

2025 ACCC COMPLIANCE REPORT

Purpose

1. To note the 2025 ACCC Compliance Report has been published.

Background

2. The discussions held at the previous meeting covered the Aarhus concerns for Scotland as narrated within the 2021 ACCC Compliance Report¹.
3. That report has been superseded by the draft 2025 ACCC Compliance Report². It was published on 8 August 2025 prior to seeking formal approval at the next Meeting of the Parties (MOP) in November. The key outcomes relevant to Scotland over the last four-year intersessional period were:
 - 2 existing Aarhus concerns³ have now been closed within that report;
 - 5 existing Aarhus concerns have been carried forward with updated narratives; and
 - There were no new concerns raised.
4. For members seeking further detail Annex 1 provides an extract of the paragraphs (128-198) that are specific to Scotland's compliance. Those refreshed narratives will further assist the Council in determining appropriate responses to the 5 Aarhus concerns that do fall within the remit of the SCJC:

Concern (i) - The type of claims covered – relates to the accepted need to widen the availability of Environmental PEOS to the range of other environmental law cases that need to be initiated within the Sheriff Court.

Concern (ii) - The level of cost caps – reflects that the ACCC would prefer the caps to be set as 'fixed maximum sums' by removal of the ability for caps to be varied upwards "on cause shown".

Concern (v) Clarifying elements of the application procedure – with the 3 elements of that concern being:

- *Terms of Representation* - the ACCC would prefer that the requirement to provide information on the terms of representation was withdrawn.
- *Estimating Expenses* - the ACCC would prefer that the requirement for the applicant to provide an estimate of the expenses of the respondent was withdrawn.
- *Confidentiality* - the ACCC has welcomed the amendment made in 2024 but are now seeking a clarification of how that works in practice.

¹ https://unece.org/sites/default/files/2022-01/Decision_VII.8s_eng.pdf

² <https://unece.org/env/pp/cc/decision-vii8s-concerning-united-kingdom>

³ The 2018 SSI clarified the 'definition of prohibitively expensive' and the 2024 SSI removed the 'differential in cost protection on appeal'

Concern (vi) - The exposure to interveners costs – the ACCC has welcomed the 2024 addition of rule RCS 58.10 but would still prefer to see the uncertainty reduced by removal of the reference to “on cause shown”.

Concern (vii) - The recovery of court fees – the ACCC has welcomed the introduction of fee exemptions but would prefer to see the uncertainty reduced by a clarification that court fees are definitely included within the cost caps.

Recommendation

5. It is recommended that the Council notes that:

- **The 2025 Compliance Report is now available;**
- **The 2025 Public Consultation will close on 14 November, and**
- **The analysis of the consultation responses will enable significant progress to be made on resolving those 5 remaining Aarhus concerns.**

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

ANNEX 1 – RELEVANT PARAGRAPHS

The following tables are a direct extract of paragraphs 128 to 198 of the 2025 ACCC Compliance Report:

OPENING REMARKS (FOR SCOTLAND):

Para	The Aarhus Concern (from the 2025 ACCC Compliance Report)
128	In its report on decision VI/8k to the seventh session of the Meeting of the Parties, the Committee found that, with respect to Scotland, the Party concerned had not yet met the requirements of paragraph 2 (a), (b) and (d) of decision VI/8k regarding the following issues: (i) Type of claims covered; (ii) Levels of the costs caps (including default levels of costs caps and cross-caps and the possibility to vary them); (iii) Definition of “prohibitively expensive”; (iv) Cost protection on appeal; (v) The application procedure and costs regarding PEOs; (vi) Interveners; (vii) Court fees; (viii) Legal aid.
129	In its follow-up on paragraph 2 (a), (b) and (d) of decision VII/8s, the Committee therefore examines the measures taken by the Party concerned in Scotland to address the above eight issues.
130	With respect to the rules on protective expense orders (PEO), the Party concerned in its first progress report stated that: <i>The Scottish Civil Justice Council (SCJC) ... has confirmed that a review of the PEO rules, in light of the ACCC’s recommendations, is one of their priority objectives under their 2023/24 work programme. ... As the SCJC is an independent body, the Scottish Government cannot commit to an end date for completion of a rule review and any subsequent redraft of the Court Rules which may be considered necessary or appropriate.</i>
131	In its final progress report, the Party concerned states that, on 30 September 2024, the SCJC published a paper “Update on the Aarhus Concerns for Scotland” which details the amendments to court rules that have been made as well as the proposed next steps.
132	The observers the RSPB, Friends of the Earth England, Wales and Northern Ireland, and ERCS, report that the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2024 has made three changes to the PEO system, which came into force on 1 October 2024. They state that while these changes are broadly welcome , they fail to achieve compliance as they do not address all the matters identified in the Committee’s report on decision VI/8k to the seventh session of the Meeting of the Parties.

CONCERN (i) – TYPE OF CLAIMS COVERED:

Para	The Aarhus Concern (from the 2025 ACCC Compliance Report)
133	In its “Update on the Aarhus Concerns for Scotland”, the Party concerned states that the Costs and Funding Committee (CAFC) has agreed in principle to extend PEOs. It states that the SCJC has completed its further research on the type of claims covered and that, subject to CAFC members approving the proposed scope at its September 2024 meeting, rules will be prepared for consultation purposes
134	The observers the RSPB, Friends of the Earth England, Wales and Northern Ireland and ERCS submit that private law claims remain outside the PEO rules.

135	The Committee welcomes the agreement, in principle, by the CAFC to extend the scope of application of PEOs and invites the Party concerned to inform the Committee about the outcome of the CAFC's September 2024 meeting
136	However, since based on the information before it, the Committee understands that the situation has remained unchanged since its report on decision VI/8k to the seventh session of the Meeting of the Parties and that at least some private law claims remain outside the scope of the PEO rules, the Committee finds that the Party concerned has not yet fulfilled paragraphs 2 (a), (b) and (d) of decision VII/8s regarding the types of claims covered by cost protection in Scotland

CONCERN (ii) – THE LEVEL OF COST CAPS:

Para	The Aarhus Concern (from the 2025 ACCC Compliance Report)
137	The "Update on the Aarhus Concerns for Scotland" confirms that the default levels of the costs caps remain unchanged 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.
138	According to the above "Update", the 2018 PEO rules permit the default cost levels to be varied upwards or downwards "on cause shown". The "Update" adds that the SCJC is satisfied with keeping the current rule to ensure judicial independence. It adds that retaining the possibility of varying the cap upwards and downwards is consistent with that statutory guarantee, despite the fact that in practice no cap has ever been shifted upwards since costs capping was introduced in 2013.
139	Regarding the term "on cause shown", the SCJC in its "Update" states that this clause is equivalent to "where a valid reason can be demonstrated to the satisfaction of the court".
140	The observers the RSPB, Friends of the Earth England, Wales and Northern Ireland and ERCS, submit that the ability under the PEO rules to increase or decrease the costs caps for both parties "on cause shown" means that the Party concerned remains in non-compliance in this respect. They add that it is not clear why judicial independence would be threatened by the removal of the "on cause shown" test.
141	The Committee draws the attention of the Party concerned to its report to the seventh session of the Meeting of the Parties on decision VI/8k, in which it held that: <i>£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.</i> 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.
142	The Committee reiterates the concerns it expressed in its report on decision VI/8k. It moreover expresses its disappointment at the apparent lack of intention by the SCJC to amend the court cost rules in line with the Committee's report on decision VI/8k, as set out in paragraph 141 above.
143	While the SCJC states that "on cause shown" is equivalent to saying, "where a valid reason can be demonstrated to the satisfaction of the court", the Committee considers that this phrase remains vague and may have a chilling effect on claimants. The Committee makes clear that the core issue remains that the PEO rules allow for the costs cap for claimants to be varied upwards.
144	Based on the foregoing, the Committee finds that the Party concerned has not yet fulfilled the requirements of paragraphs 2 (a), (b), and (d) of decision VII/8s with respect to the level of the costs caps in Scotland.

CONCERN (iii) – DEFINITION OF “PROHIBITIVELY EXPENSIVE” (CLOSED)

Para	The Aarhus Concern (from the 2025 ACCC Compliance Report)
145	In its report to the seventh session of the Meeting of the Parties on decision VI/8k, the Committee held that: <i>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.</i>
146	The Committee notes that it has not received any information that the definition set out in rule 58A.1 (3) is not being appropriately applied in practice.
147	Based on the foregoing, the Committee finds that the Party concerned has fulfilled paragraph 2 (a), (b), and (d) of decision VII/8s with respect to the definition of “prohibitively expensive” in Scotland.

CONCERN (iv) – COSTS PROTECTION ON APPEAL (CLOSED)

Para	The Aarhus Concern (from the 2025 ACCC Compliance Report)
148	According to rule 58A.8, as it stood at the time of the Committee’s report to the seventh session of the Meeting of the Parties on decision VI/8k, when a respondent appeals, the PEO is carried over to that appeal, but where a claimant appeals, the claimant must reapply for a PEO.
149	Given this anomaly, in its report to the seventh session on decision VI/8k the Committee held that, while the Party concerned had fulfilled paragraphs 2 (a), (b) and (d) of decision VI/8k with respect to cost protection in appeals brought by respondents, it had not yet done so with respect to appeals brought by claimants.
150	In its “Update on the Aarhus Concerns for Scotland”, the Party concerned states that, as of June 2024, to improve procedural fairness, rule 58A.8 of the Rules of the Court of Session 1994 has been amended 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.”
151	The observers the RSPB, Friends of the Earth England, Wales and Northern Ireland and ERCS, confirm that as a result of the amendment made by the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2024 (Act of Sederunt), PEOs now “carry over” in appeals from the Outer House to the Inner House of the Court of Session, regardless of which party is appealing the decision
152	The Committee welcomes the amendment to rule 58A.8 of the Rules of the Court of Session 1994, which ensures that cost protection on appeal “carry over” regardless of which party is appealing the decision.
153	Based the foregoing, the Committee finds that the Party concerned has fulfilled the requirements of paragraphs 2 (a), (b), and (d) of decision VII/8s with respect to cost protection on appeal in Scotland.

CONCERN (v) – APPLICATION PROCEDURE – Part 1 - TERMS OF REPRESENTATION

Para	The Aarhus Concern (from the 2025 ACCC Compliance Report)
154	The Committee recalls that, in its report to the seventh session of the Meeting of the Parties on decision VI/8k, it held that: <i>The Committee welcomes the simplified, written procedure for applying for a PEO introduced through the 2018 amendments.</i> <i>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.</i>
155	The “Update on the Aarhus Concerns for Scotland” states that courts need sufficient information “to fully address case precedent (the Corner House principles)”. It states that, having added a duty of confidentiality into the rules, the perceived threat to the economic viability of environmental lawyers is mitigated.
156	The Committee notes that, as explained in the following excerpt from the Explanatory Note of the Act of Sederunt, paragraph 2 (2) of this Act amends rule 58A.5, of the Rules of the Court of Session: To allow an applicant, when applying for a protective expenses order, to request the court to grant an order to provide that any information lodged with the court under rule 58A.5 (3) in respect of a protective expenses order is to be kept confidential. Any breach of a court order will be dealt with as contempt of court.
157	The Committee welcomes the requirement set out in rule 58A.5 (3) of the Rules of the Court of Session that any information lodged with the court under that rule is to be kept confidential. The Committee considers that this amendment appears to constitute an improvement in ensuring that possible applicants are not deterred by the potential exposure of their sensitive information regarding their representation. However, based on the limited information before it, it is not clear to the Committee how the amended rule operates in practice. In particular, the Committee seeks clarification as to whether the confidential information provided would be shared exclusively with the judge(s) or also with the respondent. The Committee invites the Party concerned to clarify this point at an early stage in the next intersessional period.
158	Based on the foregoing, while welcoming the progress made, in the light of the lack of information as to how this provision operates in practice, the Committee is not yet in a position to conclude that the Party concerned has fulfilled paragraphs 2 (a), (b) and (d) of decision VII/8s with respect to the disclosure of the terms on which the applicant is represented.

CONCERN (v) – APPLICATION PROCEDURE - Part 2 - ESTIMATING EXPENSES

Para	The Aarhus Concern (from the 2025 ACCC Compliance Report)
159	<i>As the Committee already held in its report on decision VI/8k to the seventh session of the Meeting of the Parties:</i> <i>Pursuant to Chapter 58A.5 (3) (iv), the evaluation of expenses of each other party for which the applicant may be liable in relation to the proceeding is based on estimates. The Committee considers that not only does preparing such an estimate entail additional work (and thus cost) for the applicant, there is a risk in case of underestimation of respondent expenses with the consequence that no PEO is granted because the original estimate is deemed not prohibitively expensive, yet the situation changes as the case progresses and</i>

	<i>the expenses increase beyond initial estimates. The Committee thus invites the Party concerned in its final progress report to explain the need for such a rule, which is not found in the costs protection regimes in England and Wales or Northern Ireland.</i>
160	The “Update on Aarhus Concerns for Scotland” explains that the requirement in rule 58A.5 (3) (iv), serves to help the court understand the level of expenses that the claimant would find “prohibitively expensive”. It states that the view of a respondent 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.
161	The Committee appreciates the explanation provided in the “Update” by the Party concerned. The Committee considers however that the rule in question does not address the Committee’s concern, namely the risk that applicants may underestimate respondents’ expenses and that a PEO may be denied on the basis that the original estimate is deemed not prohibitively expensive, yet actual expenses may increase beyond initial estimates as the case progresses. As a result, the objective of ensuring that access to justice is not prohibitively expensive, as required under the Convention, could be undermined.
162	In light of the above, and understanding that the situation has remained unchanged since the Committee’s report on decision VI/8k to the seventh session of the Meeting of the Parties, the Committee finds that the Party concerned has not yet fulfilled paragraphs 2 (a), (b) and (d) of decision VII/8s with respect to the estimates of evaluation of expenses as part of the application procedure for PEOs in Scotland.

CONCERN (v) – APPLICATION PROCEDURE - Part 3 - CONFIDENTIALITY

Para	The Aarhus Concern (from the 2025 ACCC Compliance Report)
163	In its report to the Meeting of the Parties on decision VI/8k, the Committee held: <i>Chapter 58A.6 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.</i>
164	In the “Update on Aarhus Concerns for Scotland”, the Party concerned states that the Act of Sederunt inserted paragraph 5 into rule 58A.5 of the Rules of the Court of Session, which, as indicated in paragraph 156 above, allows an applicant, when applying for a PEO, to request the court to grant an order to provide that any information lodged with the court under rule 58A.5 (3) in respect of a protective expenses order be kept confidential. Any breach of such a court order will be dealt with as contempt of court.
165	The “Update” also states that, as a result of the amendment to rule 58A.6 of the Rules of the Court of Session, in the unlikely event that a hearing is required, if a motion includes a request for information to be treated as confidential, and the motion is starred, the hearing must take place in chambers.
166	The Committee welcomes the amendments to rules 58A.5 (3) and 58A.6 of the Rules of the Court of Session. In its view, these amendments appear to be an improvement in ensuring that applicants are not deterred about exposing sensitive information regarding their representation. However, as already noted in paragraph 157 above, the Committee does not have sufficient information yet regarding how the rules concerning the confidentiality of the information operate in practice. For this reason, the Committee is not yet in a position to conclude that the Party concerned has fulfilled paragraphs 2 (a), (b) and (d) of decision VII/8s in this respect. As noted in paragraph 157 above, in order to do so, the Committee will need clarification on whether the confidential information provided would be shared exclusively with the judge(s) or also with the defendant.

167	Based on paragraphs 154-166 above, while welcoming the progress made, the Committee finds that the Party concerned has not yet fulfilled 2 (a), (b) and (d) of decision VII/8s regarding the application procedure for PEOs in Scotland.
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CONCERN (vi) - INTERVENERS

Para	The Aarhus Concern (from the 2025 ACCC Compliance Report)
168	In its report to the seventh session of the Meeting of the Parties on decision VI/8k, the Committee held: <i>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.</i>
169	The “Update on Aarhus Concerns for Scotland” states that the Act of Sederunt introduced a new provision, namely rule 58A.10 of the Rules of the Court of Session, which reflects the courts’ default practice that cost orders are not normally awarded for or against an intervener.
170	The Committee takes note of the statement in the Explanatory Note of the Act of Sederunt that this rule provides that “except on cause shown, expenses incurred in respect of a protective expenses order will not be awarded for or against an applicant who was granted leave to intervene in accordance with Chapter 58” .
171	The Party concerned explains that this means that the exposure of the potential litigant to an intervener’s cost is likely to be nil, provided that 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.
172	The Committee welcomes that, as a general rule, interveners’ costs are not awarded for (or against) interveners. However, the Committee notes with concern that the exception “on cause shown” is vague and undefined . The lack of clarity regarding the cases in which PEO applicants could be liable for interveners’ costs, creates uncertainty regarding costs exposure. Such uncertainty may have a deterrent effect on claimants and discourage them from seeking access to justice.
173	Based on the foregoing, while welcoming the progress made, the Committee finds that the Party concerned has not yet fulfilled the requirements of paragraphs 2 (a), (b), and (d) of decision VII/8s as regards the costs that may be payable to interveners in Scotland.

CONCERN (vii) – COURT FEES

Para	The Aarhus Concern (from the 2025 ACCC Compliance Report)
174	In this section the Committee analyses to what extent court fees paid by the successful defendant are included in the costs cap regime in Scotland.
175	In its report to the seventh session of the Meeting of the Parties on decision VI/8k, the Committee held that: <i>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.</i>

176	The Committee notes that, in both its first and final progress reports the Party concerned states that an exemption from court fees has been introduced for Aarhus cases in the Court of Session, Scotland's principal civil court and where all petitions for judicial review are heard. This development is of relevance in this context because, if an exemption from all court fees were to be applied for Aarhus claims, the issue of whether court fees of the successful defendant are also included in the costs cap is redundant.
	While welcoming this development, the Committee understands that the exemption has not been introduced for Aarhus cases before other courts in Scotland. Based on the foregoing, the Committee will still need to assess whether in instances where court fees are not exempted, those fees borne by the successful defendant are included within the cost protection regime.
177	In the "Update on Aarhus Concerns for Scotland", the SCJC states that the cost protection regime covers: <i>The fees charged for legal representation;</i> <i>Reasonable outlays such as expert witness costs etc.; and</i> <i>Court fees.</i>
178	To support its claim, it refers to the Keating case, where the court stated that: <i>If Mr. Keating had paid out that estimate of £8,000 in court fees the court would have accepted the amount as stated;</i> 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.
179	The Committee notes that the Keating case concerned an individual who was exempt from paying court fees as he had been granted legal aid, rather than a PEO. In the Committee's view, this case therefore does not provide sufficient evidence that a court would similarly find that court fees would be covered under the current cost protection regime, and therefore that the applicant would not be liable to pay such costs.
180	In the "Update on Aarhus Concerns for Scotland", the SCJC also states that 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 cover: - The direct charges for legal representation; - The reasonable outlays incurred; and - Other expenses reasonably incurred such as court fees etc.
181	The Committee considers that the above information does not provide sufficient evidence that court fees are always included within the costs protection regime.
182	Accordingly, the Committee finds that the Party concerned has not yet fulfilled the requirements of paragraph 2 (a), (b), and (d) of decision VII/8s with respect to court fees in Scotland.

CONCERN (viii) - LEGAL AID etc.

Para	The Aarhus Concern (from the 2025 ACCC Compliance Report)
183	LEGAL AID
184	" "
185	" "
186	SECTION 41 - OF THE CONTINUITY ACT
187	" "
188	" "
189	" "
190	PROPOSED HUMAN RIGHTS BILL
191	" "
192	EXEMPTION FROM COURT FEES
193	" "

194	“ “
195	“ “

CONCLUDING REMARKS (FOR SCOTLAND):

Para	The Aarhus Concern <i>(from the 2025 ACCC Compliance Report)</i>
196	Based on the foregoing, the Committee finds that has fulfilled the requirements of paragraphs 2 (a), (b), and (d) of decision VII/8s with respect to the definition of “prohibitively expensive” in Scotland.
197	The Committee also finds that the Party concerned has met the requirements of paragraph 2 (a), (b) and (d) of decision VII/8s with respect to cost protection on appeals in Scotland.
198	The Committee however finds 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 128 – 195 above.