

# The Aarhus Convention and access to environmental justice

## Parliamentary debate briefing, April 2025

### Summary

- Scotland is in longstanding breach of Article 9 of the Aarhus Convention, due to the 'prohibitive expense' of accessing justice in environmental cases
- The Scottish Government missed an October 2024 deadline to implement recommendations issued by the Aarhus Convention's governing institutions in 2021, and is under investigation by Environmental Standards Scotland over its failure to comply with the Convention
- To improve access to justice, the government should prioritise repealing regulation 15 of Civil Legal Aid Regulations 2002; replacing the 'loser pays rule' with Qualified One-Way Cost-Shifting; and establishing a dedicated Scottish Environment Court
- Following the Human Rights Bill's exclusion from the 2024-5 Programme for Government, Scottish Ministers must recommit to introducing an enforceable right to a healthy environment with substantive and procedural elements.

### 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 provides an update to our June 2024 assessment of Scottish Government's progress in addressing its breach of the Aarhus Convention's access to justice requirements,<sup>2</sup> following Scotland's failure to meet the 1 October 2024 deadline for compliance and the publication of the UK government's subsequent progress report.<sup>3</sup> It highlights key points and questions that should be considered to inform the debate.

### 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>4</sup>

In October 2021, the Convention's Meeting of the Parties (MoP) adopted Decision VII/8s - requiring an action plan to be submitted to the Aarhus Convention Compliance Committee (ACCC) by 1 July 2022.



The action plan was required to detail how Scotland 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>5</sup>

Following the publication of the action plan, the Scottish Government tasked the Scottish Civil Justice Council (SCJC) with reviewing the rules governing Protective Expenses Orders (PEOs) to make them Aarhus compliant. Final amendments were published in June 2024 but are insufficient to achieve compliance or address concerns raised by the ACCC over the costs of litigation.<sup>6</sup>

Scotland missed the October 2024 deadline to implement the ACCC recommendations and achieve compliance with the Convention. The UK’s Final Progress Report to the ACCC confirmed that Scotland has made only minor modifications to legal expenses and no concrete commitments for future reform.<sup>7</sup>

## Actions taken by ERCS

In August 2022, ERCS submitted a representation to Environmental Standards Scotland (ESS) on the Scottish Government’s failure to comply with the Aarhus Convention.<sup>8</sup>

In a September 2024 update on that representation, ESS stated that, ‘Following ESS’ scrutiny of the changes to the PEO regime in the Court of Session... ESS remains concerned that these changes to the PEO regime will not resolve all the outstanding issues identified by the Compliance Committee... the only tangible progress – the SSI (Scottish statutory instrument) with changes to the PEO regime – while welcome, does not appear sufficient to resolve all the outstanding issues identified by the Compliance Committee.’<sup>9</sup>

In January 2025, ERCS contributed to a joint response to the ACCC together Friends of the Earth and the RSPB, commenting on the UK progress report and Scotland’s limited progress improving access to justice.<sup>10</sup>

In March 2025, ERCS submitted a formal communication to the ACCC over a breach of the Convention’s Article 8 public participation requirements,<sup>11</sup> in response to the SCJC’s failure to consult the public on its review of court rules.

## Key questions for the debate

- **Will the Scottish Government repeal regulation 15 of the Civil Legal Aid Regulations 2002?** The ‘joint interest test’ specified under regulation 15 makes it very difficult to obtain legal aid for environmental cases, since these necessarily impact more than one person. In the majority of breaches of environmental law (e.g. where public bodies are failing to discharge their duties in relation to climate policy, water regulations or the publication of public registers) it is very difficult to access legal aid, preventing individuals on low incomes from holding public bodies to account.
- **Will the Scottish Government replace the ‘loser pays rule’ with Qualified One-Way Cost Shifting (QOCS)?** The ‘loser pays’ rule means that litigants are liable to pay their opponents’



expenses if they lose their case. This can cost tens or hundreds of thousands of pounds. The ACCC has clearly stated that this causes a ‘chilling effect’ – deterring individuals and organisations taking legal action, even if they have a strong case to do so. ERCS analysis shows that proposed PEO reforms are insufficient to reduce the cost of litigation - a fairer system would be to introduce QOCS, as has been done for personal injury claims.<sup>12</sup>

- **Will the Scottish Government reconsider its refusal to establish an environmental court or tribunal?** The Scottish Government ruled out establishing an environmental court in its environmental governance review without properly considering the matter. There is strong evidence that this could increase access to justice, reduced fragmented routes to remedy, and develop judicial expertise on environmental cases. ERCS briefings and reports have detailed how such a court could work, and the prospective costs and efficiency savings of establishing one in Scotland.<sup>13</sup>
- **Will the Scottish Government introduce an enforceable right to a healthy environment in the next parliamentary session?** The government previously claimed access to justice would be addressed through the incorporation of the human right to a healthy environment as part of a comprehensive Human Rights Bill. Yet this Bill was excluded from the 2024-5 Programme for Government, throwing its future into doubt. The right to a healthy environment, including both substantive and procedural elements, must be enshrined in law to reduce environmental injustice and close protection gaps in Scotland and abroad.<sup>14</sup>
- **Will the Scottish Government extend the exemption of court fees for Aarhus cases to sheriff courts?** Court fee exemptions are relatively minor changes which do not significantly alter the prohibitively expensive nature of environmental litigation. Nevertheless, the Scottish Government’s introduction of an exemption from court fees for Aarhus cases heard in the Court of Session is welcome and should be extended to sheriff courts.<sup>15</sup>
- **Will the Scottish Government introduce an equal right of appeal in planning?** Currently, only applicants for planning permission (usually developers) have the right to appeal refusals of planning permission at low or no cost. In contrast, members of the public who may be affected by the planning decision do not enjoy the same statutory appeal rights. ERCS, Planning Democracy, Friends of the Earth Scotland, and RSPB Scotland have submitted a complaint to the ACCC that planning appeal rights in Scotland are not ‘fair’ and are therefore in breach of Article 9 of the Aarhus Convention.<sup>16</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 that were supposed to be met 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	Following the SCJC review of court rules, Scotland has agreed to minor amendments on the use of PEOs; no commitment to replace with QOCS	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 plans to resolve this matter	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 plans to resolve this matter	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 plans to resolve this matter	0

### 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> ERCS (June 2024) [Scotland's lack of progress on delivering access to justice](#)
- <sup>3</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>4</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>5</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>6</sup> ERCS (July 2024) [Scotland's new protective expenses rules remain non-compliant with the Aarhus Convention](#)
- <sup>7</sup> DEFRA (Nov 2024) [United Kingdom Final Progress Report to the Aarhus Convention Compliance Committee](#)
- <sup>8</sup> ERCS (Aug 2022) [ERCS representation to ESS - Access to justice in environmental matters](#)
- <sup>9</sup> ESS (Sept 2024) [Case Update – 26 September 2024 - Consideration of Scotland's implementation of the requirements of the Aarhus Convention in respect of access to justice in environmental matters, p.3](#)
- <sup>10</sup> RSPB, Friends of the Earth England, Wales and Northern Ireland, and ERCS (Jan 2025) [Decision VII/8s \(United Kingdom\) - invitation to comment on Final Progress Report](#)
- <sup>11</sup> ERCS (March 2025) [Communication to the Aarhus Convention Compliance Committee Failure by the Scottish Civil Justice Council to consult the public during the preparation of draft PEO rules](#)
- <sup>12</sup> ERCS (July 2024) [Scotland's new protective expenses rules remain non-compliant with the Aarhus Convention](#); ERCS (Nov 2021) [Recommendations for a plan of action on judicial expenses](#)
- <sup>13</sup> For an overview, see ERCS (May 2023) [Briefing: The clear and urgent case for a Scottish Environment Court](#) and ERCS (Feb 2025) [Efficiency savings and costs of a Scottish Environment Court](#); more detailed arguments are developed in ERCS/Christman (July 2021) [Why Scotland needs an environmental court or tribunal](#) and ERCS/Gemmell (March 2023) [The clear and urgent case for a Scottish Environment Court](#)
- <sup>14</sup> ERCS/Scottish Environment LINK (June 2023) [The Substantive Right to a Healthy Environment: A review of definitions, standards and enforcement mechanisms](#)
- <sup>15</sup> ERCS (June 2022) [ERCS welcomes exemption of court fees for some Aarhus cases, but much more is needed](#)
- <sup>16</sup> ERCS/Planning Democracy (Aug 2022) [Equal rights of appeal and access to justice in Scotland](#)