Scottish Civil Justice Council

UPDATE ON THE AARHUS CONCERNS FOR SCOTLAND
(As at 31 July 2025)

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Version control:
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Version	*Date*	*Comment*
V1	*30 Sep 2024*	*Provided an update as at 30 June 2024 on each of the 31 Aarhus concerns raised in 2021 https://www.scottishciviljusticecouncil.gov.uk/committees/costs-and-funding-committee/2024/30-september-2024*
V2	*31 Jul 2025*	*Provides a refreshed update to record the items progressed within the last year*

EXECUTIVE SUMMARY

Background

1. In 2021 the *Aarhus Convention Compliance Committee (ACCC)* narrated its concerns at paragraphs 82-113 of the *Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland: Part I*[1]. Of those 31 paragraphs: the content of 21 have already been progressed, 6 paragraphs (in green) remain as the key work in progress that the SCJC has in hand and 4 paragraphs deal with policy matters that sit with the Scottish Minsters:

PARA:	TABLE	CATEGORY OF CONCERN	Note	Comments on the remaining 'work in progress' the SCJC needs to deliver to achieve full compliance with the convention
82	1	*Preamble*	1	*Incorporating UN treaties into law is a policy matter for SG*
83- 86	2	A - Type of claims covered		Consulting on the extension of PEOs to the sheriff court. Subject to public support & approvals; that proposed extension of could be enacted by mid-2026.
87-92	3	B - Level of the cost caps		Consulting on reconsideration of the policy positions taken re: - *Maintaining the caps at £5,000 and £30,000* - *Why the term "on cause shown" needs to be kept in context* - *The tension between cost caps & judicial independence*
93-96	4	C - Costs protection on appeal		*Addressed within the 2024 Act of Sederunt*
97-98	5	D i - Definition of prohibitively expensive		*Addressed within the 2018 Act of Sederunt*
99-104	6	D ii - PEO application procedure & costs		Consulting on reconsideration of the policy positions taken re: - *Supplying information on the terms of representation* - *Estimating the likely expenses of the other party*
105-106	7	D iii - Interveners		*Progressed by publishing research on the incidence of interveners*
107-109	8	D iv - Court fees		*Progressed by the introduction of fee exemptions in 2022*
110-112	9	D v - Legal Aid	2	*Progressing legal aid reform is a policy matter for SG*
113	10	*Final Remarks*	3	

Notes:
1. Paragraph 82 raises a policy matter regarding the incorporation of this UN treaty into domestic law.
2. Paragraph 110-112 raises a policy matter regarding the proposed reform of legal aid regulations.
3. Paragraph 113 is a summary paragraph; and the conclusions reached flow from each of the concerns already raised in paragraphs 82-112.

[1] https://unece.org/sites/default/files/2024-03/ECE_MP.PP_2021_59_E.pdf

PART 1 - THE 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 8 *(the public participation pillar)*; along with the "implementation elements" that support compliance.

5. Annex 2 provides an extract of Article 9 *(the access to Justice pillar);* along with the "implementation elements" that support compliance.

The compliance mechanism:

6. The *Aarhus Convention Implementation Guide* includes observations on how compliance[2] 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.

7. All relevant correspondence on compliance is made publicly available via the following websites:

   DECISION VII/8s *(concerning the UK)*
   This site contains the text of **Decision VII/8s** which summarises all 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

[2] Under Article 15: Review of Compliance

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 by complaint reference number *(in the format of AAA/C/YYYY/NN)*. That includes the ability to select and open the "findings" specific to each complaint *(which is their equivalent to a written judgement):*
https://unece.org/env/pp/cc/communications-from-the-public

PART 2 – THE INDIVIDUAL CONCERNS RAISED BY THE ACCC

TABLE 1 - PREAMBLE:

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at July 2025)*
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** *(not the SCJC)*

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

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at July 2025)*
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.	*observation*
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.	*observation*
85	The observers note that some but not all private Aarhus claims maybe covered by the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.	*observation*
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 SCJC has published research online:** • "Research on the type of claims covered by a PEO" *(Sep 2024, SCJC)* *https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/20240930---research-on-the-type-of-cases-seeking-a-peo.pdf?sfvrsn=f459d1da_1* **Draft rules to address this gap have been prepared to support the 2025 Public consultation** That research provided the prerequisite information needed to support the preparation of draft rules on the extension of PEOs to the sheriff court. The proposed Consultation Paper, draft rules, BRIA, EQIA and RIF will be tabled for approval at the next SCJC meeting (Aug 25). Online publication will follow that meeting, with a closing date 3 months later (Nov 25). Subject to approval, the target commencement date is May 26
	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 above draft rules – are aimed at resolving the concern re nuisance** As those draft rules include cases initiated under Part III of the Environmental Protection Act 1990 *(UKPGA 1990/43):* *https://www.legislation.gov.uk/ukpga/1990/43/contents*
	The SCJC is aware of – • The findings in ACCC/C/2016/142 on littering https://unece.org/env/pp/cc/accc.c.2016.142_united-kingdom	**The above draft rules – are aimed at resolving the concern re littering** As those draft rules include cases initiated under 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 July 2025)*
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 of £5,000 & £30,000**. Under the Consumer Price Index (CPI) published as at May 2025; an inflation multiplier of 1.411 could be applied to the baseline for the default caps as set in March 2013. That would suggest revised caps at say £7,000 and £42,300. The Councils policy position is to keep the same cap amounts as that provides consistency for potential applicants; and additionally supports the statutory guiding principle that requires the Council to ensure that procedures are easy to use and understand.
		The Council is content - not to adopt split caps *(for individuals & organisations).*
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 will reconsider – and is seeking feedback to do so within section 7 of the 2025 Public Consultation** The 2018 amendment reflected a judicial request as retaining the ability to shift caps both up and down is consistent the unique *statutory guarantee* of judicial independence that exists in Scotland under section 1 of the Judiciary and Courts (Scotland) Act 2008 *(ASP 2008/6)*. https://www.legislation.gov.uk/asp/2008/6/section/1 That said there are other areas of civil justice system where discretion is limited such as: the capped expenses in cases with a claim value of £5,000 or less; and the limits set within the legal aid regulations
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 information requested was published & is available 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*
		That evidence confirms– that no upwards adjustments have been made: The published research confirms that since the cost protection regime was introduced in March 2013 there has been a total of 12 Environmental PEO's granted under the PEO Rules. In none of those PEOs were either of 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 will reconsider – and is seeking feedback to do so within section 7 of the 2025 Public Consultation** The only flexibility provided is very specific to Part 2 of the rule; as the domestic law of Scotland requires the cost capping rules to align with judicial independence. Any exception that was to be granted under Part 2 of the rule would not materially impact on what happen in practice as a matter of routine under part 1.

		In theory: it may appear that Scotland is shifting away from compliance but in practice there has been no such movement. The default caps are applied in 99.9% of cases because part 1 of the cost capping rule says the court "must" use those defaults.
	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.	**The Council is seeking feedback within section 7 of the 2025 Public Consultation** 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 establish that "on cause shown" is the same as saying "where a valid reason can be demonstrated". Getting that initial understanding is possible with minimum effort means so in practice this term of itself is unlikely to be the "root cause" for a potential litigant 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 was published & is available 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 addresses 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.	**The Council will reconsider – and is seeking feedback to do so within section 7 of the 2025 Public Consultation**

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

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at July 2025)*
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 24** *(and commenced w.e.f. 1 Oct 24)* • 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 July 2025)*
97	In its second progress review, the Committee examined for the first time issues raised by the communicant Client Earth and observers RSPB and Friends of the Earth following the 2018 revision of the PEO rules.68 The Committee considers the developments regarding these issues below	*observation*
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" is working 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 July 2025)*
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	**The Council will reconsider – and is seeking feedback to do so within section 7 of the 2025 Public Consultation** 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

	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.	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 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.	**The Council will reconsider – and is seeking feedback to do so within section 7 of the 2025 Public Consultation** 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.
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 24** *(and commenced w.e.f. 1 Oct 24)* • Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2024 *(SSI 2024/96)* Inserting paragraph 5 into rule 58A.5 now prompts a petitioner to request confidentiality when they lodge a motion requesting a PEO. The court will then specify a requirement for confidentiality in an interlocutor granting that PEO. That allows the sanction of contempt to be automatically applied if there was a failure to maintain confidentiality. The majority of PEO applications are dealt with on the papers. Inserting paragraph 3 into rule 58A.6 means that if a hearing was to be fixed following a request for confidentiality, then it 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**
104	While the Committee welcomes many of the changes made to the PEO application procedure, it has concerns regarding the potential chilling effect of the requirement to provide financial information (including with regards the claimant's legal representation). Furthermore, the Committee cannot see why the claimant should be asked to provide estimates of other parties' costs. As such, the Committee finds that, while welcoming the progress made, the Party concerned has not yet fulfilled 2 (a), (b) and (d) of decision VI/8k regarding the application procedure for PEOs in Scotland.	*Summarises the concerns above*

TABLE 7 - CONCERN - D - III - Interveners;

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at July 2025)*
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 24** *(and commenced w.e.f. 1 Oct 24)* • Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2024 (*(SSI 2024/96)* Inserting the new "informational" rule 58A.10 simply conveys the default position that is applicable under case precedent when the court grants '*leave to intervene*'; which is that any exposure to an interveners costs would be nil providing the litigant has acted reasonably. If they act unreasonably the court could award expenses as a sanction.
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.	*Summarises the concern above*

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

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at July 2025)*
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.**	**This appears to be a misperception - court fees are included in 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 received 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 - court fees are included in the cost regime** • 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: ○ The Scottish Government policy is to set court fees at a level that is only "moving towards" full cost recovery; ○ The overall % cost recovery still falls below that level; and ○ There are no court fees set in Scotland with an express policy aim of charging above full cost recovery in order 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 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 that paragraph 2 (a), (b) and (d) of decision VI/8k have been met in this regard.	**This appears to be a misperception - as all reasonable costs are recoverable** The court regulates the level of cost recovery that is considered reasonable in Scotland; through the unit based changing approach that is set out in the Taxation of Judicial Expenses Rules 2019 (SSI 2019/75). The resulting expenses awarded by the court following a taxation would cover: - The reasonable charges for legal representation; - The reasonable outlays incurred; and - Other expenses reasonably incurred such as court fees etc. As a fee exemption is now available claimants no longer need to make a payment. Logic implies that, as there is no longer any requirement for a payment to be made, this concern has become redundant.

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

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at July 2025)*
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.	**This a policy matter for the Scottish Ministers to progress** *(not the SCJC)*
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

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TABLE 10 - CONCERN - E – FINAL REMARKS:

Para	The Aarhus Concern *(from the 2021 ACCC Compliance Report)*	The SCJC Update *(as at July 2025)*
113	Based on the foregoing, the Committee concludes that the Party concerned has met the requirements of paragraph 2 (a), (b) and (d) of decision VI/8k with respect to cost protection in appeals brought by respondents in Scotland. The Committee however concludes that the Party concerned has not yet met the requirements of paragraph 2 (a), (b) and (d) with respect to Scotland as regards the other matters examined in paragraphs 83–112 above	*This overall conclusion summarises all concerns above*

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

Research on the type of cases seeking a Protective Expenses Order *(Sep 2024, SCJC)*
https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/20240930--research-on-the-type-of-cases-seeking-a-peo.pdf?sfvrsn=f459d1da_1

Research on the incidence of interveners expenses *(Aug 2025, SCJC)*
https://www.scottishciviljusticecouncil.gov.uk/publications/scjc-and-other-organisations'-publications

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***Publications by the UK member state**:*

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

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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

Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I" *(Oct 2021, UNECE)*
https://unece.org/sites/default/files/2024-03/ECE_MP.PP_2021_59_E.pdf

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 across 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 – in practice it would equate to saying 'where a valid reason can be demonstrated to the satisfaction of the court". The expectation set is that when any claim is made by a party it should be substantiated by evidence.
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 *(an inequality of arms)* the ability to apply for a PEO allows claimants to limit the amount of expenses *(i.e. legal costs, outlays and court fees*) they would otherwise be liable to pay if they did lose. In Scotland there are 2 types of PEO that can be sought: ○ Environmental PEOs – which can be 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 Commission for Europe (UNECE) which oversees the effective operation of the Aarhus Convention across all states across Europe that are signatories to the Aarhus Convention.

ANNEX 1 – ARTICLE 8 *(the public participation pillar)*

The requirements under Article 8 of the convention:
(Regarding the preparation of "generally applicable legally binding normative agreements")

1. Each Party **shall strive to promote** effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding **rules that may have a significant effect** on the environment. To this end, the following steps should be taken:

(a) Time-frames sufficient for effective participation should be fixed;
(b) Draft rules should be published or otherwise made publicly available; and
(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

2. The result of the public participation shall be taken into account as far as possible

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The "implementation elements" that support compliance (with Article 8):

Article 8 - 1st sentence - Parties must strive to promote public participation in the preparation of laws and rules by public authorities
- Parties to use best efforts
- While options still open
- Applies to rules that may have a significant effect on the environment

Article 8 - 2nd sentence - Elements of the public participation procedure required are:
- Sufficient time frames for effective participation
- Publication of draft rules
- Opportunity to comment

Article 8 - 3rd sentence - Parties must ensure that the result of the public participation is taken account of
- As far as possible

(Source: page 182 of the Aarhus Convention Implementation Guide)

ANNEX 2 – ARTICLE 9 *(the access to justice pillar)*

The requirements under Article 9 of the convention:

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 – ARTICLE 9 *(the access to justice pillar)...**continued***

The "implementation elements" that support compliance *(with Article 9):*

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
• 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

(Source page 190 of the Aarhus Convention Implementation Guide)