Scottish Civil Justice Council

UPDATE ON THE AARHUS CONCERNS FOR SCOTLAND

Issued: 30 September 2024

PURPOSE

1. As part of the ongoing PEO Rules Review; this paper narrates the current perspective of the Costs and Funding Committee (CAFC) on the concerns flagged within relevant paragraphs from the 2021 Compliance Report, of the Aarhus Convention Compliance Committee (ACCC).

BACKGROUND

Aarhus Convention:

2. The full Aarhus Convention *(25 pages)* is publicly accessible at:
https://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

3. For context - the convention must be read in conjunction with the Aarhus Convention Implementation Guide *(282 Pages*):
https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

4. Annex 1 - provides an extract of "Article 9: Access to Justice".

5. Annex 2 - covers the "implementation elements" needed to provide compliance with the Convention.

The compliance procedure:

6. The Implementation Guide does include the following observations on how the compliance procedure[1] under Article 15 is expected to work:

   - *Page 222* - The Convention requires that the **arrangements be of a "non-confrontational, non-judicial and consultative nature**". This phrase has several implications. The first is that the intention of compliance review is not to point the finger at Parties that are in violation of the Convention, but to recognize and assess the shortcomings of Parties and to work in a constructive atmosphere to assist them in complying. Moreover, the Convention requires that the arrangements include "appropriate public involvement". Thus, the public is involved in its "non-confrontational, non-judicial and consultative" activities in an appropriate manner; and

   - *Page 224* - Although **the Compliance Committee "cannot make decisions on compliance that are legally binding for the Parties**" its findings and recommendations are relevant for overall compliance with and implementation of the Convention

[1] Under Article 15: Review of Compliance

7. As a key pillar of the Aarhus Convention is "public participation in decision making" - a number of user friendly websites facilitate ready access to all relevant correspondence with regard to compliance monitoring:

   DECISION VII/8s *(concerning the UK)*
   This site contains the text of **Decision VII/8s** which summarises the concerns regarding the UK's compliance, as adopted at the 7th Meeting of the Parties (MOP) in October 2021. It also contains the UK Plan of Action *(Jul 2022)*, and the first progress report on that UK Plan of Action *(Oct 2023)*.
   https://unece.org/env/pp/cc/decision-vii8s-concerning-united-kingdom

   ALL DECISIONS *(for all member states)*
   This site provides the Decisions for all member states, as adopted at the each session of the Meeting of the Parties (MOP). It allows compliance issues to be tracked as they evolve between sessions. The decisions related to UK compliance started to arise from 2011 onwards:
   https://unece.org/env/pp/cc/documents

   - *JUL 2011* – MOP 4 - Decision IV/9k
     https://unece.org/DAM/env/pp/mop5/Documents/Post_session_docs/Decision_excerpts_in_English/Decision_V_9n_on_compliance_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland.pdf

   - *JUL 2014* – MOP 5 – Decision V/9n
     https://unece.org/DAM/env/pp/mop5/Documents/Post_session_docs/Decision_excerpts_in_English/Decision_V_9n_on_compliance_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland.pdf

   - *SEP 2017* – MOP 6 – Decision VI/8k
     https://unece.org/DAM/env/pp/compliance/MoP6decisions/Compliance_by_United_Kingdom_VI-8k.pdf

   - *OCT 2021* – MOP 7 – Decision VII/8s
     https://unece.org/sites/default/files/2022-01/Decision_VII.8s_eng.pdf

   FINDINGS *(concerning UK complaints made)*
   This site summarises all of the individual allegations made by communicants and the findings issued by complaint reference number *(in the format of AAA/C/YYYY/NN)*. It provides the ability to select and open the findings of the UNECE specific to each complaint:
   https://unece.org/env/pp/cc/communications-from-the-public

8. The detailed concerns of the Aarhus Convention Compliance Committee (ACCC) were narrated in paragraphs 82-113 of the:
   - *"Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I".*
     https://unece.org/sites/default/files/2024-03/ECE_MP.PP_2021_59_E.pdf

9. The following tables present the relevant paragraph from that ACCC report on the left, with the Councils current perspective on the right:

TABLE 1 - PREAMBLE:

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at September 2024)*
82	As an initial point, the Committee notes that **the Scottish Government is considering the possibility of making the Convention justiciable within its law.** The Committee welcomes any action that furthers the implementation, effectiveness and objectives of the Convention within domestic legal systems.	**This a policy matter for the Scottish Ministers to progress**.

TABLE 2 - CONCERN - A - Type of claims covered:

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at September 2024)*
83	The revised rules on PEOs entered into force on 10 December 2018, through the amendment of Chapter 58A of the Court of Session Rules.	
84	The Party concerned states that the PEO regime applies to certain judicial and statutory reviews but not to private law claims. The Party concerned indicates that although the revised PEO rules do not apply to private law cases, it is generally public bodies that enforce nuisance matters in Scotland.	
85	The observers note that some but not all private Aarhus claims may be covered by the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.	
86	Since **at least some private law claims remain outside the PEO rules**, the Committee finds that the Party concerned has not fulfilled paragraph 2(a), (b) and (d) of decision VI/8k with respect to the type of claims covered in Scotland.	**The CAFC has agreed "in principle" to extend PEOs** The Council has completed its further research on the type of claims covered. Subject to CAFC members approving the proposed scope at its September 2024 meeting, rules will be prepared for consultation purposes.
	The SCJC is aware of – • The findings in **ACCC/C/2013/86** on nuisance *https://unece.org/env/pp/cc/accc.c.2013.86_united-kingdom* • The findings in **ACCC/C/2016/142** on littering https://unece.org/env/pp/cc/accc.c.2016.142_united-kingdom	The domestic law on nuisance is in Part III of the Environmental Protection Act 1990 *(UKPGA 1990/43):* *https://www.legislation.gov.uk/ukpga/1990/43/contents* The domestic law on litter etc. is in Part IV of the Environmental Protection Act 1990 (UKPGA 1990/43): https://www.legislation.gov.uk/ukpga/1990/43/contents

TABLE 3 - CONCERN - B - Levels of the costs caps:

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at September 2024)*
87	The default levels of **the costs caps have not changed** since the Committee's report to the sixth session, namely £5,000 for a claimant (whether an individual or an organization), with a cross-cap of £30,000 for the defendant	**The Council is content - to keep the current amounts**. **The Council is content - not to adopt split caps** *(for individuals & organisations).* Under the Consumer Price Index (CPI) an inflation multiplier of 1.367 could be applied to the baseline for the default caps as set in March 2013, which would suggest revised caps at say £7,000 and £42,000. The decision made is to keep the same cap amounts to provide consistency for potential applicants and to support the Councils statutory guiding principle for ensuring that procedures are easy to use and understand.
88	Under the 2018 PEO rules, **the default cost levels can be varied up or down "on cause shown"**. Previously, in contrast to the regime in England and Wales, they could only be varied in a manner favourable to the claimants, which the Committee specifically welcomed.	**The Council is content – to keep the current rule to provide for judicial independence** The 2018 amendment was made at the direct request of the judiciary; as the domestic law of Scotland includes a statutory guarantee of judicial independence under section 1 of the Judiciary and Courts (Scotland) Act 2008 *(ASP 2008/6)*. https://www.legislation.gov.uk/asp/2008/6/section/1 Retaining that ability to shift the caps both up and down is consistent with that statutory guarantee (even though there have never been a cap shifted upwards in practice, since cost capping was introduced in 2013).
89	In its second progress report, the Party concerned indicated that the 2018 PEO rules were untested, but that **it was "not expected" that there will be large numbers of cases in which the costs caps will be increased**. The Party concerned has not provided any **information** since its second progress report **on how the caps are being applied in practice.**	**The policy assumption remains the same**: The discretion to vary caps upwards is subject to a sufficient reason to do so being demonstrated to the satisfaction of the court, which would rarely happen (if at all).
		The evidence confirms no upwards adjustments have been made: Since 2013 a total of 12 Environmental PEO's have been granted under the PEO Rules. In none of those PEOs were the caps varied upwards.
90	The Committee already indicated in its review of decision V/9n **that £5,000 should be the maximum amount** of costs payable by a claimant in proceedings under article 9 of the Convention, with the possibility for the court to lower that amount if the circumstances of the case make it reasonable to do so. It therefore regrets that the 2018 PEO rules allow for both increases and decreases in the costs cap for both parties.	**The Council prefers having flexibility, rather than using fixed maximum sums:** The domestic law of Scotland requires the cost capping rules to align with judicial independence; through the flexibility provided in Part 2 of the rule. That second Part 2 of the rule will not have a material impact on what happens in practice - as Part 1 of the rule still says the court "must" use the default caps.
	Moreover, **the vague term "on cause shown" introduces legal uncertainty and could have a chilling effect**. The Committee thus considers that the 2018 PEO rules move the Party concerned further away from fulfilling paragraph 2(a), (b) and (d) of decision VI/8k.	**This would appear to be a misperception:** Potential litigants reading the court rules will encounter terms in Scots law that are initially unfamiliar but frequently used within the domestic law of Scotland. A brief internet search should soon establish that "on cause shown" is the same as saying "where a valid reason can be demonstrated to the satisfaction of the court". Getting

		that understanding with minimum effort means this term is unlikely to be the root cause for someone abandoning their potential litigation.
91	Given the lack of data on how the 2018 PEO rules are being applied in practice, the Committee invites the Party concerned, in its progress reports in the next intersessional period, to **provide up-to-data on the points (i)–(vii)** in paragraph 32 above with respect to costs caps under the PEO rules in Scotland also.	**The information requested has been published online:** • "Research on the cost caps used in practice *(Aug 2024, SCJC)* *https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/research-on-the-cost-caps-used-in-practice.pdf?sfvrsn=ef272688_1*
	• (i) the proportion of Aarhus claims in which an application to vary the claimant's costs cap is made, indicating whether this was to vary up or down; • (ii) the proportion of Aarhus claims in which an application to vary the cross-cap is made, indicating whether this was to vary up or down; • (iii) the stage of the proceeding at which the application to vary was made; • (iv) **the outcomes of each application**; • (v) the stage of the proceeding at which the application was decided; • (vi) **the quantum of each varied costs caps**; and • (vii) for each case in which a variation to either the claimant's cap or the cross-cap was granted, **the reasons given by the court** for doing so.	**The published data should address the information requested:** In the period from introducing cost capping in March 2013 to June 2024: • There were 12 Environmental PEOs granted under the PEO Rules • The default caps were applied in 11 of those PEOs • The default caps were reduced downwards (to nil) in 1 of those 12 PEO's; and • None of those Environmental PEO's had the default caps varied upwards In that same period: • 2 Common Law PEOs were granted; and • Both applied comparable caps of £5,000 and £30,000 under the common law The above research report sets out: - The quantum of each cost cap used; and - The courts reason for varying any of those caps.
92	Based on the foregoing, the Committee finds that the Party concerned has not yet fulfilled paragraph 2 (a), (b) and (d) with respect to the level of the costs caps in Scotland.	**In theory: it may appear that Scotland is shifting away from compliance but in practice there has been no such movement.** The default caps will continue to be applied in 99.9% of cases because part 1 of the cost capping rule says the court "must" use those defaults.

TABLE 4 - CONCERN - C - Costs protection on appeal;

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at September 2024)*
93	Chapter 58A.8 now provides that when a respondent appeals, the PEO is carried over to that appeal, but **where a claimant appeals, the claimant must reapply for a PEO**. The Party concerned states that this is justified by the need to give some flexibility for courts to respond to the circumstances of the case. It submits, for instance, that if the circumstances, or the claimant, have changed on appeal a PEO may no longer be appropriate. It claims that in most cases a fresh PEO will be granted, under the revised, less cumbersome procedure.	**A rule change was enacted in June 2024**: • Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2024 *(SSI 2024/96)* To improve procedural fairness; the two edits made by section 2(4) of the SSI have reworded rule 58A.8 so that reclaiming is progressed in the same manner regardless of whether it is the petitioner or the respondent that is appealing the original decision.
94	It is the Committee's understanding that, based on Chapter 58A.8, when the respondent appeals, the claimant's costs will remain capped at £5,000 and the respondent's cross-cap at £30,000, total for both proceedings. In contrast, when the claimant appeals, it must reapply for a new PEO and if it is successful, a new cap of £5,000 and cross-cap of £30,000 will apply. It is not immediately clear from the text of Chapter 58A that the costs cap covers all costs of both procedures, for example the costs of interveners and the successful party's court fees. In its final progress report, the Party concerned states that the Scottish Government "would expect that the costs cap covers all of the costs of the procedure". That is not, however, the same as a clear rule that the costs cap indeed does so.	ditto
95	In its report to the sixth session of the Meeting of the Parties, **the Committee had welcomed the proposal to automatically extend the application of the costs cap to cover an appeal filed by the respondent and had encouraged the Party concerned to consider applying this approach to appeals filed by the claimant also,** or at least to adopt the approach taken in Northern Ireland, where costs protection automatically continues, albeit a further cap (at the same level) is applied. The Committee regrets that the Party concerned has not to date adopted either of the Committee's suggested approaches and invites it to do so as soon as possible, and at the same time to provide clear evidence that the costs cap covers all costs payable to successful parties and interveners, including their court fees.	ditto
96	In the light of the above, the Committee finds that while the Party concerned has fulfilled paragraphs 2 (a), (b) and (d) of decision VI/8k with respect to cost protection in appeals brought by respondents, it has not yet done so with respect to appeals brought by claimants.	ditto

TABLE 5 - CONCERN - D - I - Definition of "prohibitively expensive"

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at September 2024)*
98	The Committee notes that the definition of "prohibitively expensive" costs in Chapter 58A.1 (3) is based on the criteria set out by the CJEU in the Edwards case. The Committee considers that the elements included in this provision are relevant and appropriate, and provided that they are appropriately applied in practice, set a useful framework to ascertain whether costs are to be considered prohibitively expensive for a particular applicant.	**The definition of "prohibitively expensive" continues to work as intended**

***TABLE 6* - CONCERN - D - II - PEO application procedure and costs;**

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at September 2024)*
99	The Committee welcomes the simplified, written procedure for applying for a PEO introduced through the 2018 amendments.	**Making decisions on the papers - is working as intended** The move away from using mandatory hearings to having decisions made on the papers has delivered a significant reduction in expenses for both claimants and respondents *(as they can both avoid the costs of a hearing).*
100	The Committee notes, however, that Chapter 58A.5 (3) (ii) requires the applicant to provide information about **the terms on which the applicant is represented**. The Party concerned states that this is to enable the court to have the broadest possible understanding of the circumstances of an application and applicants. The Committee does not see why this information should be required in order to apply for a PEO. This could require disclosure concerning pro bono representation and threaten the economic viability of environmental lawyers representing clients in public interest cases in the mid- to long-term.	**Inserting a duty of confidentiality – will have mitigated the perceived threat** As a generality the existence of pro bono representation conveys that a qualified lawyer has sufficient confidence in the merits of a case to voluntarily provide their own time. That is seen as just one factor that may enhance the merits of a PEO application, without that factor being determinative. There remains a need for the court to have sufficient information to fully address case precedent (the Corner House principles). Having added a duty of confidentiality into the rules, the perceived threat to the economic viability of environmental lawyers is mitigated.
101	Pursuant to Chapter 58A.5 (3) (iv) **the applicant must provide an estimate of the expenses of each other party** for which the applicant may be liable in the proceedings. The Party concerned states that this is likewise to enable the court to have as broad an understanding as possible of the circumstances of an application. The Committee considers that	**Having expenses estimated by the claimant – is working as intended** The added value is that the court can understand the level of expenses that the claimant would find "prohibitively expensive". A respondent's view on what a claimant might find prohibitive would be less informative, and waiting for a respondents estimate could unreasonably delay the claimant making their application.

	preparing such an estimate entails additional work (and thus cost) for the claimant. The Committee notes that neither England and Wales or Northern Ireland have such a requirement and it is difficult to see what value it adds, since the other party would surely be better placed to provide its own estimate.	
102	Chapter 58A.674 provides that the procedure for PEO applications is by default a written procedure. The Committee has no evidence that the default proceedings is not followed in the majority of cases. However, **for those cases in which a public PEO hearing is held, the Committee is concerned that the absence of confidentiality** of financial information may have a deterrent effect on claimants	**A rule change was enacted in June 2024**: • Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2024 *(SSI 2024/96)* Section 2 (2) of that SSI inserts paragraph 5 into rule 58A.5; prompting a petitioner to request confidentiality when they lodge a motion requesting a PEO. In response the court will specify that requirement for confidentiality in an interlocutor, allowing the sanction of contempt to be automatically applied to any failure to maintain confidentiality. The majority of PEO applications are dealt with on the papers. Section 2 (3) of that SSI Inserts paragraph 3 into rule 58A.6; which means that in the unlikely event that a hearing was to be fixed following a request for confidentiality, then that hearing would default to an "in chambers" hearing (excluding the public).
103	Concerning the cost of applying for a PEO, the Committee welcomes that under Chapter 58A.9 (2), **the cost of an unsuccessful PEO application is limited to £500, other than on exceptional cause shown**. The Committee considers that this increases certainty for claimants and is thus a positive step towards fulfilling paragraph 2 (a), (b) and (d) of decision VI/8k.	**The £500 limit on the expenses of an application – is working as intended**

TABLE 7 - CONCERN - D - III - Interveners;

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at September 2024)*
105	The Party concerned has confirmed that the costs of interveners are not included in the costs caps and that **there is no special provision within the costs regime for interveners.**	**A rule change was enacted in June 2024:** • Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2024 (*(SSI 2024/96)* In practice; the courts default position is that orders are not normally made for or against an intervener. That reflects that the purpose of an intervener's written submission is to assist the court, without introducing unreasonable delay into

		proceedings. Both those factors influence the discretion then exercised by the court when deciding on reasonable expenses. Section 5 of the above SSI inserts a new rule 58A.10 which makes that default explicit. That does convey to a potential litigant that their exposure to an interveners costs is likely to be nil; providing they act reasonably. If they act unreasonably some risk will remain - as the court may choose to use expenses as a sanction for that unreasonable behaviour.
106	The Committee finds that the failure of the costs caps to cover any costs that may be payable to interveners does not meet the requirements of paragraph 2 (a), (b) and (d) of decision VI/8k.	ditto

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TABLE 8 - CONCERN - D - IV - Court fees;

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at September 2024)*
107	The Party concerned reports that the Scottish Government "expects" the costs cap will cover all stages of the procedure and that **court fees would be included in the costs regime.**	**Court fees are included within the cost regime** The cost regime covers: - The fees charged for legal representation; - Reasonable outlays such as expert witness costs etc.; and - Court fees The Keating case (Para 25) provides relevant evidence: • If Mr Keating had paid out that estimate of £8,000 in court fees the court would have accepted the amount as stated; • The only reason that £8,000 was excluded was that no payment had ever been made, because Mr Keating was entitled to financial assistance via legal aid; • Rather than creating any dubiety that case should be seen as providing clarity - that if a litigant has not incurred any payment then they should exclude that amount from their expenses.
108	The observers submit that **case law indicates that it may not cover court fees** and that **court fees have increased** in recent years.	**This appears to be a misperception**: • The cases referred to do not support the claim of "dubiety"; and • Inflationary adjustments occur as a matter of routine and that will continue.

		Dubiety - The cases referred to by observers do not evidence dubiety over the ability to recover court fees. By way of example Keating (Para. 25) – Simply confirms that parties should only claim an expense if they actually make a payment (As he was legally aided, no court fees were ever paid). Keating (Para. 36) – The court suggested that extending financial assistance through fee exemptions should be considered by the state (which has since happened) Unison - does not create a "dubiety" around recovery of court fees set in Scotland - The core issue in Unison was that the HMCTS was already at full cost recovery when it set the fees for the Employment Tribunal and then added an additional sum taking those tribunal fees well above full cost recovery (with the express aim of cross subsidising other court services); - The subsequent 90% fall in the volume of cases did provide clear evidence that such high fees were acting as an unreasonable barrier in access to justice; - Hence the court declared those fees to be unlawful and required the HMCTS to refund all fees charged; - The position on court fees charges in Scotland is very different: o The Scottish Government policy is to set court fees at a level that is only "moving towards" full cost recovery; o The overall % cost recovery still falls below that level; and o There are no court fees set in Scotland with an express policy aim of charging above full cost recovery to cross subsidise other court services.
		Fees Setting - the SCJC would ask to ACCC to note that: • The setting of court fees is a matter reserved to the Scottish Ministers, by section 107 of the Courts Reform (Scotland) Act *2014 (ASP 2014/18)*. • That approach enables the elected members of the Scottish Parliament to then take a view on whether access to justice is being impacted unreasonably; • Public participation on changes to the regulated fee tables is provided through the Public Consultations run by the Scottish Government every 3 years; and • The annual increases then made in each three yearly cycle were predominantly just adjustments for inflation.
109	The Committee underlines that court fees must be included within the costs protection regime since **it is the entire costs of proceedings that must be considered when ensuring that proceedings are not prohibitively expensive** under article 9 (4) of the Convention. While noting that the Party concerned "expects" that costs caps will include court fees, the Committee will require clear evidence to that effect before it can conclude	**The entire costs of proceedings is included** The court procedures for the "taxation of expenses" in Scotland are set out in the Taxation of Judicial Expenses Rules 2019 (SSI 2019/75). The expenses awarded following a taxation do cover - The direct charges for legal representation; - The reasonable outlays incurred; and - Other expenses reasonably incurred such as court fees etc.

	that paragraph 2 (a), (b) and (d) of decision VI/8k have been met in this regard.	As a fee exemption is now available claimants no longer incur any need to make a payment. It follows that, as a payment is no longer required, this concern becomes redundant.

TABLE 9 - CONCERN - D - V - Legal Aid:

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at September 2024)*
110	The observers claim that Regulation 15 of the Civil Legal Aid Regulations appears to exclude environmental public interest cases, that very few environmental cases receive legal aid (and most that do are private law cases) and that the cap of £7,000 on legal aid is unrealistic to run a complex judicial review procedure.	**The Council awaits the updated regulations.** Making changes to the civil legal aid regulations is a policy matter for the Scottish Ministers and the Scottish Legal Aid board (SLAB) *(rather than this Council).* The Council will consider the planned Bill once the Public Consultation on its proposed contents has been issued
111	The Party concerned reports that the Scottish Government consulted on legal aid reform in 2019 and intends to introduce a Bill in the first session of the next Parliament on this issue.	ditto
112	The Committee invites the Party concerned to provide the text of the relevant legislative provisions at any early stage in the next intersessional period for its consideration.	ditto

BIBLIOGRAPHY

Publications by the SCJC:

Research on the cost caps used in practice *(Aug 2024, SCJC)*
https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/research-on-the-cost-caps-used-in-practice.pdf?sfvrsn=ef272688_1

Publications by the party (DEFRA liaise with the Scottish Government to agree the response for Scotland).

Plan of action for decision VII/8s (United Kingdom) *(Oct 2022, DEFRA)*
https://unece.org/sites/default/files/2022-07/frPartyVII.8s_01.07.2022_plan_action.pdf

UK Progress Report to the ACCC - Jul 22 to Sep 23 *(Oct 2023, DEFRA)*
https://unece.org/sites/default/files/2023-10/frPartyVII.8s_13.10.2023_report_1.pdf

Publications by the UNECE:

Aarhus Convention *(June 1998, UNECE)*
https://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

Aarhus Convention Implementation Guide – 2nd Edition *(Apr 2014, UNECE)*
https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

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Preparing the Plan of Action: Information Note by the ACCC *(Feb 2022, ACCC)*
https://unece.org/sites/default/files/2022-02/Information_note_for_Parties_on_preparing_their_plan_of_action.pdf

GLOSSARY

The key terms used within this paper are:

Term	*Meaning*
AARHUS CONVENTION	The international treaty on the protection of the environment signed at Aarhus Denmark on the 25 June 1998 which covers access to **information** on the environment, **public participation** in decision making, and **access to justice**. Following the United Kingdom signing that treaty, it came into effect in Scotland on 24 May 2008.
ACCC	Acronym for - the "Aarhus Convention Compliance Committee (ACCC)", which supports the monitoring of compliance for the UNECE.
CAFC	Acronym for - the Costs and Funding Committee (CAFC), which supports the work of the SCJC.
DEFRA	Acronym for - the Department for Environment Food and Rural Affairs (DEFRA); which collates the UK states response to the ACCC.
HMCTS	Acronym for – His Majesty's Courts and Tribunals Service (HMCTS)
On cause shown	A term in Scots law – which equates to saying 'where a valid reason can be demonstrated to the satisfaction of the court'.
PEO	Acronym for - a Protective Expenses Order (PEO). The general rule for recovery of expenses is referred to as "expenses follow success", or alternatively "loser pays". When a significant imbalance of power arises between the parties, the ability to apply for a PEO allows claimants to limit the amount of expenses (i.e. legal costs and outlays) they would otherwise pay if they did lose. For the purposes of this paper there are 2 types of PEO: ○ Environmental PEOs – as sought under RCS Chapter 58A for civil proceedings related to the environment; and ○ Common law PEOs – which can be sought in any civil proceedings.
SCJC	Acronym for - the "Scottish Civil Justice Council (SCJC)."
SLAB	Acronym for – the "Scottish Legal Aid Board (SLAB)"
SCTS	Acronym for – the "Scottish Courts and Tribunals Service (SCTS)"
UNECE	Acronym for - the United Nations Economic Council for Europe (UNECE) which oversees the effective operation of the Aarhus Convention across all states in Europe that are signatories to the Convention.

ANNEX 1 – EXTRACT OF - ARTICLE 9: ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her 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, has access to a review procedure before a court of law or another independent and impartial body established by law. In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice

ANNEX 2 – THE IMPLEMENTATION OF ARTICLE 9

The "implementation elements" for compliance with Article 9 are summarised at page 190 of the Aarhus Convention Implementation Guide *https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf*

Article 9, paragraph 1 - Requires access to review procedures relating to information requests under article 4.
• Available to any person that has requested information
• Judicial or other independent and impartial review
• Additional expeditious and inexpensive reconsideration or review procedure
• Binding final decisions
• Reasons for decision in writing

Article 9, paragraph 2 - Requires access to review procedures relating to decisions, acts or omissions subject to article 6 and other relevant provisions of the Convention.
• Judicial or other independent and impartial review of substantive or procedural legality
• Standing requirements to be determined in accordance with national law and the objective of wide access to justice
• Possibility for preliminary administrative review procedure

Article 9, paragraph 3 - Requires access to review procedures for public review of acts and omissions of private persons and public authorities concerning national law relating to the environment.
• Administrative review procedures
• Judicial review procedures
• Criteria for access, if any, to be laid down in national law

Article 9, paragraph 4 - Sets general minimum standards that apply to all relevant review procedures, decisions and remedies.
• Adequate and effective remedies, including injunctive relief as appropriate
• Fair
• Equitable
• Timely
• Not prohibitively expensive
• Decisions given in writing
• Decisions publicly accessible

Article 9, paragraph 5 - Requires Parties to facilitate effective access to justice.
• Information on access to administrative and judicial review procedures
• Appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice