

# Evaluation of Scotland's action plan on access to environmental justice

## Briefing, July 2022

### Introduction

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. We carry out advocacy in policy and law reform<sup>1</sup> 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.<sup>2</sup>

This briefing summarises ERCS's evaluation<sup>3</sup> of the Scottish Government's contribution to the UK Action Plan to meet the recommendations of the Aarhus Convention's Meeting of the Parties (MoP) Decision VII/8s.<sup>4</sup>

### Background

In 2021, the governing institutions of the Aarhus Convention made their tenth consecutive finding that the UK is in breach of Article 9(4) of the Convention's access to justice requirements.<sup>5</sup> In October 2021, the Convention's Meeting of the Parties (MoP) adopted Decision VII/8s<sup>6</sup> - requiring the UK government to submit an action plan to the Aarhus Convention Compliance Committee (ACCC) by 1 July, detailing how it will, 'as a matter of urgency' address the findings and recommendations of the Decision.

Importantly, the Action Plan must include a time schedule of how the Scottish Government, in its contribution to the UK Action Plan, will implement the MoP's recommendations to achieve compliance by 1 October 2024. This briefing evaluates the UK Action Plan<sup>7</sup> as it relates to Scotland, and the powers held by the Scottish Government as a devolved administration.

The recommendations relevant for Scotland are:

- I.* **Paragraph 2(a):** Ensure that the allocation of costs in all court procedures subject to Article 9, including private nuisance claims, is fair and equitable and not prohibitively expensive
- II.* **Paragraph 2(b):** Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice
- III.* **Paragraph 2(d)** Establish a clear, transparent and consistent framework to implement Article 9(4) of the Convention



- IV. **Paragraph 4(a):** Ensure that decisions to permit activities subject to Article 6 of the Convention cannot be taken after the activity has already commenced or has been constructed, save in highly exceptional cases and subject to strict and defined criteria
- V. **Paragraph 6(a):** Ensure the time-frame for bringing an application for judicial review of any planning-related decision within the scope of Article 9 is calculated from the date the decision became known to the public and not from the date the contested decision was taken
- VI. **Paragraph 8:** Ensure that procedures to challenge acts and omissions by public authorities that contravene provisions of its law on litter are fair, equitable and not prohibitively expensive.

## Overall evaluation

### Acknowledgement of non-compliance is not matched with concrete reforms

ERCS welcomes the Scottish Government's acknowledgement in the Action Plan that access to justice on environmental matters is prohibitively expensive. However, corresponding legal and policy commitments are not clearly specified.

The action plan states that the Scottish Civil Justice Council (SCJC) will review court rules by end of March 2023. This does not equate to a commitment to implement the recommendations of Decision VII/8s by 1 October 2024. We believe that fundamental changes to the legislative framework are required,<sup>8</sup> and it is disappointing that the Scottish Government maintain they 'cannot commit to a timeframe on behalf of a third party'.

### Public engagement in the Action Plan has been inadequate

Although ERCS was able to comment on a draft version of the Action Plan, there was no wider public engagement prior to the publication of the Action Plan.

While the Action Plan states that it 'looks forward to receiving further input from stakeholders', ERCS has not been notified on any planned engagement. Given the concerns outlined below regarding the SCJC's review process, there needs to be clear action to increase awareness and transparency on the planned activities.

## Evaluation of the detailed plan of action

- I. **Paragraph 2(a):** The SCJC's review process for court rules is not fit for purpose

ERCS welcomes the Scottish Government requesting the SCJC review of court rules governing Protective Expenses Orders (PEO) 'in order to make them compliant with Article 9(4)'. We have argued that the PEO regime requires a full overhaul and that the 'loser pays' rule should be replaced with 'qualified one-way costs shifting' (QOCS).<sup>9</sup>



However, Article 8 of the Aarhus Convention sets out minimum public participation requirements during the preparation of generally applicable legal instruments by public authorities. Our view is that the SCJC's review of court rules will engage the legal obligations set out in Article 8 yet, as it stands, there is no evidence that the SCJC review process will meet those minimum public participation requirements. ERCS has made multiple attempts to engage with the SCJC review, without success.<sup>10</sup> It is imperative that this review of court rules is a transparent and participative process.

## II. Paragraph 2(b): Legal expenses remain a barrier to justice

While ERCS welcomes the Scottish Government's recent decision to exempt court fees for Aarhus cases which are heard in the Court of Session,<sup>11</sup> litigants in other Scottish courts, such as Sheriff Courts, remain liable to pay court fees. Moreover, while the new court fee exemption represents a positive development, the full costs of litigation remain a barrier to accessing justice in environmental matters.

The Action Plan refers to the forthcoming Legal Aid Reform Bill, which they indicate will be held late in the current parliamentary session. However, they do not set out a clear timeframe, and there is no corresponding commitment to reform Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002. Reform is needed to broaden the scope of legal aid to include community groups and NGOs, and to ensure that legal aid is available in public interest litigation on environmental matters. Relevant provisions of the forthcoming Bill are absent from the Action Plan.

## III. Paragraph 2(d): Time frames are too slow and too vague

ERCS is part of the Advisory Board to the Human Rights (Scotland) Bill and we welcome the Scottish Government's commitment to incorporating the human right to a healthy environment with substantive and procedural elements, and improving access to justice - as recommended by the National Taskforce for Human Rights Leadership.<sup>12</sup>

The Action Plan refers to the Bill being introduced in this parliamentary session (2021- 2026) but the details are yet unknown and this does not affect the necessity of implementing a programme of reforms to legal expenses by 1 October 2024.

In addition, although the Action Plan refers to the duty to consult on an environmental court, there is no timeline for the programme of consultation, decision and implementation.<sup>13</sup> ERCS believes the creation of a specialist environmental court or tribunal would be the most cost effective and efficient way to secure fair, timely, effective and not prohibitively expensive access to justice.<sup>14</sup>

## IV. Paragraph 4(a): Retrospective planning permission should be reviewed

The Convention requires that retrospective planning permission cannot be given save in highly exceptional cases and subject to strict and defined criteria. ERCS notes that section 33 of the Town and Country Planning (Scotland) Act 1997 allows for the grant of retrospective planning permission



(i.e. for development already carried out). The only exception is where an enforcement notice has been served in respect of the development. This does not appear to be compliant and we await Scotland's actions to review and address this by 1 October 2024.

#### V. Paragraph 6(a): Time limits for raising Aarhus cases should be reviewed

The Convention requires that the time limits for raising legal action for judicial review of any planning-related decision within the scope of Article 9 are calculated from the date the decision became known to the public. In Scotland, the time limits for raising actions for judicial review and statutory planning appeals run from the date on which a decision was made, which appears to be non-compliant. The Action Plan contains no proposals or details for Scotland on this matter.

#### VI. Paragraph 8: Procedures in Sheriff Courts relating to litter must be reformed

Legal expenses from actions arising in the Sheriff Courts can be prohibitively expensive. This was demonstrated in the case of George Niblock whose attempt to obtain a litter abatement order against a local authority was unsuccessful. The local authority was awarded £9,000 in legal expenses, which led to the closure of Mr Niblock's environmental charity the Aberdeenshire Environmental Forum.<sup>15</sup>

### Recommendations for Scotland's action plan on access to justice

These recommendations are without prejudice to the need to secure full compliance with the Aarhus Convention's access to justice requirements, which ERCS's considers could be met by the establishment of a specialist environmental court.

In order to address the recommendations of Decision VII/8s, the Scottish Government must:

- Commit to fully implementing the recommendations of Decision VII/8s by 1 October 2024 and detail the process for public engagement
- Open the SCJC review of court rules to public scrutiny
- Make Aarhus cases affordable by reform of legal aid, replacing the 'loser pays' rule with qualified one way costs shifting, and removal of court fees outwith the Court of Session
- Review retrospective planning permission and time limits for judicial review
- Reform costs relating to enforcing law on litter

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<sup>1</sup> For more information read our Advocacy Manifesto ERCS (Dec 2021) [An Enforceable human right to a healthy environment](#) or one-page [Summary of recommendations](#).

<sup>2</sup> United Nations Economic Commission for Europe (1998) [Convention on access to information, public participation in decision-making and access to justice in environmental matters](#).

<sup>3</sup> This is the full [joint response from RSPB, Friends of the Earth, Friends of the Earth Scotland and ERCS to the Aarhus Convention secretariat on the UK Action Plan](#).

<sup>4</sup> MoP (Oct 2021) [Decision VII/8s concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention](#).

<sup>5</sup> 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\\*](#).

<sup>6</sup> MoP (Oct 2021) [Decision VII/8s concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention](#).

<sup>7</sup> DEFRA, UK (July 2022) Plan of action for decision VII/8s (United Kingdom).

<sup>8</sup> For full details of the legal reforms needed read ERCS (Nov 2021) [Recommendations for a plan of action on judicial expenses](#).

<sup>9</sup> Ibid.

<sup>10</sup> ERCS first wrote to SCJC on 18/11/21 to request a public consultation as part of the review process. There was subsequent email correspondence from ERCS to SCJC in February and March 2022. ERCS sent a further letter to the SCJC on 26 May to request participation with a response deadline of 27 June - with no reply.

<sup>11</sup> Scottish Government (June 2022) [Scottish court fees 2022 to 2025: consultation analysis and Scottish Government Response](#). Scottish Government (2022) [The Court of Session etc. Fees Order 2022](#).

<sup>12</sup> National Taskforce for Human Rights Leadership (Mar 2021) [Report](#), Rec 2 and Rec 21-26.

<sup>13</sup> Scottish Government (2021) [A Fairer, Greener Scotland: Programme for Government 2021-22](#) (p.67) states 'a review of environmental justice and the case for an environmental court' will be undertaken commencing by spring 2023 but no further details are given in the UK Action Plan.

<sup>14</sup> For more information read our report ERCS (Oct 2021) [Why Scotland needs an environmental court or tribunal](#).