help to ensure that the standard of food provided by those who are duty holders does not fall below this. Progress beyond this would then be achieved through progressive realisation.

With regards to progressive realisation, the consultation does not make it clear how this will be realised or over what period of time, for example. This needs to be clarified, to ensure duty holders are clear on their obligations and to ensure rights are met and fulfilled at all times.

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

We welcome the right to a healthy environment falling under the same duties as economic, social and cultural rights. In this regard, and as outlined earlier in our response, the right to food needs to be included as a core part of the right to a healthy environment in order for the right to be properly met and fulfilled.

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

All of the international rights detailed within the Bill to be incorporated are already in place, so implementation of these rights can and should begin now.

We support the recommendation of the Scottish Human Rights Consortium that timescales need to be specified within the Bill and given priority. Commencement of the Bill should be no more than six months after Royal Assent, with the duty to comply with incorporated rights to be delivered no more than 2 years later. These are reasonable timescales that allow for the development of guidance, public sector capacity, and development of the required MCOs.

¹³ <https://www.who.int/data/gho/data/themes/noncommunicable-diseases#:~:text=Common%2C%20modifiable%20risk%20factors%20underlie,be%20overcome%20using%20existing%20knowledge.>

About us

Obesity Action Scotland provide clinical leadership and independent advocacy on preventing and reducing overweight and obesity in Scotland.

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