

NEXT STEPS WHEN “PROMOTING PUBLIC PARTICIPATION”

Purpose

1. To enable the Council:
 - To consider the duty held under the Aarhus convention which requires the Council to “*strive to promote public participation*” whenever it makes decisions that will have a “*significant effect*” on the environment; and
 - To agree those actions that would assist the Council in responding to the recent allegation made by the ERCS of a failure to comply with that duty.

Background

2. The UK became a signatory to the Aarhus convention in 2005 and the findings of non-compliance by the UK started to arise in 2011, and has increased with each of the subsequent compliance reports considered at the Meeting of the Parties (MOP) in 2014, 2017 and 2021.
3. Whilst actions have been taken by the Council and the Scottish Government to address those concerns there is growing public dissatisfaction with the slow and fragmented rate of progress. The current legal challenge has brought into focus the Councils lead role in enacting the remaining actions needed to address those concerns.

The Aarhus concerns as raised in 2021

4. The Scottish Government has the lead responsibility for:
 - Improving environmental governance;
 - Progressing a Human Rights Bill to embed the right to a healthy environment within Scots law;
 - Reforming legal aid; and
 - Any future policy decision on whether to incorporate the Aarhus convention into domestic law (*given the treaty itself is not yet justiciable in Scots law*).
5. The Council has the lead responsibility for:
 - Improving the ability for potential litigants to access *cost protection*; if seeking an *Environmental PEO* under the procedure set out in RCS Chapter 58A.
6. In that regard the main concerns raised with regard to how that existing Chapter 58A procedure works were specific to:

- *A - The type of claims covered* - whether the scope could be expanded to include further types of environmental law cases ; such as Sheriff Court public nuisance and littering cases;
- *B - The level of cost caps* – given that the ACCC would prefer that the Council reverts to using caps as ‘fixed maximum sums’; rather than using caps that may (by exception) be varied upwards “on cause shown”;
- *C - The differential in cost protection on appeal* - regarding the fairness of an applicant needing to apply for a new PEO on appeal;
- *D - Clarifying elements of the application procedure* - including the mitigation of risk for applicants when they are disclosing financial information;
- *E - The recovery of interveners costs* – if the court was to make an adverse expenses award in favour of an intervener; and
- *F - The recovery of court fees* – as applicants could not yet apply for an exemption from paying court fees in 2021.

The timeline for responding to the concerns raised by the ACCC

7. This timeline covers how the concerns raised have (or will be) addressed:

In 2022 – the Scottish Government addressed item F (*court fees*) by the introduction of a fee exemption for all Aarhus related cases.

In 2024 – the Council addressed items C, D and E (*unfairness, confidentiality & interveners expenses*) through the rule changes that were made within the 2024 Act of Sederunt.

In 2025 – the Council will publish its planned 2025 Public Consultation to progress the proposed changes to items A (*the type of claims*) and secure the feedback needed to further progress item B (*moving caps upwards*), and item D (*regarding the terms of representation & estimates of expenses*).

In 2026 – the Council will publish its Consultation Analysis report and finalise the draft rules regarding A (*the type of claims*) for consideration and approval by the Court of Session. If the analysis of the additional feedback sought regarding items B and D warrants further rule changes the Council would instruct further draft rules and may consult again latter in 2026.

In 2027 - the Council will publish its second Consultation Analysis report and finalise the draft rules regarding item B (*moving caps upwards*), and item D

(regarding the terms of representation & estimates of expenses) for consideration and approval by the Court of Session.

8. Once all of those actions have been completed the Council will have addressed all 5 of the Aarhus concerns (A-E) that it has been asked to consider.

The timeline for responding to the current legal challenge

9. The March 2025 communication (2025/216) lodged by the ERCS alleges a non-compliance with the need to strive to support *public participation* under Article 8 of the convention; with further detail available from the UNECE web page¹.
10. The equivalent of “the steps in legal process” that exist under Scots law is narrated within the *Guide to the Aarhus Convention Compliance Committee*²; which conveys (at para 86-134) an indicative timeline for how a communication might proceed through that compliance mechanism. By way of example:

Date	Key steps in the ACCC compliance mechanism
Mar 2025	The ERCS lodged their communication alleging non-compliance
Jun 2025	The ACCC considered the de minimis level for any communication. It decided it was met and the UK member state should submit a response
Nov 2025 (at the earliest)	A formal response of 6,000 words or less along with supporting documents is normally due within 5 months. Technically the clock does not start ticking until the ACCC email their request and we understand that is still awaited. This initial response when lodged by the party (DEFRA) is still only expected to address their “ <u>preliminary observations</u> ” on the admissibility of the communication.
At any point in the following 12 to 24 months	The ACCC will consider the papers submitted by the party (the UK member state) in response and will either : <ul style="list-style-type: none"> - Dismiss the communication as inadmissible; or - Fix a preliminary hearing prior to making a decision on admissibility; or - Go straight to fixing a substantive hearing for the purposes of resolving the communication and issuing its “findings”.

11. The purpose of today’s meeting is to consider whether the Council has strived sufficiently in its efforts to support public participation

CONSIDERING THE NEXT STEPS

STEP 1 – would be for the Council to plan for achieving compliance regarding the 5 concerns (A-E) that fall within its remit.

¹ https://unece.org/env/pp/cc/accc.c.2025.216_united_kingdom

² <https://unece.org/environment-policy/publications/guide-aarhus-convention-compliance-committee>

12. The Aarhus compliance mechanism means the ACCC considers non-compliance every three to five years. They will currently be considering the extent to which the concerns raised in 2021 have been addressed; and those that remain will be carried forward into their 2025 report.
13. The secretariat is assuming that 2025 Compliance Report will be published later this month; to support the latest position on compliance being considered at the 8th session of the Meeting of the Parties (MOP) on 17-21 November 2025.
14. Concerns (A, B & D) will be carried forward and progressed as follows
- *A - The type of claims covered* – the publication of the 2025 Publication Consultation will significantly progress concern A. It is the major outstanding concern (*para 86*) given that an extension of the scope of PEOs does constitute a change that has a “*significant effect*” on the environment. Subject to the analysis of consultation responses, the expectation is that new rules to address this concern could be finalised and enacted during 2026.
 - *B - The level of cost caps* – to support the Council reconsidering some of its current policy positions; the 2025 Publication Consultation is additionally seeking feedback on:
 - *Why the term “on cause shown” should be read in context (para 88)*
 - *The tension between cost caps and the constraint that places on judicial discretion; and the impact on judicial independence (para 90);*
 Within its Consultation Response paper the Council will decide whether to retain its current approach or progress rules changes. If it’s the latter the Council may consult again on a set of draft rules to implement those changes.
 - *D - The application procedure* - to support the Council reconsidering its policy positions; the 2025 Publication Consultation also seeks feedback on the need:
 - *To supply information on the terms of representation (para 100) which flows from the Gunning Principles; and*
 - *To estimate the likely expenses of the other party (para 101) so that the court has a fuller picture.*
 Within its Consultation Response paper the Council will decide whether to retain its current approach or progress rules changes. If it’s the latter the Council may consult again on a set of draft rules to implement those changes.
15. The above actions will significantly progress the ‘*PEO Rules Review*’ by addressing each of the remaining Aarhus concerns as carried forward from 2021. In turn that constitutes a clear direction of travel the Council can share with DEFRA as the UK point of contact with the ACCC. Longer term the Council would then look to communicate its approach to the public as appropriate.
16. For any members seeking further detail – each concern as raised by the ACCC in 2021, along with the secretariat’s current perspective, is narrated within the attached “*Update on the Aarhus concerns for Scotland*” (**Paper 2.1B**).

STEP 2 – is to approve publication of the 2025 Public Consultation (item 2.2) as (subject to other priorities) that can support the accompanying draft rules being finalised, proposed, and enacted during 2026.

17. The advantages of running the 2025 Public Consultation as soon as possible are:

- It delivers a second opportunity for the public to participate in the development of the options for this *costs protection procedure*;
- If the ACCC was to decide that the Council had erred when it decided ‘not to consult’ on the 2024 Act of Sederunt the content of this 2025 Public Consultation would help to maintain trust in the decisions made;
- Most consultation responses will be available before DEFRA lodges their formal response to communication 2025/216 with the ACCC;
- If the changes are supported the Council could be in a position to propose finalised rules for consideration by the Court of Session by mid-2026; and
- Subject to approval by the Court of Session amended rules could potentially be commenced and in force by late-2026.

18. The indicative implementation plan is:

- AUG 2025 – Finalise the consultation documents;
- SEP 2025 – Publish the consultation documents;
- DEC 2025 - Close the public consultation;
- JAN 2026 – Upload the responses to the website and analyse;
- FEB 2026 – Publish the Consultation Analysis;
- APR 2026 – Finalise the draft rules as consulted on;
- MAY 2026 – Seek Council approval of the finalised Act of Sederunt and propose those draft rules to the Court of Session;
- JUN 2026 – For the Court of Session to consider the proposal made and then approve, sign and enact the finalised Act of Sederunt; and
- SEP 2026 – The amended rules would come into force.

STEP 3 – is for the Council to provide relevant input to support DEFRA lodging their formal response with the ACCC by November 2025.

19. Annex 1 of the *Guide to the Aarhus Convention Compliance Committee (May 2019, UNECE)* covers the format member states must use when providing “*preliminary observations on admissibility*”. Within a 6,000 word limit that response needs to cover:

- The facts of the communication;
- The provisions of the Convention with which non-compliance is alleged;
- The nature of alleged non-compliance;
- The use of domestic remedies; and
- The use of other international procedures.

20. As it is the UK member state that is the party to the convention DEFRA always instructs counsel when preparing their responses to the ACCC. They would prefer to consider their options when responding.

21. Similarly when SG is providing their input to DEFRA they always instruct counsel when preparing their responses and prefer to consider their options when responding. That is of particular relevance as the Scottish Ministers are now dealing with two communications from the same communicant. The first (2022 / 196) regarding the way planning appeals are considered by those democratically elected in Scotland and now this second (2025 / 216) communication regarding the opportunities for public participation in the making of draft rules.

STEP 4 – would be for Council members to meet representative bodies during the 2025 Public Consultation; or after the consultation responses have been lodged; or after the DEFRA response to the ACCC has been lodged.

22. As part of the development of a communication strategy for the SCJC; one option to be considered would be for selected members of the Council to directly engage with the ERCS and Scottish Environment LINK etc. to facilitate a better shared understanding of: what is practicable; the pragmatic timeline in which the Councils amending rules instruments can be delivered; and to exchange views specific to the PEO Rules and any other options that may be raised within consultation responses.

Recommendation

23. It is recommended that the Council considers the contents of this paper and agrees the “next steps” to take before communicating any public position with regard to communication 2025 / 216.

**Secretariat to the Scottish Civil Justice Council
August 2025**