

Environmental Rights Recognition Project

The right to a healthy environment:
the time has come



About the Environmental Rights Recognition Project

The Environmental Rights Recognition Project (ERRP) was started by lawyers Harry Balfour-Lynn and Sue Willman in 2021 to promote the recognition of the legal right to a healthy environment in the UK and across Europe, through partnership between students, academics, NGOs, practising lawyers, law-makers and environmentalists. The project is principally based at the Legal Clinic of the Dickson Poon School of Law of King's College London and relies on research by undergraduate and graduate students from King's.

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1. INTRODUCTION

In May 2022, the Environmental Rights Recognition Project published a briefing paper exploring the benefits of recognising a right to a healthy environment in the United Kingdom (“ERRP 2022 Briefing”),¹ with a focus on recognising the right within the European Convention on Human Rights.² Since the field of environmental rights is a fast-moving one, there have been significant developments since that paper was published. However, the seriousness of the environmental crises facing the world has not diminished,³ and the relentless extreme weather events that have affected the global population in 2023 (which has included the hottest month on record) have further emphasised the effect of global heating.⁴

The arguments in favour of recognising a right to a healthy environment set out in the ERRP 2022 Briefing are therefore more relevant than ever, and with a general election likely to take place in the UK in 2024, now is the time to consider how a right to a healthy environment can be implemented here in the UK. This briefing paper is intended to act as a prompt for those considerations, by summarising the current position and providing some recommendations as to what the next steps should be.

Section 2 of the paper sets the scene by providing an update on the growing support for the right to a healthy environment in the UK and around the world. Section 3 provides a brief summary of the different dimensions that the right to a healthy environment can contain, in order to provide a high-level picture of what recognition of a right to a healthy environment means. Section 4 considers some global examples of the right to a healthy environment working in practice. Section 5 considers how the right to a healthy environment can be implemented in the UK, in particular by considering the draft Environmental Rights Bill published in June 2023.⁵ Section 6 sets out some conclusions and recommendations.

¹ Harry Balfour-Lynn and Sue Willman, ‘The Right to a Healthy Environment in the United Kingdom: Supporting the Proposal for a New Protocol to the European Convention on Human Rights’ (3 May 2022) <<https://papers.ssrn.com/abstract=4099619>>.

² “ECHR” or “the Convention”.

³ See eg Katherine Calvin and others, ‘IPCC, 2023: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (Eds.)]. IPCC, Geneva, Switzerland.’ (First, Intergovernmental Panel on Climate Change (IPCC) 2023) <<https://www.ipcc.ch/report/ar6/syr/>>.

⁴ UN News, ‘It’s Official: July 2023 Was the Warmest Month Ever Recorded’ (8 August 2023) <<https://news.un.org/en/story/2023/08/1139527>>.

⁵ Wildlife & Countryside Link and others, ‘The Environmental Rights Bill’ (June 2023) <<https://www.wcl.org.uk/assets/uploads/0/The%20Environmental%20Rights%20Bill%20-%20June%202023.pdf>>.

In summary, the recommendations in section 6 are as follows:

- Each political party in the UK should adopt a pledge in their 2024 general election manifesto to seek the recognition of the right to a healthy environment.
- As part of that pledge, each party should commit to the commissioning of a report and recommendations as soon as possible on the implementation of the right to a healthy environment. That report should be produced by the Law Commission with input from the Office for Environmental Protection.
- The referral to the Law Commission should take the draft Environmental Rights Bill as its starting point. However, it should also provide for the exploration of international examples and further points beyond the draft Environmental Rights Bill.

2. THE GROWING SUPPORT FOR A RIGHT TO A HEALTHY ENVIRONMENT

There is significant and growing support for the recognition of a right to a healthy environment, at the international, Council of Europe, and UK levels.

At the international level, a key milestone came on 28 July 2022, when the United Nations General Assembly (UNGA) voted in favour of recognising “the right to a clean, healthy and sustainable environment as a human right”.⁶ That followed the recognition of the same right by the United Nations Human Rights Council (UNHRC) on 18 October 2021.⁷ The UNGA resolution passed with 161 votes in favour, eight abstentions, and no opposition.⁸ Those voting in favour included the countries of the EU, the UK and – notwithstanding its historical opposition to the recognition of new rights – the USA.⁹ The recognition of a universal right to a healthy environment by UNGA was the result of decades of work,¹⁰ and was trailed as a moment that could change “the very nature of international human rights law”.¹¹ However, such resolutions are “soft law”, meaning that they are not legally binding, and some therefore see the UNGA resolution as only a start. For example, the Global Pact Coalition has called for the resolution to be converted into “hard law” through the establishment of a new global Covenant on the Right to a Healthy Environment.¹²

There have also been significant steps at the level of the Council of Europe – the body with responsibility for the ECHR – which was the main focus of the ERRP 2022 Briefing.¹³ As explained in that paper, the Parliamentary Assembly of the Council of Europe (PACE) passed a resolution and published a recommendation in 2021 proposing a new Protocol to the ECHR establishing the right to a healthy

⁶ UNGA, Resolution on the human right to a clean, healthy and sustainable environment (28 July 2022) A/RES/76/300 <<https://digitallibrary.un.org/record/3983329?ln=en>>.

⁷ UNHRC, Resolution on the human right to a clean, healthy and sustainable environment (8 October 2021) A/HRC/48/13 <<https://digitallibrary.un.org/record/3945636?ln=en>>.

⁸ UNGA, Verbatim record of the 97th plenary meeting of the 76th session (July 28, 2022) A/76/PV.97 <<https://perma.cc/Z46H-LH2V>>.

⁹ Jacob Katz Cogan, ‘The United States Recognizes the Human Right to a Clean, Healthy, and Sustainable Environment’ (2023) 117 *American Journal of International Law* 128.

¹⁰ Marc Limon, ‘United Nations Recognition of the Universal Right to a Clean, Healthy and Sustainable Environment: An Eyewitness Account’ (2022) 31 *Review of European, Comparative & International Environmental Law* 155.

¹¹ UN News, ‘Why the UN General Assembly Must Back the Right to a Healthy Environment’ (22 July 2022) <<https://news.un.org/en/story/2022/07/1123142>>.

¹² Yann Aguila and Victoria Lichet, ‘The Need for a New Covenant on the Right to a Healthy Environment’ (2023) 53 *Environmental Policy and Law* 111.

¹³ Balfour-Lynn and Willman (n 1).

environment.¹⁴ For that proposed Protocol to take effect, it would need to be approved by the Council of Europe's Committee of Ministers (made up of the Ministers for Foreign Affairs of the 46 Council of Europe Member States). That has not happened. However, on 27 September 2022, the Committee of Ministers adopted a recommendation calling on individual Council of Europe Member States to "reflect on the nature, content and implications" of the right to a healthy environment and to "actively consider recognising at the national level this right as a human right".¹⁵ In addition, Iceland used its Presidency of the Council of Europe between November 2022 and May 2023 to promote the recognition of the right to a healthy environment, including by organising a high-level conference on the right on 3 May 2023.¹⁶

At the UK level, there has been limited indication that the current Government is moving towards recognising a right to a healthy environment. There have however been two significant legislative proposals from outside government:

- In May 2022, the Clean Air (Human Rights) Bill was introduced into the House of Lords as a Private Members' Bill.¹⁷ The Bill would establish a new right to breathe clean air, as well as various new powers and duties in respect of air pollution.¹⁸ While the Bill passed the House of Lords with cross-party support, the Bill has not been given a date for a Second Reading in the House of Commons,¹⁹ and as such it is unlikely to progress (at least in the short term).
- On 20 June 2023, a draft Environmental Rights Bill was launched by a group of environmental NGOs.²⁰ The draft bill would establish "a right to a clean, healthy and sustainable environment for everyone", and implement various elements of the Aarhus Convention.²¹ The draft bill is one of five policy proposals within Wildlife

¹⁴ PACE, 'Anchoring the Right to a Healthy Environment: Need for Enhanced Action by the Council of Europe' (2021) Resolution 2396 <<https://pace.coe.int/en/files/29499>>; PACE, 'Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe' (2021) Recommendation 2211 <<https://pace.coe.int/en/files/29499>>.

¹⁵ Council of Europe Committee of Ministers, Recommendation on human rights and the protection of the environment (27 September 2022) CM/Rec(2022)20 <https://search.coe.int/cm/pages/result_details.aspx?objectId=0900001680a83df1>.

¹⁶ Draft Programme for a High-Level Conference on 'The right to a clean, healthy and sustainable environment in practice' (3 May 2023) <<https://rm.coe.int/high-level-cddh-env-conference-3-may-2023-draft-programme-en/1680aae885>>. The Environmental Rights Recognition Project specifically engaged with the Icelandic government during its Presidency to encourage it to promote the right to a healthy environment.

¹⁷ Clean Air (Human Rights) HL Bill (2022-23) 210 <<https://bills.parliament.uk/bills/3161>>. The Bill is known as "Ella's Law", in recognition of Ella Roberta Adoo Kissi Debrah, who died aged nine in 15 February 2013 as a result of Asthma contributed to by exposure to excessive air pollution.

¹⁸ *ibid.*

¹⁹ UK Parliament, 'Clean Air (Human Rights) Bill [HL] - Latest News and Events' <<https://bills.parliament.uk/bills/3161/news>>.

²⁰ Wildlife & Countryside Link and others (n 5).

²¹ *ibid.*

and Countryside Link's Nature 2030 campaign, which is aimed at encouraging political parties to include environmental policies in their next General Election manifesto.²²

In addition, at their September 2023 party conference, the Liberal Democrats passed a motion endorsing the recognition of the right to a healthy environment.²³

Therefore, it is clear that there is increasing momentum behind the movement seeking the recognition of the right to a healthy environment. The recognition of the right to a healthy environment by the UNGA, and support for the right by the Council of Europe, show that there is ever-increasing support for the right worldwide. And the proposed Clean Air (Human Rights) and draft Environmental Rights Bills – as well as the support shown for the right to a healthy environment by the Liberal Democrats – show that leading environmental law thinkers in the UK are actively working towards turning that international support into domestic legislation through a rights-based approach.

However, for some, there remain significant questions about the right to a healthy environment in principle, and significant questions about how it would work in practice in the UK. This briefing paper aims to help answer those questions.

²² Wildlife and Countryside Link, 'Nature 2030 Campaign' <<http://www.wcl.org.uk/nature2030.asp>>.

²³ Liberal Democrats, 'Tackling the Nature Crisis' (September 2023) Policy Paper 156 <<https://www.libdems.org.uk/conference/motions/autumn-2023/f44>>.

3. UNDERSTANDING THE RIGHT TO A HEALTHY ENVIRONMENT

The right to a healthy environment is a human right. At its core, the right to a healthy environment is based on the idea that each person has a human right to an environment that meets certain standards, and where an act or omission causes the environment to fall below those standards, it will constitute an interference with each affected person's human rights. Therefore, the right to a healthy environment can be simply expressed in the following way:

*Everyone has the right to a safe, clean, healthy and sustainable environment.*²⁴

However, to make the right effective, other elements are often included alongside that core element of the right. Since the purpose of this paper is to consider how the right to a healthy environment can be recognised in the UK, it is helpful to briefly consider the different elements that could be contained within a right as applied in the UK. To do that, this paper considers three dimensions, which are summarised below: individual rights, collective rights, and rights of nature.²⁵

The individual rights dimension

Any version of the right to a healthy environment would provide substantive and (at least some) procedural rights to individuals.

As to substantive rights, one question that arises is the applicable standards. If the right recognises (for example) a clean, healthy and sustainable environment, a need arises to define what those terms mean.²⁶ As part of that process, it is necessary to consider how the right to a healthy environment interacts with other existing rights, like the right to life or the right to respect for private life. One of the benefits of recognising a right to a healthy environment is that, by sitting alongside other rights, it can bring greater coherence to existing environmental human rights law by

²⁴ This wording is taken from the 2021 recommendation of the Parliamentary Assembly of the Council of Europe. See PACE Recommendation 2211 (n 14).

²⁵ This breaking down of the right into three dimensions mirrors the approach adopted by the Inter-American Court of Human Rights (IACtHR): see IACtHR, Advisory Opinion OC-23/17 (15 November 2017) <https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf>.

²⁶ It has been argued that difficulties defining the terms makes it inappropriate to recognise a right to a health environment. However, that fails to recognise that the very nature of human rights is that they involve broad statements whose meaning is established through further guidance (whether from legislatures or courts). See further the ERRP 2022 Briefing (Balfour-Lynn and Willman (n 1)).

providing a single right for the consideration of environmental issues.²⁷ Indeed, a right to a healthy environment is a “prerequisite for the full enjoyment of human rights”.²⁸

Procedural rights are also key to the right to a healthy environment. In particular, giving individuals a right to information, participation in decision-making and access to justice are seen as *instrumental* in achieving the benefits of a right to a healthy environment, in the sense that the procedural rights allow for the realisation of substantive environmental rights.²⁹

The collective rights dimension

The right to a healthy environment can also include rights that attach to the *collective* as opposed to *individuals*. For example, the PACE proposal emphasises that the right covers present and future generations, and places a duty on each generation to protect the environment.

The inclusion of a collective element in the right to a healthy environment can take the right beyond a narrow approach that seeks to protect the conditions immediately necessary for any given individual, towards a broader approach that aligns the right with the concept of sustainable development.³⁰

The rights of nature dimension

The right to a healthy environment can also involve giving protection to non-human components of the environment (for example, forests, rivers, or seas). Giving legal rights to nature in that way is an explicit recognition that the environment is worthy of protection in its own right, and not simply because of its relationship with human beings, and it expands the right to a healthy environment beyond the confines of traditional human rights law (which focuses on the individual) into the parallel field of rights of nature.

²⁷ See Balfour-Lynn and Willman (n 1). A good illustration of the point is provided by the high-profile case *Duarte Agostinho & Others v Portugal & Others* (App no. 39371/20), which is currently before the European Court of Human Rights. That case has been brought on the basis of the right to life (ECHR art. 2) and the right to respect for private and family life, home and correspondence (ECHR art. 8). However, the issues could be better understood by reference to a right to a healthy environment.

²⁸ Angela Schwerdtfeger, ‘The Human Rights Dimension: The Impact of the Right to a Healthy Environment’, *Sustainability through Participation?* (Brill Nijhoff 2023) <<https://brill.com/edcollchap-qa/book/9789004509382/BP000021.xml>>.

²⁹ *ibid.* Those three procedural rights are the three ‘pillars’ of the Aarhus Convention (strictly, the ‘United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447’).

³⁰ John H Knox, ‘Constructing the Human Right to a Healthy Environment’ (2020) 16 *Annual Review of Law and Social Science* 79.

The rights of nature field is a broad and evolving one which is beyond the scope of this paper.³¹ But it is worth noting that there have been some noteworthy successes in the field. For example, in 2017, New Zealand recognised the Whanganui River as a legal person with legal rights as part of a settlement with the Whanganui iwi people aimed at protecting the river.³² In addition, the Rights of Nature movement has been active at a local level in the UK. In 2018, for example, Frome Council issued a byelaw to give the River Frome legal personhood. In February 2023, Lewes District Council in Sussex passed a motion to start working towards a declaration of rights for the River Ouse in the form of a River Charter. Incorporating a rights-of-nature dimension into the right to a healthy environment would recognise growing popular interest in protecting nature in the UK.

³¹ For an overview of the field, see eg Jan Darpö, 'Can Nature Get It Right? A Study on Rights of Nature' [2021] European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs <[https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2021\)689328](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)689328)>.

³² Christopher Rodgers, 'A New Approach to Protecting Ecosystems: The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017' (2017) 19 Environmental Law Review 266.

4. GLOBAL EXAMPLES OF THE RIGHT TO A HEALTHY ENVIRONMENT IN ACTION

As of October 2021, more than 155 states had recognised some form of right to a healthy environment.³³ This section considers just three examples of such states: South Africa, Colombia, and Norway. These examples provide useful illustrations of how a right to a healthy environment:

- helps contribute to better decision-making by public bodies;
- can help push governments to set better environmental policy; and
- leads to an evolution of court approaches rather than a fundamental change in constitutional arrangements.

More generally, the examples show that the right to a healthy environment is a right that can and does work in practice, and that it could be implemented in the UK to achieve real public benefits.

South Africa: better decision-making by public bodies

South Africa has a constitutional right to a healthy environment. Section 24 of the South African Constitution provides that everyone has a right “to an environment that is not harmful to their health or wellbeing” and a right “to have the environment protected, for the benefit of present and future generations”.

Two leading cases on the South African right to a healthy environment show how the recognition of the right to a healthy environment can help support better public body decision-making.

In *BP Southern Africa (Pty) Limited v Mec for Agriculture, Conservation, Environment & Land Affairs*,³⁴ BP challenged a government decision to refuse permission for a new petrol station, on the basis that the relevant government department’s remit was strictly environmental, and that the department had improperly considered economic issues when reaching its decision. Rejecting that siloed approach, the High Court found against BP and gave a statement as to the benefits that the right to a healthy environment can have on decision-making:

Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact... By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a

³³ UNHRC (n 7).

³⁴ [2004] ZAGPHC 18 (31 March 2004) <<https://www.saflii.org/za/cases/ZAGPHC/2004/18.html>>.

*protected environment by an integrated approach, which takes into consideration, inter alia, socio-economic concerns and principles.*³⁵

In other words, the High Court of South Africa was clear that the recognition of the right to a healthy environment helps attain a protected environment by supporting better decision-making by public bodies that strikes a proper balance between environmental and socio-economic concerns.

In the later case of *Earthlife Africa v Minister of Environmental Affairs*,³⁶ a key question was whether the government should have conducted a climate change impact assessment as part of its environmental authorisation for a coal power station, in circumstances where the relevant regulations were silent on the point. By reference to the right to a healthy environment, the High Court found in favour of the claimant and held that a climate change impact assessment should have been conducted.

Earthlife again shows how a right to a healthy environment can contribute to better decision-making. In that case, there was some ambiguity in the applicable environmental law. However, the court made clear that the proper application of a right to a healthy environment means that public bodies should err on the side of environmental protection when resolving such ambiguities and should as a default strive to make environmentally-friendly decisions. In other words, where there is a right to a healthy environment, public bodies are required to make better decisions that engage meaningfully with environmental issues, rather than simply being able to rely on bare minimums required by applicable regulations.

Colombia: better environmental policy

Colombia's Constitution, adopted in 1991 and amended in 2015, contains a right to a healthy environment.³⁷ Article 79 gives each individual "*the right to enjoy a healthy environment*", seeks to guarantee "*the community's participation in the decisions that may affect it*" and places a duty on the state to protect the environment.

The right to a healthy environment was applied in the landmark case of *Salamanca Mancera v Presidencia de la República de Colombia*.³⁸ That case was brought by 25 young Colombians, who argued that the deforestation of the Amazon and the related increase of the average temperatures in Colombia threatened their rights, including

³⁵ *ibid*

³⁶ [2017] ZAGPPHC 58 (8 March 2017) <<https://www.saflii.org/za/cases/ZAGPPHC/2017/58.html>>.

³⁷ Political Constitution of Colombia (English Translation) <<https://www.corteconstitucional.gov.co/english/Constitucion%CC%81n%20en%20Ingle%CC%81s.pdf>>.

³⁸ *Salamanca Mancera et al v Presidencia de la Republica de Colombia et al*, Corte Suprema de Justicia de Colombia, Case no 110012203 000 2018 00319 01 (5 April 2018). See also Dejusticia, 'Climate Change and Future Generations Lawsuit in Colombia: Key Excerpts from the Supreme Court's Decision' (13 April 2018) <<https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/>>.

their right to a healthy environment. The Supreme Court upheld the claim, and required the government to present an action plan for dealing with deforestation within four months.

The *Salamanca Mancera* case provides a clear example of how the right to a healthy environment can provide a basis for challenging the most environmentally-damaging government policies and for ensuring that better environmental policy is implemented. Through the right to a healthy environment, the young claimants were able to bring a successful claim in respect of extremely damaging government (in)action, and were able to force the government to adopt a better policy in respect of the Colombian Amazon.

Norway: court approaches to the right to a healthy environment

Norway has, since 2014, had a constitutional right to a healthy environment. Article 112 of the Norwegian Constitution gives each individual “*the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained*”, and requires that natural resources are “*managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations*”, as well as giving citizens an entitlement to environmental information.³⁹

The extent of the Norwegian right to a healthy environment was recently tested in a case popularly referred to as *People v Arctic Oil*.⁴⁰ In that case, environmental NGOs argued that the decision to issue new licences for oil and gas production violated the constitutional right to a healthy environment in Article 112 of the Constitution. When the case reached the Supreme Court, the judgment included important statements recognising the environmental crises facing the world, the legal importance of the Paris Agreement, and the ability of the Norwegian right to a healthy environment to found a claim in respect of legislation. However, ultimately, the Court held that the decision to issue licences was not unlawful, largely because it considered that the threshold for finding a breach of Article 112 was the very high one of whether the Article had been “grossly neglected”.

Clearly, the decision in *People v Arctic Oil* was a disappointing one for the claimants, and it has been criticised in some quarters for being a regressive one.⁴¹ However, it does helpfully show what a right to a healthy environment does *not* do. It does not

³⁹ Constitution of Norway (English Translation)

<<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/35061/102254/F1641754591/NOR35061%20ENG%202020.pdf>>.

⁴⁰ Nature and Youth Norway and others v Ministry of Petroleum and Energy (22 December 2020) HR-2020-2472-P, known as *People v Arctic Oil* <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20201222_HR-2020-846-J_judgment.pdf>.

⁴¹ Christina Voigt, ‘The First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics’ (2021) 33 *Journal of Environmental Law* 697.

mean that all environmental issues are resolved in favour of the environmental movement, and it does not mean that the fundamental constitutional arrangements in a given country are swept away. Instead, it provides a coherent way for environmental issues to be considered by the courts and to be dealt with within the existing legal framework. In many instances, the recognition of a right to a healthy environment within a given legal framework will mean that courts are able to reach more environmentally-progressive decisions that reflect the seriousness of the environmental challenges facing the globe.⁴² But *People v Arctic Oil* shows the recognition of the right to a healthy environment does not (as some seem to suggest) mean that existing constitutional and procedural arrangements are abandoned. In other words, recognising the right to a healthy environment in the UK would not constitute a fundamental overhaul of the UK's existing constitutional arrangement, but would instead be an evolution of the legal framework in light of the environmental challenges we face.

⁴² See eg David R Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Cambridge University Press 2018).

5. THE DRAFT ENVIRONMENTAL RIGHTS BILL AND RECOGNISING THE RIGHT TO A HEALTHY ENVIRONMENT IN THE UK

As set out in Section 2, significant steps have been taken towards recognising the right to the healthy environment in the UK since the ERRP published the ERRP 2022 Briefing. In particular, through the Council of Europe Committee of Ministers, the UK has agreed and is now subject to a recommendation that it should “actively consider recognising at the national level this right as a human right”.⁴³

The draft Environmental Rights Bill published in June 2023 represents one route for the UK to recognise the right to a healthy environment at the national level. The draft bill was written by David Wolfe KC and Kate Cook of Matrix Chambers with the support of charities including Wildlife & Countryside Link, ClientEarth, the RSPB, and Friends of the Earth, and forms one element in the Wildlife & Countryside Link’s Nature 2023 campaign.⁴⁴

In summary, the draft Environmental Rights Bill proposes to recognise a right to a healthy environment in the UK in the following way:

- **The right to a healthy environment** – The draft bill provides for the recognition of the following right to a healthy environment: “Everyone has the right to a clean, healthy and sustainable environment” (s 1(1)). That right is an individual substantive one. However, it is given a collective-rights dimension, by a statement that it applies to present and future generations (s 1(7)).
- **Public authority duties** – The draft bill places a general obligation on public authorities not to act incompatibly with the right to a healthy environment (s 1(2)). Exceptions apply where a public authority is explicitly mandated to act incompatibly with the right by Parliament or where there is an emergency (s 1(3)). However, in those circumstances, public authorities are still required to have “due regard” to the need to secure the right to a healthy environment (s 1(4)).⁴⁵
- **Protection for environmental defenders** – The draft bill provides greater protection to those seeking to protect environmental rights, by recognising victimisation of “environmental defenders” (s 5).

⁴³ Council of Europe Committee of Ministers (n 15).

⁴⁴ Wildlife & Countryside Link and others (n 5).

⁴⁵ In the draft bill, the drafters note that the two requirements – not to act incompatibly, and (as a back-up) to have due regard – purposefully adopt, respectively, the approach to other human rights under the ECHR and the approach to the public sector equality duty under s 149 of the Equality Act 2010.

- **Access to information** – The draft bill strengthens rights of access to environmental information (ss 6-8), the first pillar of the Aarhus Convention.
- **Public participation** – The draft bill provides the public with a right to “meaningful public participation” in respect of environmental decision-making, and gives detail on what that term means by reference to (for example) requirements for public participation to occur sufficiently early, for sufficient information to be provided, and for public authorities to take account of consultation responses (s 9). It also requires a public authority to issue a statement specifying how it will comply with its duties in respect of public participation (s 12). The provisions as to public participation seek to realise individual procedural rights, and are expressly based on the procedural rights contained in the Aarhus Convention under its second pillar.
- **Access to justice** – The draft bill puts a general obligation on public authorities “to secure the right of access to justice in environmental matters” (s 13(1)). Again, in doing so, the draft bill seeks to provide for individual procedural rights based on the Aarhus Convention, in this case under the third pillar. The draft bill fleshes out that general obligation by putting specific duties on public authorities involved in environmental claims – which include (for example) a duty of candour (s 13(4)) – and by providing for potential costs consequences for any failures to comply (ss 13(5),(6)).
- **The courts** – Relatedly, the draft bill provides for two potentially significant changes to the way in which environmental claims are heard by the courts. First, it provides that courts must always consider substantive legality in environmental claims, rather than simply questions of procedural legality as happens in many judicial review claims (s 13(3)). Second, the draft bill makes provision for the establishment of local environmental tribunals for hearing environmental claims (s 14).

The draft Environmental Rights Bill is therefore a comprehensive piece of draft legislation that provides for a substantive individual right to a healthy environment, a range of procedural rights for securing that right (largely based on the Aarhus Convention), and a collective dimension through the recognition that the substantive right applies to future generations. By setting out a specific and detailed proposal for a right to a healthy environment, the draft bill represents a significant step towards the recognition of the right to a healthy environment in the UK. Notwithstanding that, it is important to highlight that there are a number of issues that the Environmental Rights Bill does not (explicitly) address, which should be contemplated when considering how to implement a right to a healthy environment in the UK. We highlight four in particular.

First, the bill does not provide provisions requiring scrutiny of new legislation to ensure that it is compatible with the right to a healthy environment. That kind of scrutiny does occur in respect of other human rights, in particular in two ways: first, every Bill is

scrutinised by the Joint Committee on Human Rights, which issues a report on the Bill's compatibility with human rights; secondly, under s.19 of the Human Rights Act 1998, a minister is required to make a statement in respect of each Bill as to whether it is compatible with human rights. That type of scrutiny during the legislative phase ensures that human rights are properly integrated into the legal system, and should reduce the need for litigation.⁴⁶ However, the draft Environmental Rights Bill does not apply that type of scrutiny in respect of the proposed right to a healthy environment. As such, as currently drafted, the draft bill may not ensure that the benefits of the proposed right are fully felt.

Secondly, the draft Environmental Rights Bill does not address the question of environmental education. The Aarhus Convention (which the Environmental Rights Bill otherwise draws from extensively) requires signatories to "promote environmental education" (Art. 3(3)), and such education is generally seen as a vital element of efforts to address the environmental challenges facing the world.⁴⁷ Some countries have taken specific legislative steps to promote environmental education: Finland's Basic Education Act promotes environmental education by including environmental perspectives and the concept of environmental education across different subjects,⁴⁸ and South Africa's National Environment Management Act provides for increased environmental education.⁴⁹ In the UK, a private members' bill seeking to promote environmental education and sustainable citizenship was introduced during the 2021-22 Parliamentary Session.⁵⁰ However, the bill was not progressed, and the UK therefore still lacks specific legislative provisions on environmental education that could sit alongside and contribute to the effectiveness of a right to a healthy environment. The draft Environmental Rights Bill as currently drafted does not fill that lacuna.

Thirdly, the draft Environmental Rights Bill does not address issues of remoteness, causation and extraterritoriality. Those concepts are of particular importance when considering environmental issues, as shown by the Norwegian case of *People v Arctic Oil* discussed above, and as shown by the recent Supreme Court case of *R (Finch) v Surrey County Council*.⁵¹ In *People v Arctic Oil*, one issue was the extent to which the Norwegian right to a healthy environment applies beyond Norway's borders, an issue of particular importance because almost all of Norway's oil and gas is exported, and as such the related greenhouse gas emissions strictly occur outside Norway. In *R (Finch) v Surrey County Council*, the key question was whether an environmental

⁴⁶ See Balfour-Lynn and Willman (n 1) 9-10.

⁴⁷ Alan Reid and others, 'Scientists' Warnings and the Need to Reimagine, Recreate, and Restore Environmental Education' (2021) 27 Environmental Education Research 783.

⁴⁸ Basic Education Act 628/1998 <<https://www.finlex.fi/en/laki/kaannokset/1998/en19980628.pdf>>.

⁴⁹ National Environmental Management Act 107 of 1998 <<https://www.gov.za/documents/national-environmental-management-act>>.

⁵⁰ Education (Environment and Sustainable Citizenship) HL Bill (2021-22) 266 <<https://bills.parliament.uk/bills/2874>>.

⁵¹ On appeal from *R (Finch) v Surrey County Council* [2022] EWCA Civ 187.

impact assessment needed to incorporate a consideration of downstream greenhouse gas emissions that would inevitably result from the proposed oil well site but would not arise directly from it. In other words, the issue was the extent to which the remoteness of environmental effects affected the scope of environmental law obligations. Those two recent and high-profile cases show how the nature of environmental harms can make it more difficult to apply conventional approaches to remoteness, causation and extraterritoriality. However, the draft Environmental Rights Bill does not seek to grapple with those issues expressly.

Fourthly, the draft Environmental Rights Bill contains no rights of nature dimensions. As noted in Section 3, including rights of nature within a broad right to a healthy environment can move the right beyond a narrower, anthropocentric one to a broader one that recognises the environment as having value in its own right. However, the Environmental Rights Bill takes a more conservative approach, by limiting the right to a healthy environment to an individual right with a collective dimension.

Therefore, while the Environmental Rights Recognition Project supports the broad thrust of the draft Environmental Rights Bill, we suggest that further consideration of the issues around the right to a healthy environment would ensure that the UK adopts as comprehensive and effective right to a healthy environment as possible.

6. CONCLUSIONS AND RECOMMENDATIONS

The scale of the environmental crises facing the world requires an evolving and ever stronger response. Recognition of the right to a healthy environment here in the UK should be part of that response.

The arguments in favour of recognising the right are considered in the 2022 Briefing Paper. The purpose of this paper is to show that the time has now come to begin the process of implementing the right to a healthy environment in the UK. There has been progress towards recognising the right globally.⁵² As part of that, a large number of countries have implemented the right successfully, and South Africa, Colombia and Norway represent three example countries where the right applies and is effective.⁵³ Work towards recognising a right to a healthy environment in the UK is already under way – and the Environmental Rights Bill represents a vital starting point for the process of implementing the right – but there are further issues to consider.⁵⁴

The Environmental Rights Recognition Project firmly believes that now is the time to begin the process of implementing the right to a healthy environment here in the UK. As such, we make the following recommendations:

- **Each political party in the UK should adopt a pledge in their 2024 general election manifesto to seek the recognition of the right to a healthy environment.** A manifesto pledge to seek the recognition of the right to a healthy environment would align with the UK's commitment in September 2022 to "actively consider recognising" the right to a healthy environment in domestic law. More generally, it would show that environmental issues are a priority.
- **As part of that pledge, each party should commit to the commissioning of a report and recommendations on the implementation of the right to a healthy environment.** That report should be produced by the Law Commission with input from the Office for Environmental Protection (the OEP). While the Law Commission is an obvious body for this type of work, we also note the OEP's duty to give advice on environmental law issues under s 30 of the Environment Act 2021. A report from the Law Commission with input from the OEP would ensure that the expertise of both bodies is leveraged.
- **The referral to the Law Commission should take the draft Environmental Rights Bill as its starting point.** However, it should also provide for exploration of international examples and further points beyond the draft Environmental

⁵² See in particular Section 2 above.

⁵³ See in particular Section 4 above.

⁵⁴ See in particular Section 5 above.

Rights Bill. As explained in Section 5, the Environmental Rights Recognition Project supports the draft Environmental Rights Bill, but considers that it could be developed to ensure that the right to a healthy environment contained within it is as comprehensive and effective as possible.