AARHUS STRATEGY

Purpose

1. At the last meeting members agreed that the SCJC would consider its approach to all environmental actions that fell within the scope of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters *('the Convention').*

2. This paper sets out some of the key issues to be considered.

Background

The structure of this paper:

3. The body of this paper contains the key matters for members to consider when deciding on the specific strategic actions they would wish to take forward.

4. Those seeking further detail on the way in which the Convention itself works in practice should consider the content provided within each annex:

   - Annex 1 - contains general background on the Convention;
   - Annex 2 - contains general background on the Compliance Committee; and
   - Annex 3 - provides a timeline for the key decisions taken.

The outstanding compliance issues for Scotland:

5. The issue of the UK's compliance with Article 9 of the Convention has been before the compliance mechanisms of the Convention since 2011. Decision VII8/s taken by the Meeting of the Parties in 2021 provides a useful starting point. That decision requires Scotland to take:

> *"…**the necessary legislative, regulatory, administrative and practical measures** to:*
>
> *(a) Ensure that the allocation of costs in all court procedures subject to article 9, including private nuisance claims, is fair and equitable and **not prohibitively expensive**;*
>
> *(b) Further consider the establishment of appropriate assistance mechanisms to **remove or reduce financial barriers** to access to justice;*
>
> *(d) **establish a clear, transparent and consistent framework** to implement article 9 (4) of the Convention"*

6. The updated content within the Compliance Committee's report to the 2025 Meeting of the Parties will be addressed in a separate paper. Putting to one

side the issues that the Compliance Committee consider dealt with,[1] the issues of non-compliance are:

- A - The type of claims covered.
- B - The levels of the cost caps (including default levels of costs caps and cross-caps and the possibility to vary them).
- C - The application procedure for a PEO including:
  - *Terms of representation*
  - *Confidentiality of information*
  - *Estimating expenses*
- D - Interveners.
- E - Court fees.
- F - Legal aid.

7. That last issue on legal aid falls outside the remit of the SCJC. It may, however, be helpful for members to understand that issue to allow a better understanding of the overall concern as to Scotland's compliance with Article 9:

- In brief terms, the issue regarding legal aid concerns Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002. That provision prevents the Scottish Legal Aid Board SLAB) from granting civil legal aid where the applicant would not be personally prejudiced without the grant of legal aid or alternatively, that others with the same interest should pay the costs that would otherwise be met by the Board.

- Examples provided on the Board's website of where it may not be reasonable to grant legal aid include for actions complaining of noise arising from a large public event. Whilst there have been some environmental actions funded on a legally aided basis, it is thought to be relatively rare to obtain legal aid in an environmental issue.

- The operation of Regulation 15 would appear to exclude actions being funded on a legally aided basis unless there is a strong private interest in the matter.

Note – additional information has been provided by way of addendum (refer page 23).

CONCERN A – THE TYPE OF CLAIMS COVERED

8. The current PEO rules only apply to judicial reviews and statutory appeals in the Court of Session. The recent 2025 consultation proposes to extend the existing PEO rules to Group Proceedings in the Court of Session and then introduce new rules to cover one type of summary application that arises in the Sheriff Court.

[1] The draft report before the Meeting of the Parties due to take place in November 2025 considers two matters dealt with: the definition of 'prohibitively expensive' and costs protection on appeal.

9. It is worth starting with the rights under Article 9 of the Convention (rights to access to justice) which envisages 3 different types of challenges:

   - Challenges to requests for environmental information, under Article 9(1);

   - Challenges to decisions on permitting activities covered by Article 6 - generally large-scale developments requiring an Environmental Impact Assessment as set out in Article 9(2); and

   - Challenges to other acts or omissions *'by private persons and public authorities which contravene provisions of its national law relating to the environment*', as found in Article 9(3).

10. Each of those challenges, whether in Article 9(1), 9(2) or 9(3), should meet the standard set out in Article 9 (4), which reads:

> *"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."*

11. Challenges to requests for environmental information and decisions as to permitting activities are already covered by the existing Court of Session rules on PEO applications. Accordingly, whilst there are potential issues with the wording of that rule as set out later in this report, the availability of such a rule does not need to be considered further for the purposes of Article 9 (1) or 9(2).[2]

12. Accordingly, it is Article 9 (3) which is problematic. The scope of Article 9(3) has been interpreted in a broad way. By way of an example, in decision ACCC/C/2011/63 (Austria), the Compliance Committee noted that:

> "*Article 9, paragraph 3, is not limited to "environmental laws", e.g., laws that explicitly include the term "environment" in their title or provisions. Rather, it covers any law that relates to the environment, i.e. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy, taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact on the environment."*[3]

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[2] It should be noted that the SCJC Costs and Funding Committee agreed at its meeting of 30 September 2024 to "*to instruct the preparation of draft rules for the purposes of running a Public Consultation during 2024/25 on:*

Extending PEOs to the sheriff courts and Sheriff Appeal Court for:

- *Proceedings under the Environmental Protection Act 1990;*
- *Proceedings where access to environmental information has been requested under the Environmental Information (Scotland) Regulations 2004 and the Environmental Assessment (Scotland) Act 2005.."*

It appears the reference to proceedings under the Environmental Information (Scotland) Regulations 2004 and the Environmental Assessment (Scotland) Act 2005 are in error, as such applications are not made to the Sheriff Court (and by extension, are not appealed to the Sheriff Appeal Court).

[3] The decision was endorsed at the Meeting of the Parties in 2014, which noted in its decision there was a breach of Article 9 (3) due to the absence of being able to challenge certain acts or omissions "*of public authorities and private persons which contravene provisions of national laws…"*

13. The Compliance Committee has included within the scope of Article 9 (3) disputes over noise, noting *"… it is not necessary that the alleged violation concern environmental law in a narrow sense: an alleged violation of any legislation in some way relating to the environment, for example, legislation on noise or health, will suffice."* [4]

14. Accordingly, some nuisance actions are within the scope of Article 9 (3). There remains something of a dispute as to the extent to which the harm complained of requires to be connected to a wider environmental impact. That issue has been the subject of submissions by the UK Government in their responses to the Compliance Committee on the UK's Action Plan. In cases from England and Wales, the Compliance Committee have referred to a range of nuisances such as air pollution and vibration, and acknowledge that although nuisance law primarily arises from private property rights, the question is whether the nuisance complained of affected the environment in its broad sense, noting *"The fact that the law of private nuisance primarily relates to protecting the rights of individual property owners to enjoy their land does not exclude that it at the same time regularly concerns various components of the environment and aims to protect them.."* [5]. The Committee considered the motivation nor numbers of persons affected were not decisive to determine if Article 9 (3) applied.[6]

15. More generally there has been litigation in England & Wales as to the scope of Article 9 (3). That is because the Civil Procedure Rules (CPR) in England & Wales allow for an application for a protective cost order in any "Aarhus Convention claim".[7] The Court of Appeal recently observed in *HM Treasury & another* v *Global Feedback Ltd* [2025] EWCA Civ 624 that "*what matters is whether the purpose of the national law that has allegedly been contravened is to protect or regulate the environment, not, whether the decision being challenged has an effect on, or some connection with, the environment*".

16. Turning to Scotland, the following areas might be caught by Article 9(3), as there is currently no rule allowing an application for a PEO for:

    - Common law nuisance actions in the Court of Session and Sheriff Court.[8]

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[4] See communication ACCC/C/2010/50 (Czech Republic), ECE/MP.PP/C.1/2012/11, para. 84; endorsed in MOP decision V/9f, ECE/MP.PP/2014/2/Add.1, para. 1.

[5] See ACCC/C2008/23 re a nuisance action from the odour from a waste composting site, but also ACCC/C/2013/85 and ACCC/C/2013/86 (United Kingdom), ECE/MP.PP/C.1/2016/10, paras. 72-73 (non-compliance); endorsed in MOP decision VI/8k, ECE/MP.PP/2017/2/Add.1, para. 5.

[6] Ibid at paragraph 73.

[7] Rule 46.24 and 46.25 within the Civil Procedure Rules

[8] Whilst relatively unusual, examples of common law nuisance cases in the Court of Session include Chalmers v Diageo Scotland Ltd [2017] CSOH 36 and [2019] CSOH 63.

- Summary applications in the Sheriff Court beyond those in the recent consultation as to a rule for actions under the Environmental Protection Act 1990.[9]

- Damages claims in the Court of Session (beyond the Group Litigation PEO rule recently consulted upon) and in the Sheriff Court.[10]

- Applications for leave to appeal to the UKSC.[11]

17. The Council will wish to consider whether it supports taking a broad approach, notwithstanding that as yet the above matters have not been specifically raised by the Compliance Committee.

18. Some of the above issues as to scope have been raised in consultation responses in both the 2025 and previous consultations.[12] The SCJC may wish to take a proactive approach to the scope of rules to give the ability to apply for a PEO in any type of civil case where an environmental issue within the scope of Article 9 could conceivably be raised. If so, the SCJC would need to consult as to the introduction of a rule within the Court of Session (beyond judicial review and statutory appeals) and to introduce a PEO rule in Ordinary Cause, Simple Procedure and Summary Applications rules in the Sheriff Court.

19. In relation to other types of actions in the Sheriff Court, there are arguments for and against the inclusion of a rule in simple procedure and in summary cause.

Simple Procedure:

[9] There are residual rights to appeal or apply to the Sheriff by way of summary application; see s3(p) of the Sheriff Courts (Scotland) Act 1907, although it is understood that this section does not apply to statutory applications made by Acts of the Scottish Parliament. It has not been possible to identify all types of summary application that that might engage Article 9(3), but there may be infrequently used summary applications with the potential to do so such as appeals under s18 of the Zoo Licensing Act 1981 and s93 of the Roads (Scotland) Act 1984. Both give interested parties a right of appeal against the decisions of public authorities. There are other summary applications which might appear to be environmental in character, but are more truly related to private landowner's rights and thus arguably beyond the scope of Article 9(3). See for example various appeals under the Water (Scotland) Act 1980.

[10] Article 9(4) requires effective remedies; the Compliance Committee considered where an injunction is not an effective solution, damages may be an effective remedy but that such a case is still environmental in character; see ACCC/C/2013/85 and ACCC/C/2013/86 (United Kingdom), ECE/MP.PP/C.1/2016/10, para. 99 (non-compliance); endorsed in MOP decision VI/8k, ECE/MP.PP/2017/2/Add.1, para. 5.

[11] See Wildcat Community Interest Co Ltd v Scottish Ministers (No 2) [2025] CSIH 10

[12] The issue of common law nuisance was raised by the Law Society of Scotland in 2017 in their consultation response on draft PEO rules for the Court of Session: "*Consideration should be given to the Rules extending to the Sheriff Courts for environmental cases (such as applications under the Environmental Protection Act 1990) and to their application in nuisance cases (in whatever court) given the Aarhus Compliance Committee's decisions that some nuisance actions fall within the scope of the Convention"*

20. In relation to simple procedure, the procedure is designed to allow individuals to represent themselves, with a more informal approach to identify and focus on the issues in dispute. Instead of written pleadings, the scope of the case is set out by way of an application form and response form. The rules are designed to allow an applicant to represent themselves, potentially saving the cost of legal representation.

21. However, the position as to potential liability for expenses is not as straightforward. Potentially an applicant could be held liable for unlimited expenses if the value of the action is over £3,000. If below £3,000, the potential liability in simple procedure is generally capped depending on the claim value:[13]

Claim value up to £300:	*No award of expenses*
Claim value from £301 to £1,500	*Max award of £150*
Claim value from £1,501 to £3,000	*Max award of 10% of claim value*

22. Some of the consultation responses in 2025 raised a concern as to the £500 cap for liability for an unsuccessful protective expenses order. That cap applies where a party's application for a protective expenses order has been unsuccessful. Some respondents considered £500 was too high a cap. Accordingly, there may be concerns as to whether in a claim up to £3,000, simple procedure expenses could also be considered prohibitively expensive.

23. For claims higher than £3,000, technically there is no fixed maximum of expenses an applicant might be liable for, other than that an account of expenses would be subject to assessment and entries can be deleted from that account if not reasonable. The Sheriff Court Auditor decides what is "reasonable" by reference to schedule V of the Taxation of Judicial Expenses Rules 2019. However, given the Compliance Committee's emphasis on the need for certainly at the outset of an action, it is unlikely that reliance on discretion by the judge in modifying liability for expenses, or the Auditor in determining what is reasonable, would assist in showing compliance.

24. Fee exemption orders do not apply under simple procedure for environmental cases. The fee for lodging an application is £22 where the claim is for less than £300, and £123 if over £300 (with a separate fee should there be an appeal to the Sheriff Appeal Court).

25. It is arguable that there is justification for the inclusion of a rule for Simple Procedure cases over £3,000, and there may be justification for such a rule for applications under £3,000, only to be granted depending on the finances of the individual concerned.

26. It is recognised that there is a relatively low likelihood of an environmental case arising within simple procedure. Against that members should note there is a potential for such a claim to arise, and that potential may be a good enough

[13] The Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016. Certain types of claims are not subject to the cap on expenses, but such actions are unlikely to be environmental actions caught by Article 9 of the Convention.

reason to act. Whilst an environmental case could be remitted to ordinary procedure (as provided for within the rules) that would have the disadvantage that if a case was to proceed as an ordinary cause, the Sheriff must order an initial writ to be lodged. Given the complexities of preparing written pleadings, the advantage of individuals being able to represent themselves in a more informal procedure may be lost. On balance it is suggested the SCJC may wish to consult on the wording of a rule allowing a PEO to be applied for in simple procedure.

Summary Cause:

27. It will be recalled that only limited types of action are still raised under summary cause procedure. It is likely that the summary cause rules will be revoked in the next two years, and actions currently raised under summary cause will, in future, be raised as Simple Procedure Special Cases. The Secretariat has analysed the types of actions still raised under summary cause.

28. The underlying subject matter of summary cause actions is unlikely to involve environmental issues caught by Article 9 (3). The types of action still raised under summary cause are limited and include, for example, actions of aliment and actions for eviction and payment of rent arrears. The numbers of summary cause actions raised each year are low. In comparison to 30,000 simple procedure cases there were only 7,900 summary cause cases in 2024-25.[14] Whilst there is no breakdown of the overall number of cases, it is likely most summary cause actions are eviction actions. Given that background, Council members may take a view that there is no need to propose the introduction of a rule for summary cause actions.

Leave to appeal to the UKSC:

29. Lastly, as recently observed by the Inner House,[15] there is no rule to allow a PEO to be carried forward for an application for leave to appeal to the UKSC. It may be useful to consider whether such a rule should be introduced. Whilst it has not been raised as an issue before the Compliance Committee, it may be helpful to consult on introducing such a rule in the 2026 consultation.

Recommendation:

30. If the SCJC are minded to seek rules providing for costs protection in civil actions in the Court of Session more generally, as well as for Ordinary Causes and Summary Applications in the Sheriff Court, then a consultation would be issued in 2026. It is proposed that consultation would have a draft rule for each type of action but would also consult on whether there is any requirement for a rule for summary cause actions. If the SCJC agree to this approach, the 2025 consultation on the limited extension in the Court of Session and sheriff courts

[14] SCTS Statistics | Scottish Courts and Tribunals Service

[15] See Wildcat Community Interest Co Ltd v Scottish Ministers (No 2) [2025] CSIH 10

may not need to progress beyond the current analysis of the consultation responses.

31. It would also be helpful for further data to be captured on the numbers of civil cases each year where there is an application for a PEO. Members may wish the Secretariat to undertake further discussions within SCTS to ensure the required information can be captured. Consideration should also be given to liaising with the Judicial Institute on appropriate training materials to be made available for the judiciary.

32. It is recommended that the Council considers the running of a 2026 Public Consultation on the introduction of PEO rules that would:

- **Cover all relevant cases in the Court of Session:**
- **Cover all relevant cases in the Sheriff Appeal Court; and**
- **Cover all relevant summary applications, ordinary cause and simple procedure cases in the Sheriff Court.**

33. It is recommended that the Council considers including a consultation question on having PEO rules inserted within the summary cause rules.

34. It is recommended that the Council ask the Secretariat to liaise with SCTS to ensure sufficient data on PEOs is captured and reported on.

CONCERN B – COST CAPS

35. This issue is set out in the Compliance Committee's report for the November 2025 Meeting of the Parties at paragraphs 152 to 159.[16] It concerns the inclusion of the phrase *"on cause shown"* in the current rule RCS 58A.7 of the Court of Session which reads:

> *"(1) A protective expenses order must— (a) limit the applicant's liability in expenses to the respondent to the sum of £5,000, or such other sum as may be justified* ***on cause shown****"*

36. The Compliance Committee consider the phrase *"on cause shown"* to be problematic, considering that phrase to be uncertain and that, as such, it may have a chilling effect.[17] The Compliance Committee has considered and rejected the explanatory information included within papers published by the SCJC. That includes the explanation that *"this clause is equivalent to "where a valid reason*

[16] The Compliance Committee's report to the 2025 Meeting of the Parties is found here. Note the Meeting of the Parties postponed its consideration of that report.

[17] The Compliance Committee notes its concerns "*despite the fact that in practice no cap has ever been shifted upwards since costs capping was introduced in 2013*", although there is one example of a cap of £10,000, discussed below.

can be demonstrated to the satisfaction of the court".[18] It was not satisfied with that explanation, nor with the reference to judicial independence found in the SCJC's update paper on Aarhus, which reflected discussions at the Cost and Funding Committee regarding the need to maintain judicial discretion.[19]

37. The Compliance Committee has expressed the view that, for the rules in Scotland, £5,000 is the maximum cost that a litigant should be exposed to, and that any judicial discretion should only be to lower the £5,000 cap if it is considered reasonable to do so.[20] Members will recall that not every litigant involved in an environmental action will be able to seek a cost cap. The court must be satisfied that the applicant is a member of the public concerned, that the action is an environmental one, and that, for that applicant, the action would be prohibitively expensive if the PEO were not granted.[21]

38. There is one reported case in Scotland that did increase the cap upwards from £5,000 to £10,000.[22] Given the underlying aim of the Convention is to enable access to the courts within a certain, clear and accessible legal structure, the

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[18] The Compliance Committee references, at para 154 of its report to the Meeting of the Parties, the SCJC paper "Update on the Aarhus Concerns for Scotland" dated 30 September 2024 put before the Compliance Committee by the UK's final progress report of 29 November 2024. Although there are updated versions of this paper, on this issue, the later version of the paper does not alter the position.

[19] In 2022 the Cost and Funding Committee considered this issue and "*The Committee agreed that the current rules do provide the courts with a level of discretion that is warranted for use on a 'by exception' basis. The secretariat is to provide further data on how often that exception for "on cause shown" is used in practice."*

[20] Para 90 of the 2025 report to the Meeting of the Parties references the 2021 report of the Compliance Committee: "*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. 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 SCJC may wish to note that the caps in England and Wales are £5,000 for individuals and £10,000 for organisations.

[21] The SCJC is reminded that the existing Court of Session rule reads:

> *"(3) Proceedings are to be considered prohibitively expensive for the purpose of this Chapter if the costs and expenses likely to be incurred by the applicant for a protective expenses order*
> *(a) exceed the financial means of the applicant; or*
> *(b) are objectively unreasonable having regard to*
> *(i) the situation of the parties;*
> *(ii) whether the applicant has reasonable prospects of success;*
> *(iii) the importance of what is at stake for the applicant;*
> *(iv) the importance of what is at stake for the environment;*
> *(v)the complexity of the relevant law and procedure; and*
> *(vi) whether the case is frivolous."*

[22] A protective expenses order of caps of £10,000 appears to have been granted in a judicial review brought by Wildcat Haven Community Interest Company, but on joint motion. The main decision is reported at [2024] CSOH 10.

Compliance Committee has maintained its concerns (notwithstanding the absence of evidence of such orders routinely being varied above £5,000).[23]

39. The 2025 consultation on proposed rules for group proceedings in the Court of Session and for some statutory applications in the Sheriff Court included the phrase *"on cause shown"* in terms of being able to both increase and decrease the level of the cap.

40. It is recommended that the Council agrees that the underlying policy to be consulted on for all court fora should be:

- **To provide for a maximum cap of £5,000 but with the ability of the court to lower that figure through judicial discretion; and**
- **To delete the phrase *"on cause shown"* and draft a suitable alternative phrase to allow the figure of £5,000 to be lowered if reasonable to do so.**

41. Alternatively, if members are not minded to introduce rules covering most civil actions, the Council should consult on:

- **The deletion of the words *'on cause shown'* within the existing Court of Session rules for statutory appeals and judicial reviews, to be replaced with a suitable alternative phrase to allow the figure of £5,000 to lowered if reasonable to do so; and**
- **To consider how the issue was covered in the draft rules for the 2025 Public Consultation and how best to respond to the feedback received.**

CONCERN C (i) – DISCLOSURE OF THE TERMS OF REPRESENTATION

42. The current Court of Session rule requires the motion for a PEO to be accompanied by:

> *"(a) a statement setting out the grounds for seeking the order;* ***the terms on which the applicant is represented;*** *an estimate of the expenses that the applicant will incur in relation to the proceedings; an estimate of the expenses of each other party for which the applicant may be liable in relation to the proceedings; and in the case of an application for liability in expenses to be limited to an amount lower or, as the case may be, higher than a sum*

[23] It should be remembered that the Compliance Committee has consistently held this position for a substantial period of time; in the 2021 report to the Meeting of the Parties, it said at para 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. 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 reference to decision V/9n is the 2017 report that the Compliance Committee produced on the UK's implementation of it decision V/9n, made by the Compliance Committee on 29 December 2014, available here.

mentioned in rule 58A.7(1), the grounds on which the lower or higher amount is applied for…."

43. In its 2021 report to the Meeting of the Parties, the Compliance Committee raised the issue of why an applicant must disclose the basis on which they are represented, noting the explanation that:

"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."[24]

44. In its 2025 report to the Meeting of the Parties, the Compliance Committee invited further information on how an application for a PEO works in practice. That appears to raise the prospect that if the Committee can be satisfied that such information is kept confidential, it may be content that disclosure to the court would not threaten the economic viability of pro bono work. Notwithstanding that, members may wish to take the opportunity to consider whether the requirement to lodge that information in a statement before the court is, in fact, required. The following points may assist:

- It could be argued that it is unclear as to why the basis on which an applicant is represented would be relevant for the court's decision. The existing Court of Session rule already requires the production of an estimate of expenses that the applicant will incur. Accordingly, there is duplication as to what information the applicant needs to provide. Whilst the court rules to apply for a PEO must require the applicant to produce sufficient information to allow the court to determine if proceedings are prohibitively expensive, it might be thought that the rules should, to comply with the principles of the Convention, encourage a straightforward procedure. It is unclear what the court gains from requiring such additional information.

- Secondly, whilst the SCJC referenced the Corner House principles as a justification, the Corner House principles do arguably have a different starting point from at least some environmental actions falling within Article 9.[25]

45. It is recommended that the Council agrees the underlying policy positions to be consulted upon during 2026 including:

[24] See ECE/MP.PP/2021/59 at para 100, found here.

[25] The version of the report provided was September 2024, as that was the latest version available at the time of the UK's final update on progress on the Action Plan in November 2024. The SCJC had an updated version of that report before it at its August 2025 meeting. The justification for this rule in August 2025 reads "*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*." It might argued that a representative's view of the merits of a case and the reference to the Corner House principles will not advance the justification for such a rule.

- **The introduction of a PEO rule for all types of civil cases in Scotland (as detailed above) which would not have the requirement to provide 'terms of representation' within the statement lodged with the motion for a PEO**

46. Alternatively, if the Council is not minded to consult on a rule being introduced for most civil actions, the Council consult on:

- **The deletion of requirement to provide the terms on which the applicant is represented within the existing Court of Session rules for statutory appeals and judicial reviews; and**

- **To consider how the issue of terms of representation should be dealt with in the draft rules consulted upon in the 2025 public consultation.**

CONCERN C(ii) – DISCLOSURE OF FINANCIAL INFORMATION

47. This heading relates to the provision of information on an applicant's finances, and the confidentiality of that information."

48. Rule 58A.1 of the Court of Session reads:

> *"(3) Proceedings are to be considered prohibitively expensive for the purpose of this Chapter if the costs and expenses likely to be incurred by the applicant for a protective expenses order—*
> *(a) exceed the financial means of the applicant; or*
> *(b) are objectively unreasonable having regard to—*
> *(i) the situation of the parties;*
> *(ii) whether the applicant has reasonable prospects of success;*
> *(iii) the importance of what is at stake for the applicant;*
> *(iv) the importance of what is at stake for the environment;*
> *(v) the complexity of the relevant law and procedure; and*
> *(vi) whether the case is frivolous.*
> *(4) The costs and expenses mentioned in paragraph (3) are—*
> *(a) the costs incurred by the applicant in conducting the proceedings; and*
> *(b) the expenses for which the applicant would be liable if the applicant was found liable for the taxed expenses of process, without modification.*

49. Rule 58A.5 (3) requires the applicant to lodge with the motion seeking a PEO:

> *(a) a statement setting out—*
> *(i) the grounds for seeking the order;*
> *(ii) the terms on which the applicant is represented;*
> *(iii) an estimate of the expenses that the applicant will incur in relation to the proceedings;*
> *(iv) an estimate of the expenses of each other party for which the applicant may be liable in relation to the proceedings; and*
> *(v) in the case of an application for liability in expenses to be limited to an amount lower or, as the case may be, higher than a sum mentioned in rule 58A.7(1), the grounds on which the lower or higher amount is applied for; and*
> *(b) any documents or other materials on which the applicant seeks to rely*

50. Lastly, Rule 58A.5 (5) reads:

> *(5) The motion may request that the court grant an order treating any of the information listed in paragraph (3) as confidential and open only to the court and the parties to the proceedings.*

51. In the Compliance Committee's report for the November 2025 Meeting of the Parties, the Committee stated:

> "*… 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."*[26]

52. It is unclear whether the Compliance Committee are simply seeking further information in reassurance as to the confidentiality of private information or if the Compliance Committee is suggesting that such information should not provided to the respondent and interested parties. That second scenario may be a misreading of the Compliance Committee's view.

53. It is helpful for the SCJC to consider the practicalities of an application for a PEO and the operation of this rule in an adversarial system.

54. The practical operation of this rule can be summarised as follows. The expectation in the rules is that a decision for a PEO would be made on the papers wherever possible, without a hearing taking place. The parties to the action will generally have liaised and discussed the issue of a PEO prior to the lodging of a motion.

55. Once a motion for a PEO has been lodged the following procedures apply:

> *For an unopposed motion* – the court clerk will draft an interlocutor and send it to a judge for approval and, providing the judge is content with the position, that interlocutor is authorised and issued to the parties.
>
> *For an opposed motion* – the court clerk will fix a hearing before the judge who has been assigned to case manage those proceedings. Once parties have been heard and a judicial decision made, an interlocutor is authorised and issued to the parties.

56. On the operation of this rule within the context of adversarial proceedings, members will readily understand the impossible situation for a court if a court was asked to determine matters based on information not seen by one party. A PEO has implications for both parties. Whilst the grant of an order allows a litigant to access the courts without the risk of a high award of expenses against them, such an order also means the other party, who might have expected to obtain an award of judicial expenses if successful, has limited ability to recover expenses. In that sense, it is a significant order to be granted. It is axiomatic to the fairness of a process in an adversarial system to allow both parties access to the information upon which the court will make its decision. It is notable that the Compliance Committee has a range of experienced and legally qualified

[26] At para 172, available here

members, drawn from a variety of jurisdictions. Some of those jurisdictions may have their roots in an inquisitorial system. Other systems may operate without the same emphasis on the importance of awards of expenses within the court or tribunal system. In that respect, fairness to both sides may not need the disclosure of such information to both sides.

57. It may be the core of the Compliance Committee's concern is the need to maintain confidentiality of private information put before the court. As set out above, the wording of the existing Court of Session rule already provides the applicant can seek for such information to be kept private.[27] It may be useful, as part of a consultation in 2026, to seek views on whether there are any issues with the terms or operation of this part of the rule.

58. It is recommended that the Council:

- **Note the information provided as regards the protective expenses application process; and**

- **Agree to include a question within the 2026 consultation on whether there are any issues as to the maintenance of confidential information.**

CONCERN C(iii) – SEEKING ESTIMATES OF EXPENSES

59. Members will recall that the existing Court of Session rule 58A.5 (3) requires the applicant to lodge, with the motion seeking a PEO:

> *(b) a statement setting out—*
> *(vi) the grounds for seeking the order;*
> *(vii) the terms on which the applicant is represented;*
> *(viii) an estimate of the expenses that the applicant will incur in relation to the proceedings;*
> *(ix) an estimate of the expenses of each other party for which the applicant may be liable in relation to the proceedings; and*
> *(x) in the case of an application for liability in expenses to be limited to an amount lower or, as the case may be, higher than a sum mentioned in rule 58A.7(1), the grounds on which the lower or higher amount is applied for; and*
> *(b) any documents or other materials on which the applicant seeks to rely*

60. This question of the need to provide estimates was raised by the Compliance Committee in 2019 in its second progress review of the UK's compliance:

> *"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*

[27] Rule 58A.5(5) reads "*The motion may request that the court grant an order treating any of the information listed in paragraph (3) as confidential and open only to the court and the parties to the proceedings".*

> *(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 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."[28]

61. In the report[29] to the 2025 Meeting of the Parties, the Compliance Committee notes:

> *"Para 175. 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.*
>
> *Para 176. 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.*
>
> *Para 177. 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."*

62. In short, the Compliance Committee has three concerns. Firstly, if the applicant prepares the note of potential liability for expenses, the Committee considers there is a risk of underestimating liability for expenses. Secondly, the Compliance Committee considers there is a risk that the liability for expenses may change during the progression of an action. Thirdly it is concerned as to the additional work required in providing the court with such estimates. It notes the absence of such a requirement in England and Wales.[30]

63. It may be helpful to set out the background on judicial expenses. Members will be aware that if a successful party is awarded judicial expenses this does not allow that party to claim all and any expenses that party incurred. Rather, judicial

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[28] See "*Second progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention*", 6 March 2020, available here.

[29] Members will recall the Meeting of the Parties deferred consideration of this report.

[30] The Civil Procedure Rules for England and Wales 46.25 require *"… filed and served with the claim form a schedule of the claimant's financial resources, which is verified by a statement of truth and provides details of—*

(i) the claimant's significant assets, liabilities, income and expenditure; and

(ii) in relation to any financial support which any person has provided or is likely to provide to the claimant, the aggregate amount which has been provided and which is likely to be provided

(ii) in relation to any financial support which any person has provided or is likely to provide to the claimant, the aggregate amount which has been provided and which is likely to be provided.

expenses covers fees of solicitors (and counsel if appropriate or sanctioned), VAT and necessary outlays such as expert witness costs and court fees.[31] Similar rules govern the procedure in the Court of Session and Sheriff Court.[32] The party entitled to expenses intimates the lodging of the account to the party which is liable. The account is lodged with the process in court, and is passed to the Auditor of the relevant court, who fixes a date for the taxation to take place and intimates the date to the interested parties. Argument is held before the Auditor, who then adjudicates on individual items in the account, before calculating a final figure which represents the taxed account. The Auditor will allow "such expenses as are reasonable for conducting the proceedings in a proper manner", and will tax off (deduct) any entries which are:

- Incurred as a result of fault or error on the part of the entitled party or the entitled party's representative"; or relate to, "a part of the proceedings in which the Auditor considers that the entitled party was unsuccessful".

64. The auditor has a power to "tax off" items which are not allowed or are reduced, as well as adding any appropriate charges which have been omitted.

65. As such, the Compliance Committee's concern as to whether an applicant could underestimate their liability for expenses may not arise. The respondent (or opponent) does not have an unlimited ability to claim all expenses that they incurred. Rather the Auditor has the final say on whether the entry in the account is reasonable. On the additional cost of preparing estimates, a recent examination of the estimates included when lodging a motion for a PEO would indicate that practitioners are logging broad estimates only, rather than instructing tax accountants or paralegals to prepare detailed submissions.

66. However, the SCJC may wish to take the opportunity to consider the necessity of applicants lodging an estimate of their liability for expenses, particularly for Court of Session cases. It might be that there is little purpose to preparing such information given judges have reasonable familiarity with approximate costs for different types of procedures. If necessary, generic information could be provided for judges. In line with the requirement of the Convention to provide access to justice in a fair, equitable, timely manner and in a way that is not prohibitively expensive, the SCJC may wish to reconsider the necessity of this requirement within the rules.

67. It is recommended that the Council agrees the underlying policy positions to be consulted upon during 2026 including:

- **The introduction of a PEO rule for all types of civil cases in Scotland (as detailed above) which would not have the requirement to provide estimates of opponent's expenses included within the statement lodged with the motion for a PEO (but retaining the requirement to have the applicant estimate expenses)**

[31] The point is uncontroversial, but useful reference can be made to Hennessy 'Civil Procedure and Practice' (5th edition) at chapter 19 paras 19.04 to 19.08

[32] Via the relevant table of charges from the Taxation of Judicial Expenses Rules 2019 (SSI 2019/75)

68. Alternatively, if the Council is not minded to support a consultation on a rule being introduced for most civil actions, the Council may consult on:

- **The deletion of requirement to provide in the statement lodged with the court an estimate of the opponent's expenses with the existing Court of Session rules for statutory appeals and judicial reviews; and**

- **To consider how the issue this issue should be dealt with in the rules consulted upon in the 2025 public consultation.**

CONCERN D - INTERVENERS

69. This issue concerns the Court of Session rule relative to interveners and the use of the phrase *"on cause shown"* within the existing rule.

70. Members will be aware that in a judicial review case the court can allow an intervener to participate in the court action to the extent of providing a written submission to the court.[33] The numbers of cases where the Court of Session has allowed interventions is low.[34] The allowance of a public interest intervention should allow the court to have a broader picture of the issues raised by the case beyond the specific facts in the case before it. An intervener may be able to provide observations on the arguments arising, the background to the statutory provision, or provide the court with additional factual information such as research or statistics.

71. Rule 58A.10 on expenses for interventions in environmental cases reads:

> *"(1) Expenses are not to be awarded in favour of or against a relevant party, except on cause shown.*
> *(2) If the court decides expenses are to be awarded under paragraph (1), it may impose conditions on the payment of expenses.*
> *(3) In paragraph (1), "a relevant party" means a party who has—*
> *(a)been granted leave to intervene under rule 58.19(1)(b) or;*
> *(b)been refused or granted leave after a hearing under rule 58.19(1)(c)."*

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[33] Court of Session rule 58.17 relates to public interest interventions in judicial review:
"(1) This rule applies to a person who—
(a) was not specified in an order made under rules 58.4(1), 58.11(2) or 58.12(2) as a person who should be served with the petition; and
(b) is not directly affected by any issue raised in the petition."

[34] See research paper 2.3A before the SCJC at its meeting on 8 August 2025 which examined the numbers of cases where a public interest intervention had been allowed, available here. The research is limited to cases where a protective expenses order was granted, but it suggests that interventions are rarely sought. Note the difference between a public interest intervention and the position of an interested party (who may enter the process to defend their particular interests by the issues raised in the case).

72. The Compliance Committee's concern is the use of the term "*on cause shown*".[35] Its reasons are similar to the reasons provided regarding the use of the same term relative to cost caps, but also a concern that a party raising the action may become liable for intervener's costs.

73. It might be helpful for the SCJC to set out that once a PEO is granted, that has the effect of capping the liability of that party relative to all expenses in the court action, whether that is intervener's expenses, court fees or liability for judicial expenses to the successful party. As such, the concern as to intervener's costs being additional over and above the PEO cap is not a concern.

74. However, notwithstanding that, the SCJC may wish to consider the utility of retaining *'on cause shown'* within this part of the rules. An environmental NGO which seeks to make a public interest intervention may be exercising a limited form of an Article 9 right. That NGO may wish to bring to the court's attention its view on whether, for example, a national environmental law has been breached. Accordingly, given the Compliance Committee's view on the uncertainty that may be caused by the phrase *'on cause shown'*, the SCJC may wish to consult on deletion of that phrase within Rule 58A.10.

75. It is recommended that the Council:

- **Agrees to consult on the deletion the words *"on cause shown"* within RCS rule 58A.10; and**

- **Notes that environmental NGOs have previously raised concerns that the rule on expenses for intervenors were made without public consultation.[36]**

CONCERN D – COURT FEES

76. In relation to court fees, there is a risk of conflation of different issues and misunderstanding.

77. In the Compliance Committee's report to the November 2025 Meeting of the Parties, the Committee welcomed the fee exemption order relative to judicial review and statutory appeals in the Court of Session. The Committee criticised that the same fee exemption does not yet extend to the Sheriff Court. Members should note the position only as progressing fee exemptions is a matter for the Scottish Government (rather than the SCJC).

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[35] See para 187 "*However, the Committee notes with concern that the exception in Party concerned's final progress report, 29 November 2024. 26 "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"*

[36] See submission to Compliance Committee from a coalition of NGOs dated 6 January 2025, on the UK's progress report, available here.

78. The Compliance Committee has queried whether court fees would be included within the upper sum of a PEO, or whether there is a risk that a litigant with a PEO cap would be expected to pay court fees in addition to the £5,000 cap.

79. A PEO limits the ability of an opponent to recover judicial expenses over the capped sum. Judicial expenses include fees of solicitors (and counsel if appropriate or sanctioned), VAT and all necessary and reasonable outlays such as expert witness costs and court fees.[37] As such, someone who has obtained a PEO will have their full liability limited to the amount of the cap. The opponent, if they paid court fees, can seek to recover court fees but only within the cross cap within the PEO.

80. Members should note what happens in practice, and that providing information that evidences that approach may assist the Compliance Committee in their deliberations.

OTHER MATTERS FOR CONSIDERATION

81. There have been other concerns highlighted by the Compliance Committee in their 2025 Compliance Report relating to England & Wales and to Northern Ireland. Arguably they apply equally to Scotland. Whilst it does not fall within the statutory powers of the SCJC, it is useful to note the two following matters.

Time limits in judicial reviews and statutory appeals

82. The Compliance Committee has considered the issue of judicial review and statutory appeal time limits. It arises from a complaint upheld as to the time limit in Northern Ireland.[38] The issue of time limits has not appeared as specific action point for Scotland (although it should be noted that the Committee have indicated the general obligation to provide a system that complies with Article 9), although it has been raised by Scottish environmental groups.[39] It is worth also noting that a consultation by the UK Government on achieving Aarhus compliance has indicated the wording of the current rule in Scotland is similarly problematic.[40]

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[37] The point is uncontroversial, but useful reference can be made to Hennessy 'Civil Procedure and Practice' (5th edition) chapter 19 at paras 19.04 to 19.08

[38] ACCC/C/2015/131 at paragraphs 125 onwards. The time limit in the rule from Northern Ireland, as considered by the Compliance Committee, is calculated from the date that "*the ground to make the claim first arose*". In that particular case, the public authority did not publish the screening decision which was to be challenged until a number of months after the decision was made.

[39] For example, in ERCS letter to the Compliance Committee, commenting on the UK's first progress report of 10 November 2023

[40] See Ministry of Justice consultation "*Access to Justice in relation to the Aarhus Convention: A Call for Evidence*" at paragraph 69 which reads "*Although the wording of Article 2(c) refers specifically to Northern Ireland, the finding and associated recommendation apply equally to England and Wales and to Scotland where similar rules are in place.*

83. Insofar as judicial review and statutory appeals are concerned, it appears to be solely a matter of primary legislation (the court rules dealing with judicial reviews and statutory appeals in the Court of Session do not contain any wording in either chapter 41 or 58 which is problematic).

84. In the Sheriff Court the position is similar. In the main, any time limits for the raising of an action are found in primary legislation and thus are outwith the competence of the SCJC. For summary applications, there is a catch-all rule for summary applications where the time limit is not otherwise prescribed.[41] Given the wording of that catch-all rule, there is no issue with compliance as it already provides a time limit running from the date of intimation of a decision, and not from the date that the decision was made.

85. It is recommended that the Council notes the position and agrees that no steps need to be taken by the SCJC in relation to time limits.

Recovery of expenses by party litigants

86. There has been criticism of fees in England and Wales as to what fees a party litigant might be able to recover. The Secretariat has considered the position and considers no action is required by the SCJC in this respect.

87. The Compliance Committee considers that "…a successful *"litigant in person"* is entitled to recover a fair and equitable hourly rate". The Committee have expressed concern that in England & Wales the hourly rate recoverable by a *"litigant in person"* is less than one-tenth (10%) of the sum that a legally represented party could recover.

88. In Scotland that concern does not arise, as taxation rule 3.10(3) enables a 'party litigant' to recover reasonable expenses up to two thirds (66%) of the sum that a legally represented party could recover:

> *3.10.—Party litigants*
>
> *(1) Where the entitled party was not represented by a solicitor the Auditor may, subject to paragraph (3), allow a reasonable sum in respect of work done by the entitled party which was reasonably required in connection with the proceedings.*
>
> *(2) In determining what would be a reasonable sum the Auditor is to have regard to all the circumstances, including—*
>
> *(a)the nature of the work;*
>
> *(b)the time required to do the work;*

[41] Rule 2.6(2) of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 reads "*An application to which this rule applies shall be lodged with the sheriff clerk within 21 days after the date on which the decision, order, scheme, determination, refusal or other act complained of was intimated to the pursuer."*

(c)the amount of any earnings lost during that time;

(d)the importance of the proceedings to the entitled party; and

(e)the complexity of the issues involved in the proceedings.

(3) Any sum allowed under this rule must not exceed two thirds of the charges that would be allowed under this Chapter if the same work had been done by a solicitor.

89. Accordingly given the statutory provision for party litigants (as litigants in person are referred to in Scotland), it would appear no further action is required. **It is recommended the Council note the position and agree no further action is required as the issue of recovery of expenses by party litigants**.

Communication and engagement by SCJC around Aarhus

90. Members also wished to consider the wider issue of the way the Council communicates and engages with the public on environmental actions. It is worth starting with the statutory functions of the SCJC:[42]

(1) The functions of the Council are—
(a) to keep the civil justice system under review,
(b) to review the practice and procedure followed in proceedings in the Court of Session and in civil proceedings in the Sheriff Appeal Court or the sheriff court,

Research and engagement on the volume of transactions

91. Whilst there are a low number of cases where access to justice has been provided by the grant of a PEO, each case may have had significant impacts not just on the environment, but also on the interests of others. Public authorities might successfully defend a claim but be unable to claim expenses. More significantly the raising of court proceedings can affect commercial interests in projects, cause delay and uncertainty, and have wider commercial impacts.[43]

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[42] *Section 2(1) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. The powers of the SCJC are set out in section 3:*
"Powers of the Council
(1)The Council may take such action as it considers necessary or desirable in pursuance of its functions.
(2)In particular, the Council may—
(a)have regard to proposals for legislative reform which may affect the civil justice system,
(b)have regard to the criminal justice system and its effects on the civil justice system,
(c)consult such persons as it considers appropriate,
- *(d)co-operate with, and seek the assistance and advice of, such persons as it considers appropriate,*
(e)make proposals for research into the civil justice system,
(f)provide advice and make recommendations to the Scottish Ministers on the development of, and changes to, the civil justice system, and
(g)publish any recommendation it makes."

[43] *By way of example, see Lord Banner KC's Independent review into legal challenges against Nationally Significant Infrastructure Projects, which whilst considering a narrow class of challenges to*

92. Members may wish to consider those statutory functions and consider longer term research on the way that environmental cases are dealt with in the civil justice system. As the numbers of cases are expected to gradually increase over time, with consequential impacts on other parts of the economy, it may be wise for the SCJC to ensure such disputes are dealt with efficiently and effectively, within the terms of Article 9 of the Convention.

Research and engagement on the rationale for an environmental court or tribunal

93. There may be merit in the SCJC seeking further information on the roles of environmental tribunals elsewhere, to supplement the initial background information that was compiled by the UN in their "Environmental Courts and Tribunals 2021: A Guide for Policy Makers".[44] Models of environmental tribunals do vary and range from:

- A designation of cases to particular ticketed judges with supporting Practice Notes, similar to having commercial courts as a specialism in some courts
- The transfer of certain cases to an existing body (such as the Land Court)
- The establishment of a new tribunal
- The establishment of a new court.

94. Whilst it is a complex and difficult issue, members may wish to consider if a more comprehensive examination of the issues should be considered, along with wider engagement in this area.

Making better use of other modes of engagement

95. Whilst there have been helpful and informative responses to the 2025 consultation, there is scope for encouraging greater engagement across the wide range of persons and bodies likely to be affected by changes to PEO rules.

96. The consultation paper was sent to 38 organisations, many of which were representative of business interests. Most of the responses came from individuals or organisations who had been applicants for PEOs. The SCJC may also wish to ensure there is dialogue with a range of individuals and organisations, including environmental NGOs, representative bodies of business, representative bodies on renewable energy, public authorities and others.

97. It is important the SCJC is accessible across a broad range of society, and that the SCJC is aware of practical and any other issues arising from the rules. In practice that may include consideration of the following modes of engagement:

national infrastructure, highlighted a degree of frustration by commercial and government, including court delays.

[44] https://wedocs.unep.org/handle/20.500.11822/40309

- The use of roadshows / workshops / focus groups;
- The use of questionnaires / surveys;
- The use of meetings with representative bodies; and
- The use of calls for evidence.

98. It is recommended that the Council asks the secretariat to:

- **Bring forward detailed proposals for 'commissioning research' on:**
  - **The way that environmental actions are carried out in Scotland, and the options for change as to the way such matters are determined.**
  - **The potential advantages and disadvantages of changing to an environmental court or tribunal.**
- **Consider the other steps that could and should be taken to increase engagement with those affected by the provision of "costs protection".**

Secretariat to the Scottish Civil Justice Council
December 2025

ADDENDUM (to paragraph 7) – REGARDING LEGAL AID

This strategy paper was considered by the Council at its meeting on 8 December 2025.

Following that meeting SLAB provided this additional information:

- *In a submission to the Equalities, Human Rights & Civil Justice Committee of the Scottish Parliament in 2025, SLAB committed to reviewing its guidance on Regulation 15. In advance of that full review, SLAB recently altered its guidance resulting in the deletion of the examples listed in the second bullet of paragraph 6 of this paper.*
- *The numbers of applications for legal aid where regulation 15 is engaged appear to be relatively small. In the above submission, SLAB advised that between 2020 and 2025 only 29 cases were considered in terms of the tests set out in Regulation 15 (the submission is available here). Of those cases, 23 were granted and no applications were refused on the grounds of Regulation 15.*

ANNEX 1 – THE CONVENTION

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Convention') was signed in 1998 and ratified by the UK in 2005. Together with a protocol on pollutant releases (which does not affect the work of the SCJC), the Convention is designed to protect an individual's right to live in an environment adequate to their health and well-being.

It is often described as a treaty in environmental democracy with its three 'pillars':

(1) the right to information
(2) the right to public participation in environmental decision-making and
(3) the right to challenge environmental decision making.

it is that last pillar which directly impacts on the work of the SCJC.

The Convention does not set out, for the most part, what the substantive law on the environment is or should be. Rather it grants procedural rights, allowing the public to participate in environmental decision making at various stages: the right to obtain information, consultation rights, and rights to challenge certain environmental decisions. As one commentator has noted, despite the absence in the Convention of any limit values, pollution reduction targets or substance bans, the significance of Aarhus on domestic environmental law cannot be underestimated.

For the purposes of this paper, and although the right to information and public participation have relevance to the SCJC's operating functions, it is the third pillar which the SCJC need be most concerned with. The third pillar is found in Article 9 of the Convention. There are three broad categories of rights:

- Challenges to decisions re environmental information requests
- Challenges to decisions, acts or omissions regarding permitting activities covered by Article 6. This article covers major infrastructure projects but also decisions which may have a significant effect on the environment (Article 9(2))
- Challenges to other acts or omissions 'by private persons and public authorities which contravene provisions of its national laws relating to the environment' (Article 9(3)).

The Convention requires there to be *"adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive"*. (Article 9 (4)).

The scope of the convention

The scope of Article 9(3) has been interpreted in a broad way, with the Compliance Committee emphasising it is not "environmental laws" but "laws relating to the environment".[45] It is said to include law relating to the wider environment, such as

[45] Findings on communication ACCC/C/2011/63 (Austria), ECE/MP.PP/C.1/2014/3, paras. 52 and 54 (non-compliance); endorsed in MOP decision V/9b, ECE/MP.PP/2014/2/Add.1, para. 2

noise and health.[46] The Compliance Committee have included nuisance actions within the scope of Article 9(3)[47] (although there may be something of a dispute on the extent to which the nuisance action requires to be connected to wider environmental impacts).[48]

The status of the Convention in Scots law

Although the decisions are often described as "non-judicial", the decisions of the Compliance Committee have been referred to by Court of Justice of the European Union, the UKSC[49] and the Inner[50] and Outer House of the Court of Session.[51] Other than where the Convention was part of EU law, and that particular law is assimilated, unincorporated international treaties do not form part of domestic law, An unincorporated international treaty cannot give rise to a direct legal right that can be enforced in domestic courts.

[46] See communication ACCC/C/2010/50 (Czech Republic), ECE/MP.PP/C.1/2012/11, para. 84 (non - compliance); endorsed in MOP decision V/9f, ECE/MP.PP/2014/2/Add.1, para. 1.

[47] See ACCC/C2008/23 re a nuisance action from the odour from a waste composting site, but also ACCC/C/2013/85 and ACCC/C/2013/86 (United Kingdom), ECE/MP.PP/C.1/2016/10, paras. 72-73 (non-compliance); endorsed in MOP decision VI/8k, ECE/MP.PP/2017/2/Add.1, para. 5, where the ACCC referred to a range of nuisances such as air pollution and vibration, and acknowledge that although nuisance law primarily arose from private property rights, the question was whether the nuisance complained of affected the environment, in its broad sense. The Compliance Committee considered motivation and numbers of persons affected were not decisive to determine if Article 9 (3) applied.

[48] The issue has arisen in England and Wales in the UK Government's response to the ACCC, but the broader issue of what is an Aarhus claim was also recently considered by the Court of Appeal in HM Treasury and another v Global Feedback Ltd [2025] EWCA Civ 624. where it was observed that *"…what matters is whether the purpose of the national law that has allegedly been contravened is to protect or regulate the environment, not, whether the decision being challenged has an effect on, or some connection with, the environment*" (at para 151, per Holgate LJ) .

[49] There are several cases where the UKSC has considered, or referred to the provision of the Convention, but in Walton v Scottish Ministers 2013 SC (UKSC) 67, Lord Carnwarth noted at paragraph 100 that "*Although the Convention is not part of domestic law as such (except where incorporated through European directives), and is no longer directly relied on in this appeal, the decisions of the committee deserve respect on issues relating to standards of public participation*."

[50] See for example, Gibson v Scottish Ministers 2016 SLT 675, at para 12 "*Finally, in so far as the expenses relative to the figures in the PEO, having regard to the principles of the Aarhus Convention, the expenses of the reclaiming motion and the Outer House should not be encompassed in the figures determined. The court will accordingly order that the ceiling of £30,000, referred to in the interlocutor, shall not include the expenses of obtaining the PEO."*

[51] See, for example, Greenpeace Ltd v Advocate General 2025 SLT 303, quoting dicta from the UKSC at para 64.

ANNEX 2 – THE COMPLIANCE COMMITTEE

The Convention has more sophisticated enforcement mechanisms than most international treaties.

As a general principle given the principle of Parliamentary sovereignty, most international law is not enforceable in domestic courts in the UK (the position for customary international law is slightly different but can be ignored for current purposes). Compliance therefore is generally a matter for the state to account to any compliance mechanisms of each treaty.

The Convention is overseen by the United Nations Economic Commission for Europe (UNECE) by way of a Meeting of the Parties each two years (unless subsequently agreed otherwise).

Compliance mechanisms are not unusual in international law treaties, particularly in treaties of an environmental character. Built into the Convention was an invitation for subsequent agreement as to an enforcement mechanism on a *"non-confrontational, non-judicial and consultative nature for reviewing compliance…"* It was to include public involvement (Art 15 of the Convention). By subsequent agreement[52] by a Meeting of the Parties, the Compliance Committee was set up, together with a number of other working groups and committees. However, the Compliance Committee is the most influential of such bodies.

The current members of the Compliance Committee come from a number of countries across the UNECE who are signatories to the Convention, many with extensive and high-level experience in European law, international law and environmental law. Unlike other international treaty mechanisms, members are appointed to serve in a personal capacity and not as representatives of their state. Nominations are made not just from the parties, but also from certain NGOs. Members of the Compliance Committee take a declaration of impartiality before sitting. Most have academic backgrounds, but some are practising lawyers or judges. Members only have expenses paid.

The Compliance Committee is not, however, a judicial body and does not seek to operate as court. It has been described as quasi-judicial.[53] It was originally designed to encourage compliance, but in recent years certain cases before it have become more legalistic in nature leading to tension with its aim of encouraging dialogue and compliance in a non-confrontational way.

The decisions of the Compliance Committee require to be adopted by the Meeting of the Parties to have effect as to the interpretation of the Convention (Art 31 (3)(a) of the Vienna Convention 1969). It has been observed that the Meeting of the Parties tends to note the decisions of the Compliance Committee. There are a range of options as to the position the Compliance Committee can take from advice and recommendations to the party concerned, to issuing cautions. In terms of the Convention, such decisions should be done in a non-confrontational, non-judicial and

[52] See g0430994.doc

[53] See 'The Aarhus Convention. A Guide for UK Lawyers' ed by Banner, at page 203 referring to various texts in footnote 4.

consultative manner. The Compliance Committee, in addition to making the recommendation to the Meeting of the Parties, also can, with the agreement of the party concerned, make recommendations and agree a strategy to achieve compliance.

As such the Committee's outlook is forward thinking focusing on achieving compliance, rather than as a redress mechanism in individual cases. It does not, for example, award damages or intervene in national courts. It has considered domestic court judgements in determining whether a party is in compliance with the Convention.

Complaints to the Compliance Committee can be made by parties as to another parties' compliance, from the party itself, by the Convention Secretariat and from members of the public, including NGOs. It is the last category which is unusual in international treaty mechanisms.

Thus, there are two important differences in the compliance mechanism from most international conventions in that the Compliance Committee (1) has independence from the parties to the Convention and expertise in its membership and (2) accepts complaints from the public and NGOs.

The Convention has not been incorporated into Scots law (and the Scottish Parliament have not sought to do so). Domestic courts do not directly apply international law (referred to as 'non-justiciable'), although there are some limited circumstances in which a non-incorporated international treaty can be referred to by domestic courts. However, unusually the operation of the Convention still creates circumstances where there is some measure of domestic accountability by the state, even although it is not directly enforceable.

ANNEX 3 – THE DECISIONS OF THE COMMITTEE

The Compliance Committee has been considering the position of the UK relative to Article 9 (that is access to justice) since 2008. It is helpful for the SCJC to understand the timeline, albeit in brief terms.

2008: three complaints were lodged with the Compliance Committee regarding the UK, all concerning expenses following court proceedings.[54] During the course of those complaints being considered by the Compliance Committee, a coalition of environmental groups made representations to the Compliance Committee, resulting in the Compliance Committee taking a wider view of the cost of legal action in the UK beyond the facts of those particular cases.

2011: two of the complaints were upheld. The Compliance Committee made recommendations to the Meeting of the Parties, accepted by the Meeting of the Parties. The UK was asked to provide interim updates on progress to implementation of Article 9(4) in with a review at the Meeting of the Parties in 2014.

2014: the 2014 Meeting of the Parties sought detailed progress reports, with matters to be reviewed at the Meeting of the Parties in 2017. The 2014 resolution of the Meeting of the Parties recognised the separate legal systems within the UK. From 2014 onwards, the recommendations of both the Compliance Committee and the resolutions of the Meeting of the Parties became more sophisticated as to the position in Scotland.

2017: the Meeting of the Parties, after considering a report from the Compliance Committee indicating continued non-compliance, again sought detailed progress reports regarding compliance to be submitted to the Compliance Committee.

2021: the Meeting of the Parties took a different position. The UK was requested to submit an Action Plan by 1 July 2022 and detailed progress reports on the Action Plan to the Compliance Committee by 1 October 2023 and 1 October 2024.

2022: the Action Plan was submitted to the Compliance Committee.[55]

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[54] ACCC/C/2008/23 concerned private nuisance proceedings where the householder was found liable for £5,130 plus interest. The Committee refrained from making a recommendation in that case due to the lack of systematic evidence. In ACCC/C/2008/27 arising from a challenge to the expansion of Belfast airport, costs of £39,454, were found to be prohibitively expensive. In ACCC/C/2008/33, the Committee found that "*By failing to ensure that the costs for all court procedures subject to article 9 were not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to that effect, the Party concerned failed to comply with article 9, paragraph 4, of the Convention"*

[55] The Action Plan included that "*The SCJC have advised that a review of the court rules has been instructed. They intend to have this completed by the end of March 2023. The Scottish Government will however continue to liaise and follow up with SCJC. The SCJC is an independent body and the Scottish Government cannot commit to a timeframe on behalf of a third party"*

Throughout 2022: detailed correspondence between the Compliance Committee, various environmental NGOs and the UK Government as to adequacy of the plan.[56]

December 2022: the Compliance Committee advised the UK Government it considered the Action Plan to be inadequate.

2023: correspondence continued as to the Action Plan.

13 October 2023: the UK submitted its first progress report.[57]

June 2024: the Compliance Committee considered the UK's first progress report.[58]

November 2024: a further progress report was submitted by the UK to the Compliance Committee.[59] There was then correspondence with environmental NGOs. Reference was made to outstanding issues regarding the PEO regime in Scotland, with reference to the *"unwillingness of the SCJC (and by extension, the Party) to address the remaining problematic features of the PEO rules."*

August 2025: the Compliance Committee finalised its draft report to the Meeting of the Parties and sent it to various environmental NGOs and others for comment, and to the UK Government.

8 September 2025: the UK Government indicated it could not provide comments.

30 October 2025: the UK wrote to the Compliance Committee regarding a complaint the Committee upheld (as to consultation over the European Union (Withdrawal

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[56] These representations included a letter from a coalition of UK NGOs stating "…*The Scottish Government has delegated the task of implementing the Action Plan to the SCJC, which is to carry out a review of the relevant court rules. We are concerned that the SCJC's process for reviewing the rules will not include any form of public participation. Civil society was previously excluded from the Protected Expenses Order ('PEO') regime review undertaken by the SCJC in 2018, which resulted in changes to the rules that created additional barriers for litigants seeking redress for environmental harms. ERCS has written directly to the SCJC on several occasions requesting the SCJC to confirm whether there will be any public participation in the process. ERCS has not received any assurances on this issue."*

[57] The 2023 progress report included that "*The SCJC has confirmed that a review of the PEO rules, in light of the ACCCs recommendations, is one of their priority objectives under their 2023/24 work programme. The SCJC has broad powers to conduct consultations, commission research, and make recommendations to Scottish Ministers."*

[58] That report states "*The Committee welcomes that, through the SCJC, the Scottish Government is currently undertaking a review of the rules on PEOs. The Committee however expresses its concern that, as at the time of the Party concerned's first progress report and less than twelve months before the deadline of 1 October 2024 for the Party concerned to submit its final progress report, the SCJC's review was still not completed. The Committee urges the SCJC and the Scottish Government to complete the review and to take all measures necessary to implement paragraph 2 (a), (b) and (d) of decision VII/8s as a matter of urgency."*

[59] The progress report included that *"SCJC have been continuing their review of the PEO rules. SCJC have recently published a paper which details the amendments to court rules that have been made, as well as next steps. The paper commits to the preparation of rules on private nuisance claims to be consulted upon."*

Agreement) Act 2020) indicating it will not endorse that report by the Compliance Committee at the Meeting of the Parties in November 2025.

November 2025: the Meeting of the Parties postpone its consideration of two Compliance Committee reports regarding the UK (being the Compliance Committee's report on the UK's progress relative to the Action Plan procedure, and the finding of the Compliance Committee on the European Union (Withdrawal Agreement) Act 2020).