

# ERCS consultation response Scottish Court Fees 2022-2025

4 March 2022



The Environmental Rights Centre for Scotland (ERCS) was established in January 2020. We assist the public and civil society to understand and exercise their rights in environmental law and to protect the environment; and carry out advocacy in policy and law reform to improve environmental rights, including access to justice on the environment and full compliance with the Aarhus Convention.

This is ERCS's response to the Scottish Government's consultation on court fees. Our response is directed to question 3 only. Question 3 is phrased as follows:

*The Scottish Government is seeking views on whether to exempt environmental cases within the meaning of the Aarhus Convention. Do you consider that such cases should be court fee exempt? If so, how would you define an Aarhus case? Views on fees for public interest litigation more broadly would also be welcomed.*

There are effectively three parts to this question, which are dealt with in order.

## 1. A court fee exemption for Aarhus Convention cases

ERCS strongly supports a full exemption for 'Aarhus Convention cases'<sup>1</sup> from court fees.

ERCS welcomes the recognition in the consultation document that, 'Were Aarhus Convention cases to be exempt from court fees then this would enhance access to justice by making justice more affordable'.<sup>2</sup> We agree that court fees make litigation less affordable and represent a barrier to access to justice.

It is important to emphasise the prohibitively expensive nature of the current court fee regime in order to understand the need for reform. In Aarhus Convention cases in Scotland, court fees can amount to thousands of pounds, and for complex cases can run into five figures. For example, in litigation in the Court of Session, the court fee payable for hearings within normal hours is £205 for every 30 minutes or part thereof before a bench of one or two judges, and £512 for every 30 minutes or part thereof before a bench of three or more judges.<sup>3</sup>

Friends of the Earth Scotland and the Environmental Law Centre for Scotland, explained in a 2012 briefing that:



*...in McGinty the Outer House hearing took 18 hours, which we estimate would incur costs of approximately £1,620 for the hearing alone; in Walton hearings in the Outer House lasted for 22 hours, and in the Inner House for 18 hours amounting in our estimate to £5,580.<sup>4</sup>*

Applying the current court fee regime to those cases, the equivalent court fee liability if they were heard in 2022 would be £7,380 in *McGinty* and £27,452 in *Walton*.

The RSPB's 2016 Firth of Forth offshore windfarm case, which was appealed by the Scottish Ministers, resulted in court fees of £19,800 for the Outer House hearing which lasted 8 days and £23,500 in court fees for the Inner House hearing which lasted 3 and a half days.<sup>5</sup> Those fees were payable by the RSPB.

Our position in favour of a full exemption for Aarhus Convention cases from court fees is supported by the legal obligations arising from the Aarhus Convention. Article 9(4) of the Aarhus Convention requires that litigation within the scope of Article 9 of the Convention must be 'not prohibitively expensive'.

The Convention does not prescribe the measures which parties must take to minimise litigation costs. However, it does impose a clear obligation on parties to ensure that the public are not deterred by litigation costs from pursuing Aarhus Convention cases. Article 9(4) imposes an obligation of result.

The Aarhus Convention Compliance Committee ('ACCC') has found that, when assessing the costs related to procedures for accessing justice vis-à-vis the Article 9(4) obligation, a party's cost system is to be assessed 'as a whole and in a systemic manner'.<sup>6</sup> Court fees form part of the cost system in Scotland and are therefore relevant for the purposes of ensuring that system is compliant with Article 9(4).

Since 2014, the ACCC and the Aarhus Convention Meeting of the Parties have made ten decisions in which Scotland's legal system has been found to be non-compliant with the Article 9(4) obligation that litigation within the scope of Article 9 of the Convention must be 'not prohibitively expensive'.<sup>7</sup>

Court fees can be prohibitively expensive of themselves and therefore require attention as part of the costs system. For these reasons, we consider that an exemption is required for Aarhus cases, and this would be a welcome and positive step towards compliance.

Court fees represent a relatively small overall proportion of the overall financial liability faced by a member of the public considering litigation within the scope of Article 9. The overall cost of litigation within the scope of Article 9 has been deemed prohibitively expensive and must be reduced to ensure that Scotland achieves compliance with Article 9(4). The other two sources of costs faced by a potential litigant in an Aarhus case – which are paying their own legal team and potential liability to pay their opponent's expenses (and those of interveners) – must also be addressed. ERCS has made recommendations on these matters elsewhere.<sup>8</sup>



While addressing the prohibitive costs of environmental litigation is essential, ERCS will also continue to advocate for complete and comprehensive compliance with the Aarhus Convention, in recognition that costs are only one of several barriers to accessing justice in Scotland. In addition to the immediate need to remove the cost barrier to accessing justice, the establishment of an environmental court or tribunal in Scotland offers potential to secure full compliance.<sup>9</sup> Support for the establishment of an environmental court or tribunal is growing across Scotland<sup>10</sup> and ERCS looks forward to engaging in the consultation on this ahead of Spring 2023.

## 2. Definition of an Aarhus Convention case

An Aarhus Convention case, for the purposes of this consultation, is one within the scope of Article 9 of the Aarhus Convention. Paragraph 32 of the consultation document provides a useful outline definition.

### 2.1 The scope of Article 9

Article 9 of the Convention sets out several obligations for states on access to justice. It requires states to ensure that there is access to a review procedure before a court of law or another independent and impartial body established by law in the following types of cases:

- where any person considers that their request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article (Article 9(1));
- where a member of public concerned wishes to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 (Article 9(2)); or
- where members of the public wish to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment (Article 9(3)).

### 2.2 Definition of an Aarhus Convention case in Protective Expenses Orders (PEO) rules

There are several statutory instruments which effectively define Aarhus Convention cases in the UK. In Scotland, the Court of Session rules on Protective Expenses Orders in environmental appeals and judicial review apply to applications for protective expenses orders in:

*(a) an appeal under section 56 of the Freedom of Information (Scotland) Act 2002 as modified by regulation 17 of the Environmental Information (Scotland) Regulations 2004;*

*(b) relevant proceedings which include a challenge to a decision, act or omission which is subject to, or said to be subject to, the provisions of Article 6 of the Aarhus Convention;*

*(c) relevant proceedings which include a challenge to an act or omission on the grounds that it contravenes the law relating to the environment.<sup>11</sup>*



The term ‘relevant proceedings’ is defined as applications to the supervisory jurisdiction of the court and appeals under statute.<sup>12</sup>

The equivalent regulations in Northern Ireland define Aarhus Convention cases as follows:

*“an Aarhus Convention case” means an application by a member of the public (as defined by Article 2 of the Aarhus Convention)*

*(a) for judicial review under section 18 of the Judicature (Northern Ireland) Act 1978 of a decision, act or omission all or part of which is subject to the provisions of the Aarhus Convention; or*

*(b) for review under the provisions of any statutory provision to the court of a decision, act or omission all or part of which is subject to the provisions of the Aarhus Convention; and “applicant” shall be construed accordingly.<sup>13</sup>*

For England and Wales, the Civil Procedure Rules 1998 (as amended) define Aarhus Convention cases as follows:

*(a) “Aarhus Convention claim” means a claim brought by one or more members of the public—*

*(i) by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1) or 9(2) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 (“the Aarhus Convention”); or*

*(ii) by judicial review which challenges the legality of any such decision, act or omission and which is within the scope of Article 9(3) of the Aarhus Convention.<sup>14</sup>*

### 2.3 Recommendations on the definition of Aarhus Convention cases

There are broadly two approaches which could be taken to the definition of Aarhus Convention cases.

The first approach would be to give a more general definition of the types of cases subject to the exemption which reflects the terms of Article 9. This is in line with the approach used in the statutory instruments listed above. The definition of Aarhus Convention cases which is effectively contained within the Court of Session rules on protective expenses orders could be adapted for court fee exemptions. This is our preferred approach.

The second approach would be to list the types of cases which would be subject to an exemption in exhaustive detail. We do not recommend this for the reasons that there is no existing comprehensive list of types of environmental litigation which would constitute Aarhus Convention cases, that creating such a list would be a time-consuming exercise requiring further consultation



which would add delay, and that the creation of such a list may lead to the accidental exclusion of certain Aarhus Convention cases due to the difficulty of such an exercise.

**Our recommended definition of Aarhus Convention cases is as follows:**

***(a) an appeal under section 56 of the Freedom of Information (Scotland) Act 2002 as modified by regulation 17 of the Environmental Information (Scotland) Regulations 2004;***

***(b) proceedings which include a challenge to a decision, act or omission which is subject to, or said to be subject to, the provisions of Article 6 of the Aarhus Convention; or***

***(c) proceedings arising from an act or omission by a private person or a public authority which contravenes the law relating to the environment.***

Our proposed paragraph (a) is copied from the equivalent provision in the PEO rules referred to above and reflects the requirements of Article 9(1) of the Aarhus Convention. It would include appeals against a decision by the Scottish Information Commissioner to the Court of Session on a point of law, insofar as they relate to environmental information within the scope of the Environmental Information (Scotland) Regulations 2004.

Our proposed paragraph (b) is slightly amended from the equivalent provision in the PEO rules and reflects the requirements of Article 9(2) of the Aarhus Convention. It would include legal proceedings subject to the provisions of Article 6 of the Aarhus Convention, which creates certain requirements with respect to public participation in decisions on specific activities.

Our proposed paragraph (c) is amended from the equivalent provision in the PEO rules and reflects the requirements of Article 9(3) of the Aarhus Convention. It would include legal proceedings subject to Article 9(3) of the Aarhus Convention. We have proposed the explicit inclusion of the wording 'by a private person or a public authority' because similar wording is used in Article 9(3) and it would provide clarity to ensure that the fee exemption would cover both public and private law proceedings.<sup>15</sup>

In terms of the scope of the term, 'the law relating to the environment', the definition of environmental information from Article 2(3) of the Aarhus Convention could be adapted if further definition of the environment is required. A similar approach to defining the environment was recommended in the National Taskforce for Human Rights Leadership Report.<sup>16</sup>

## 2.4 Distinguishing between Aarhus Convention cases and non-Aarhus cases

The consultation document refers to the question of 'how to distinguish between Aarhus Convention cases and other environmental cases, or any other types of action, so that any exemption is appropriately targeted'.<sup>17</sup>

As an initial point, given the wording of Article 9(3), which relates to members of the public having access to procedures to challenge contraventions of 'national law relating to the environment', we



note that attempting to establish a distinction between Aarhus Convention cases and other environmental cases outwith the scope of the Convention is likely to be inconsistent with Article 9(3).

The scope of Article 9(3) is very broad. It covers ‘national law relating to the environment’. Most, if not all, environmental cases will fall within the scope of Article 9(3).

The ACCC’s findings support a broad interpretation of the term ‘national law relating to the environment’. In its consideration of the scope of Article 9(3), the ACCC has explained that:

*Importantly, the text of the Convention does not refer to “environmental laws”, but to “laws relating to the environment”. Article 9, paragraph 3, is not limited to “environmental laws”, e.g., laws that explicitly include the term “environment” in their title or provisions. Rather, it covers any law that relates to the environment, i.e. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy, taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact on the environment.<sup>18</sup>*

Having explained that distinguishing between Aarhus Convention cases and other environmental cases is likely to be inconsistent with Article 9(3), there may need to be some method of distinguishing Aarhus Convention cases from other types of legal action. Our recommendation on this point is that the court fee exemption form should be designed in a way which gives the applicant the opportunity to tick one of three boxes, each of which relates to our recommended three-part definition set out above.

Our recommendation is in accordance with the current design of the court fee exemption form,<sup>19</sup> would minimise any administrative costs in terms of the time spent by court staff processing exemption forms, and would be simple to use for applicants.

### 3. Views on court fees for public interest litigation more broadly

The Scottish Government’s policy on funding the civil justice system is one of ‘full cost recovery’. Under that policy, court fees are set at a level designed to recover in full the costs of the civil justice system from litigants (subject to certain exemptions), instead of funding the civil justice system by the state from general taxation. As a general point, we note that this policy increases the costs of litigants and creates difficulties in terms of affordability for those attempting to access justice.

There are serious concerns about the legality of the full cost recovery policy, due to its effect on access to justice. The Faculty of Advocates has expressed the view that the Scottish court fees regime may be unlawful with reference to the decision of the UK Supreme Court in *Unison v Lord Chancellor*.<sup>20</sup> Concerns have also been raised vis-à-vis Article 6 of the European Convention on Human Rights which guarantees the right of access to a court.<sup>21</sup>



Court fees are understood to present a barrier to access to justice in litigation which does not fall within the scope of the Aarhus Convention. A 2018 report on the barriers to public interest litigation explained that court fees, 'may be simply unaffordable for not-for-profit organisations'.<sup>22</sup>

The Scottish Government intends to consult on a new Human Rights (Scotland) Bill in the coming year. This Bill will see a range of human rights incorporated for the first time in Scots law: four UN treaties (ICESCR, CEDAW, and CERD, CRPD),<sup>23</sup> as well as the right to a healthy environment (including potential incorporation of the Aarhus Convention), rights for older people and LGBTI people.

To give effect to the National Taskforce on Human Rights Leadership's recommendations and to set the proposed Human Rights (Scotland) Bill up for success, ERCS fully supports an exemption from court fees for public interest litigation which does not fall within the scope of the Aarhus Convention, particularly where it concerns potential violations of human rights. This would be a practical way to support Recommendations 21 and 26 of the Taskforce's Report, which identifies the need for affordable access to justice.<sup>24</sup>

### This response is supported by

Badenoch & Strathspey Conservation Group

Cairngorms Campaign

Friends of the Earth Scotland

Planning Democracy

RSPB Scotland

Scottish Wildlife Trust

### For more information contact

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<sup>1</sup> As defined in paragraph 32 of the consultation document.

<sup>2</sup> Paragraph 33 of the consultation document.

<sup>3</sup> [The Court of Session etc. Fees Order 2018 \(SSI 2018/83\)](#), Schedule 1.

<sup>4</sup> Friends of the Earth Scotland and the Environmental Law Centre Scotland, '[Briefing on the excessive costs of challenging environmental decisions in Scottish Courts](#)' (2012), page 3.

<sup>5</sup> *The RSPB v Scottish Ministers* (2016) CSOH 103 and (2017) CSIH 31.

<sup>6</sup> ACCC (2011) [Findings and recommendations with regard to communication ACCC/C/2008/33](#), paragraph 128. Court fees are also referred to in the [Aarhus Convention Implementation Guide](#) (2014) at page 204 as a potential barrier to access to justice with reference to Article 9(4).

<sup>7</sup> ACCC (2014) [Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention](#).

UNECE Aarhus Meeting of the Parties ('Aarhus MoP') (2014) [Decision V/9n on compliance by the United Kingdom of Great Britain and Northern Ireland](#).

ACCC (2015) [First progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention](#).

ACCC (2017) [Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention](#).

ACCC (2017) [Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention](#).

Aarhus MoP (2017) [Decision VI/8k Compliance by United Kingdom with its obligations under the Convention](#).

ACCC (2019) [First progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention](#).

ACCC (2020) [Second progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention](#).

ACCC (Aug 2021) [Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I, and Part II](#).

Aarhus Meeting of the Parties (2021) [Draft decision VII/8s on compliance by the United Kingdom of Great Britain and Northern Ireland](#) (adopted at MoP-7, October 2021).

<sup>8</sup> ERCS (2021) [Scotland's non-compliance with the Aarhus Convention on prohibitive expense: Recommendations for a plan of action on judicial expenses](#).

<sup>9</sup> Environmental Rights Centre for Scotland (Oct 2021) [Why Scotland needs an environmental court or tribunal](#).

<sup>10</sup> Environmental Rights Centre for Scotland Website (accessed 13 January 2022), [Call to Action, Organisations supporting the petition](#).

<sup>11</sup> [Rules of the Court of Session](#), Rule 58A.1.(1).

<sup>12</sup> *Ibid.*, Rule 58A.1.(2).





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<sup>13</sup> [The Costs Protection \(Aarhus Convention\) Regulations \(Northern Ireland\) 2013](#) (SR 2013/81) (as amended), Regulation 2.

<sup>14</sup> [England and Wales, the Civil Procedure Rules 1998 \(as amended\)](#), Rule 45.41.

<sup>15</sup> In addition to the wording of Article 9(3), we note that in several of its findings concerning the UK, the ACCC has found that private nuisance proceedings can fall within the scope of Article 9(3). See [Findings and recommendations with regard to communication ACCC/C/2008/23](#) (2010) and [Findings and recommendations with regard to communications ACCC/C/2013/85 and ACCC/C/2013/86](#) (2015).

<sup>16</sup> National Taskforce for Human Rights Leadership (Mar 2021) [Report](#), in Annex D at page 79.

<sup>17</sup> Paragraph 33 of the consultation document.

<sup>18</sup> ACCC (2013) [Findings and recommendations with regard to communication ACCC/C/2011/63](#), at paragraph 52.

<sup>19</sup> Current court fee exemption forms are available at <https://www.scotcourts.gov.uk/rules-and-practice/forms/fee-exemption-forms>.

<sup>20</sup> Faculty of Advocates, '[Response by the Faculty of Advocates to Consultation \(October 2017\) on Scottish Court Fees 2018-2021](#)' (2018).

<sup>21</sup> B Christman and M Combe, 'Funding Civil Justice in Scotland: Full Cost Recovery, at What Cost to Justice?' *Edinburgh Law Review* (2020) 24(1) 49.

<sup>22</sup> Human Rights Consortium Scotland (2018) [Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland](#), p12.

<sup>23</sup> ICESCR: International Covenant on Economic, Social and Cultural Rights, CEDAW: Convention on the Elimination of All Forms of Discrimination against Women; CERD: Convention on the Elimination of All Forms of Racial Discrimination; CRPD: Convention on the Rights of Disabled People.

<sup>24</sup> National Taskforce for Human Rights Leadership (Mar 2021) [Report](#).