

Contact: Shivali Fifield, Chief Officer
Email: sfifield@ercs.scot
Mobile: 07395 652434

Ash Regan MSP
Minister for Community Safety
Scottish Government
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

CC:

Shona Robison MSP, Cabinet Secretary for Social Justice, Housing, and Local Government
Màiri McAllan MSP, Minister for Environment and Land Reform
Lorna Slater MSP, Minister for Green Skills, Circular Economy and Biodiversity

Sent by email only to: scottish.ministers@gov.scot

25 August 2022

Dear Ash Regan MSP,

RE: Plan of action to address Scotland's non-compliance on access to justice

Ref: 202100251112

I refer to the plan of action which was prepared in response to [Decision VII/8s of the Meeting of the Parties to the Aarhus Convention](#) ('the Action Plan'). The [Action Plan](#) was submitted by the UK to the Aarhus Convention Compliance Committee ('ACCC') on 1 July 2022, and ERCS, Friends of the Earth Scotland and RSPB Scotland contributed to [a joint response](#).

As you will be aware, the Scottish Government contributed to the Action Plan (insofar as it relates to Scotland). The purpose of the Action Plan was to ensure that action is taken to address numerous longstanding areas of non-compliance with the Aarhus Convention, largely vis-à-vis access to justice in environmental matters.

ERCS welcomes some aspects of the Action Plan, particularly the decision to introduce an exemption for court fees for Aarhus cases which are heard in the Court of Session and the announcement that the Scottish Civil Justice Council ('SCJC') will be reviewing the relevant court rules.



However, there are several areas of significant concern arising from the Action Plan as it relates to Scotland. The purpose of this letter is to draw your attention to our concerns and to request that you intervene as a matter of urgency to address them.

As an overview of the Action Plan, we note that it lacks commitments to making the necessary legal changes within specified timescales, that public engagement with the formulation of the Plan was severely limited and that there are no plans for any further public engagement in the implementation of the Plan.

Our concerns are set out in outline form in this letter and we have also enclosed a copy of our briefing which evaluates the action plan in full.

1. SCJC review of court rules – absence of public participation

We are concerned that the SCJC's review process will not meet the minimum public participation requirements set out in Article 8 of the Aarhus Convention. We have written to the SCJC on numerous occasions to raise these concerns. Copies of our letters to the SCJC dated 18 November 2021 and 26 May 2022 are enclosed.

We have had very little engagement from the SCJC. No commitments have been made from the SCJC to reassure us that the review process will be lawful. It is imperative that the process to bring the Scottish legal system into compliance with the Convention is itself compliant with the minimum prescribed public participation requirements. In the event that the process is non-compliant with Article 8, please note that we intend to raise this matter in a communication to the Aarhus Convention Compliance Committee ('ACCC').

Through a Freedom of Information request to the SCJC, we have now seen a copy of *Paper 3.3 – Rules Review – Protective Expenses Orders – private*. This shows that the SCJC's secretariat has given quite extensive consideration on the rules, but we still have grave concerns about the lack of transparency and whether the policy options raised will be given due regard and meet the recommendations of the decision (paragraph 2a) that '*allocation of costs in all court procedures subject to Article 9, including private nuisance claims, is fair, equitable and not prohibitively expensive.*'

2. Legal aid reform

We are concerned at the delay of the Legal Aid Reform Bill, and there remains no clear commitment to amend Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002: to make legal aid available in public interest litigation, and available to civil society organisations.

3. Matters not addressed in Action Plan

The Action Plan does not address the following matters:



- The Convention requires that retrospective planning permission cannot be given save in highly exceptional cases and subject to strict and defined criteria. 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 with the Convention.
- The Convention requires that the time limits for raising legal action 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 (not the date the decision became known to the public). These time limits are non-compliant.

4. Interventions requested from you

In order to address persistent barriers to access to justice on the environment and ensure that court rules are not prohibitively expensive, we respectfully request that you carry out two steps as a matter of urgency.

First, we would be grateful if you could write to the SCJC to raise the importance of their review process meeting the Article 8 minimum public participation requirements, and to ask them to confirm in writing what steps they will take to ensure that the review process will be fully compliant with the Aarhus Convention and the timescales for doing so. We wish to stress that the objective of reviewing court rules governing Protective Expenses Orders is to address the ongoing non-compliance with Article 9(4).

Second, please confirm what reforms you intend to introduce to resolve the problems highlighted above vis-à-vis legal aid reform, retrospective planning permission and the time limits for judicial review and the timescales for doing so.

We would also like to inform you that we have submitted a representation to Environmental Standards Scotland on the systematic barriers to access to justice in environmental matters.

We are grateful for your consideration of the points raised in this letter and would welcome the opportunity to meet with you to discuss these issues further.

Yours sincerely,

Dr. Shivali Fifield, Chief Officer
Environmental Rights Centre for Scotland



Enc:

- ERCS (July 2022) [Evaluation of Scotland's action plan on access to environmental justice](#)
- ERCS (May 2022) Letter to SCJC and ERCS (November 2021) Letter to SCJC