

# Scotland's lack of progress on delivering access to justice

## Briefing, June 2024

### Introduction

The Environmental Rights Centre for Scotland (ERCS) carries out advocacy in policy and law reform 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>1</sup>

This briefing assesses the Scottish Government's lack of progress in addressing its breach of the Aarhus Convention's Article 9 access to justice requirements and the actions needed to meet the 1 October 2024 deadline set by the Convention's governing institutions.<sup>2</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 of the Convention's Access to Justice requirements.<sup>3</sup> In October 2021, the Convention's Meeting of the Parties (MoP) adopted Decision VII/8s - requiring Scotland, as part of the UK, to submit an Action Plan to the Aarhus Convention Compliance Committee (ACCC) by 1 July 2022, detailing how it would, 'as a matter of urgency' meet six recommendations to make access to justice 'fair, equitable, timely and not prohibitively expensive' by 1 October 2024.<sup>4</sup>

ERCS evaluated Scotland's part of the UK Action Plan and warned that it did not go far or fast enough in addressing the six recommendations and, in particular, removing the 'prohibitively expensive' barrier for raising environmental challenges in court.<sup>5</sup>

### Representation to ESS on the Government's breach of Article 9

In August 2022, ERCS submitted a representation to Environmental Standards Scotland (ESS) on the Scottish Government's systemic failure to comply with the Aarhus Convention. ESS published a Case Summary Report in December 2022<sup>6</sup> and said that they would monitor the developments of Scotland's Action Plan and evaluate progress in Autumn 2023.

In October 2023, the Scottish Government contributed to the UK's first progress report on its Action Plan. ERCS was invited by the Aarhus Convention Compliance Committee (ACCC) to comment on Scotland's part and we highlighted that there were no clear proposals to address Scotland's non-compliance in a timely manner. Friends of the Earth and RSPB also raised concerns for England, Wales and Northern Ireland.<sup>7</sup>

ERCS asked ESS to re-open their investigation. In April 2024, ESS informed us that they are still considering what action to take and are unable to give a timescale for publishing a monitoring note.



## The long history of Scotland's non-compliance

The most positive step forward in the Scottish Government's Action Plan was to request the Scottish Civil Justice Council (SCJC) to review the court rules governing Protective Expenses Orders (PEOs) 'in order to make them compliant with Article 9(4)'.<sup>8</sup> ERCS has written several briefings on why the allocation of legal costs under the PEO regime is unfair and why it needs to be replaced with Qualified One-way Costs Shifting (QOCS) to make access to justice affordable.<sup>9</sup>

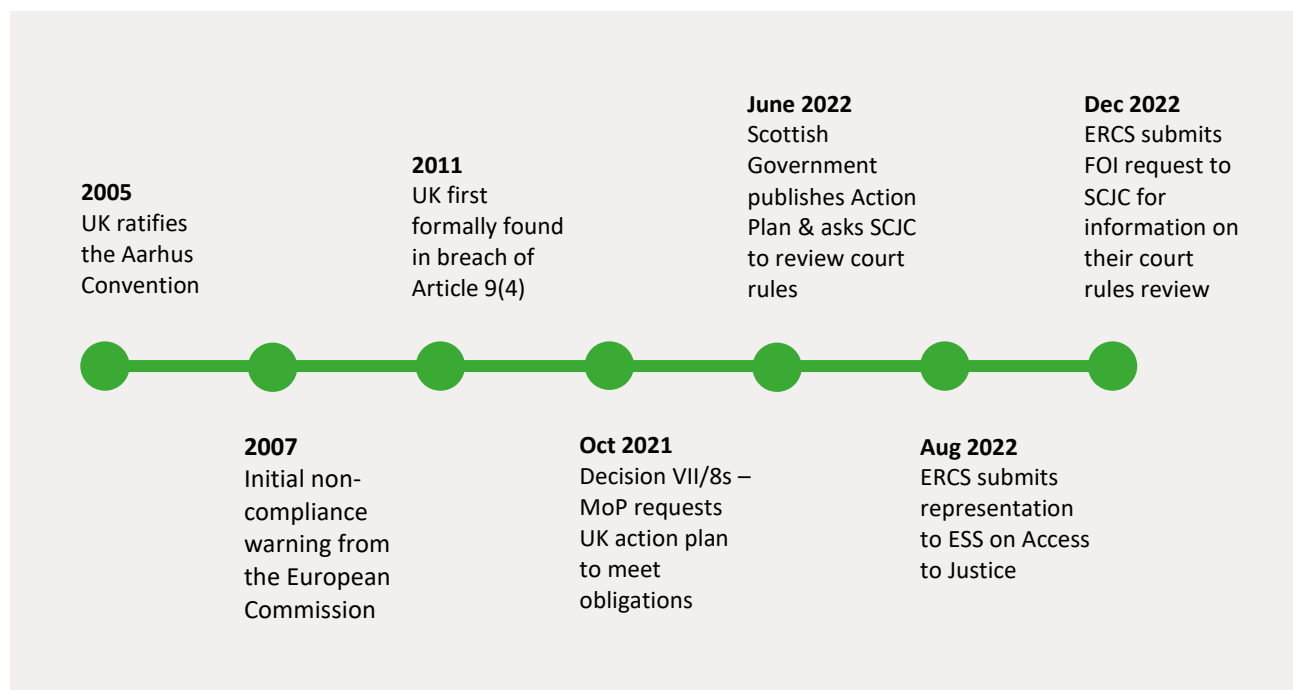
However, the SCJC process has lacked transparency and ERCS has submitted a series of FOI requests to obtain information on their review process and the proposed new court rules. Despite correspondence with Ministers and written questions from MSPs, the Scottish Government repeatedly stated that the SCJC are an independent body and they have no progress update.<sup>10</sup>

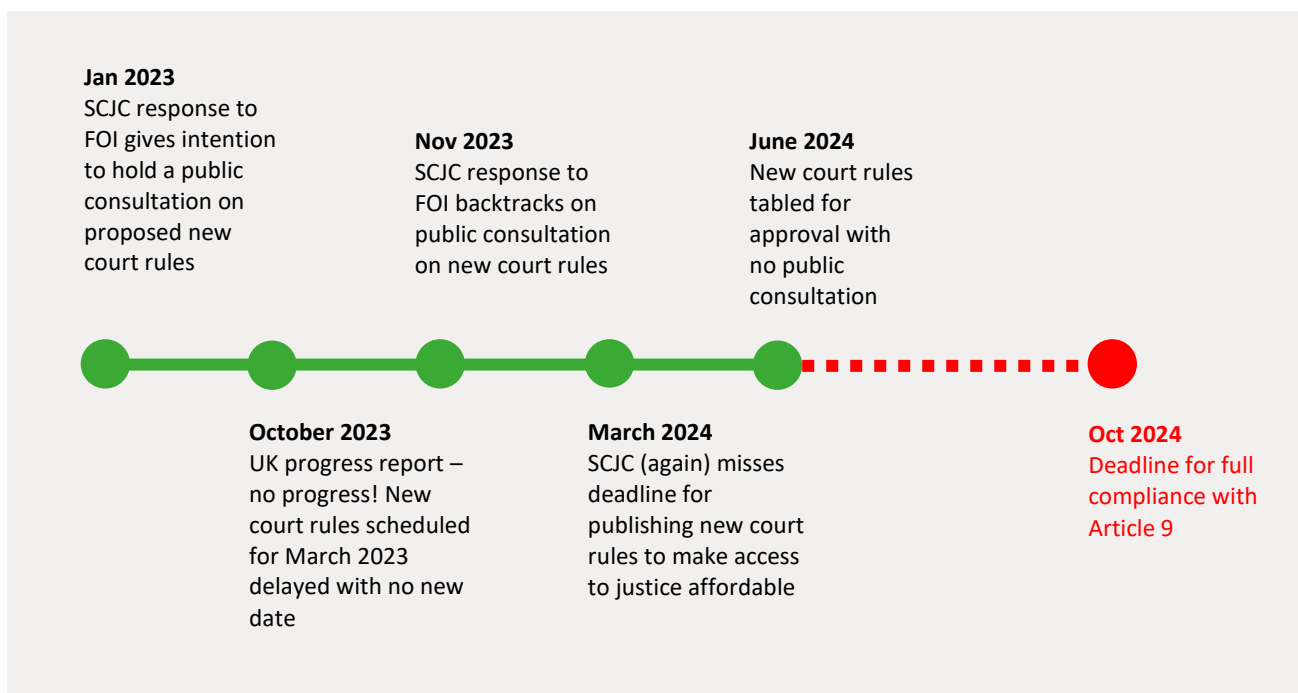
In response to an FOI request, the SCJC indicated in January 2023 that they intended to hold a public consultation on the new rules to PEOs 'later in 2023'<sup>11</sup> – which, although delayed, was somewhat reassuring. Yet, in response to a chaser FOI request in October 2023, the SCJC backtracked on a consultation 'to avoid undue resource impacts for potential respondents'.<sup>12</sup>

ERCS has previously written to the SCJC to warn that creating new PEO rules without any formal public consultation will likely breach Article 8 of the Aarhus Convention (which requires public participation during the preparation of 'executive regulations').<sup>13</sup>

The latest update from civil servants is that the new court rules will be approved in June 2024. The long saga of non-compliance - summarised in the timeline below - continues with little ability for citizens to scrutinise or hold accountable a system which is meant to make access to justice on the environment 'fair, equitable, timely and not prohibitively expensive'.

**Figure 1. Timeline of Scotland's non-compliance with the Aarhus Convention**





## Impacts on environmental governance

The Scottish Government's 2023 Review of the Effectiveness of Environmental Governance accepted that Scotland is in breach of Article 9 but provided no proposals to remedy that breach,<sup>14</sup> despite their commitment to incorporate the procedural and substantive right to a healthy environment in the forthcoming Scottish Human Rights Bill.

The prohibitive cost of legal expenses, including the risk of paying the opponent's legal fees if the case is lost, provides legal uncertainty and has a chilling effect in deterring organisations from holding public bodies to account in a court of law.

ERCS has first-hand experience of this, and because of these uncertainties, we have reluctantly decided not to proceed with legal challenges on three separate matters in the past twelve months alone:

- The Scottish Government's failure to consider whether an environmental court could enhance environmental governance arrangements under S41 of the Withdrawal from the European Union (Continuity) (Scotland) Act 2021.<sup>15</sup>
- The Scottish Government's failure to produce a climate impact assessment of the Infrastructure Investment Plan as required under S94A of the Climate Change (Scotland) Act 2009.<sup>16</sup>
- The Scottish Environment Protection Agency's (SEPA) failure to maintain a public register containing information about the most polluting industrial sites in Scotland, including the licences granted by SEPA and enforcement action taken in relation to those licences, under Regulation 64(1) of the Pollution Prevention & Control Regulations 2012.<sup>17</sup>



## Score card on meeting recommendations & compliance with Article 9

The score card below assesses Scotland's progress (0 = none) on the six recommendations of Decision VII/8s to meet by 1 October 2024. This briefing has focused on Paragraph 2 recommendations to ensure access to justice is not prohibitively expensive, but it is also important to note that there has been no progress on the other three recommendations.

| Six recommendations of Decision VII/8s   | Action taken   | Score (0-3) |
|--|--|-------------|
| <b>Paragraph 2(a):</b> 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  | SCJC review of court rules governing PEOs lacked transparency and the new rules will be introduced with no public scrutiny   | 1           |
| <b>Paragraph 2(b):</b> Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice   | No legislative timetable for legal aid reform; court fees removed from the Court of Session for Aarhus cases but remain in Sheriff Courts  | 1           |
| <b>Paragraph 2(d):</b> Establish a clear, transparent and consistent framework to implement Article 9(4) of the Convention   | Neither the Review on the Effectiveness of Environmental Governance nor the consultation on the Scottish Human Rights Bill have provided a framework to implement Article 9(4) of the Convention | 0           |
| <b>Paragraph 4(a):</b> 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                 | No action taken  | 0           |
| <b>Paragraph 6(a):</b> 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 | No action taken  | 0           |
| <b>Paragraph 8:</b> 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   | No action taken  | 0           |



## What now?

Access to justice is the ultimate guarantee to the rule of law. The Scottish Government must, as a matter of urgency, ensure that access to justice in environmental matters is no longer prohibitively expensive and demonstrate progress in meeting all the recommendations of Decision VII/8s by taking the following steps:

- Introduce a Legal Aid Reform Bill as soon as possible and amend Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 to ensure legal aid is available to community groups and NGOs undertaking public interest litigation
- Open the SCJC review of court rules to public scrutiny
- Replace the 'loser pays' rule with qualified one-way costs shifting (QOCS), and remove 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.

### For more information contact

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- <sup>1</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>2</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>3</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>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> ERCS (July 2022) [Evaluation of Scotland’s action plan on access to environmental justice](#)
- <sup>6</sup> ESS (Dec 2022) [Case summary: Consideration of Scotland’s implementation of the requirements of the Aarhus Convention in respect of access to justice in environmental matters](#)
- <sup>7</sup> RSPB, Friends of the Earth England, Wales and Northern Ireland, and ERCS (Nov 2023) [Joint formal response to Aarhus Secretariat: Decision VII/8s \(United Kingdom\) - invitation to comment on First Progress Report](#)
- <sup>8</sup> DEFRA (July 2022) [Plan of action for decision VII/8s \(United Kingdom\)](#)
- <sup>9</sup> See ERCS (Nov 2023) [Protective Expenses Orders: Investigation reveals why legal expenses regime needs reform](#); ERCS (Nov 2022) [Protective Expenses Orders: access to information remains a barrier to justice](#); and ERCS (Nov 2021) [Recommendations for a plan of action on judicial expenses](#)
- <sup>10</sup> See, for example, the Scottish Government [response to a parliamentary question](#) submitted by Donald Cameron MSP
- <sup>11</sup> [SCJC response to ERCS FOI request](#), 19 January 2023
- <sup>12</sup> [SCJC response to ERCS FOI request](#), 21 November 2023
- <sup>13</sup> [ERCS letter to SCJC](#), 21 May 2022
- <sup>14</sup> ERCS (Oct 2023) [Review of the Effectiveness of Environmental Governance Consultation - briefing](#)
- <sup>15</sup> Ibid.
- <sup>16</sup> ERCS (April 2024) [Scottish Government still hasn’t proved how flagship infrastructure plan will meet net zero targets – press release](#)
- <sup>17</sup> ERCS (June 2023) [ERCS representation to ESS: Failure of SEPA to maintain a public register under Pollution Prevention and Control Regulations](#)