

Case ID: IESS.22.017

Description: Consideration of Scotland’s implementation of the requirements of the Aarhus Convention in respect of access to justice in environmental matters

Case Summary

<p>What was the issue?</p>	<p>The Aarhus Convention requires that access to justice in environmental matters should not be prohibitively expensive. The Convention has a Compliance Committee (“the Compliance Committee”) which has, on multiple occasions, found that Scotland has not achieved full compliance with this requirement, largely due to financial barriers limiting the ability of individuals and organisations to raise environmental challenges in court. An NGO has submitted a representation to ESS, requesting that we use our investigation powers to pursue reforms which address the long-standing issue of non-compliance.</p>
<p>What did ESS do?</p>	<p>ESS accepted the case for “pre-investigation.” We researched the background to the case and the history of compliance efforts and consulted with the Scottish Government (SG) and the Scottish Civil Justice Council (SCJC) to understand existing works in progress with regards to improving access to environmental justice.</p>
<p>What was ESS’ conclusion?</p>	<p>In response to the Compliance Committee recommendations, SCJC is in the process of revising the Protective Expense Order regime, which provides eligible parties with protection against expenses in court cases. In the coming year, SG is legally required to consult and report on the effectiveness of environmental governance arrangements; this includes a review of the law on access to justice and the potential establishment of an environmental court. ESS will contribute fully to the governance review.</p>

<p>What was ESS' conclusion? (continued)</p>	<p>ESS has concluded, at the time of publishing this report, that it is important that the ongoing work described above is completed. At the conclusion of this review, which is expected to complete by Autumn 2023, we anticipate greater clarity on Scotland's compliance with the Convention requirements. At this time, we can reconsider the use of our investigation powers if SCJC's and SG's work does not, in our view, sufficiently address the Compliance Committee's findings.</p>
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Background

The United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“The Convention”) was adopted on 25 June 1998 in the Danish city of Aarhus. The Convention came into force on 30 October 2001 with UK ratification on 23 February 2005. Scotland, as a signatory through the UK, is obliged to implement the Convention.

The Convention contains three “pillars”: (1) access to information, (2) public participation, and (3) access to justice. The first and second pillars have been incorporated into Scots law through the Freedom of Information (Scotland) Act 2002 and the Environmental Assessment (Scotland) Act 2005.

Access to justice, the third pillar of the Convention, includes a right for parties with “sufficient interest” in a proposed project or activity covered by the Convention to seek a review of the decision-making process which considers the substantive legality of the decision, the procedural legality of the decision, or both. Access to justice also includes a right for parties to challenge breaches of environmental law in general. The procedures associated with access to justice are required to be “fair, equitable, timely, and not prohibitively expensive.”

While each of the first two pillars have correlating legislation in Scotland, the procedures, policies, and laws associated with the third pillar are fragmented in comparison. Environmental decisions (e.g. license applications) and planning decisions feature various appeal routes, with it being more common for the original applicant to be able to challenge a decision outside of a court setting – for example,

planning appeals. These appeal routes can be inaccessible to outside parties who are affected by a decision, or are concerned about the environmental impacts of a decision. Where outside parties seek to challenge an environmental decision or breaches of environmental law, sometimes their only option is to raise proceedings in court, for example via judicial review. In bringing a case to court, potential cost liabilities include legal representation, court fees, and the legal costs of the other party (should the applicant lose the case).

For judicial review of environmental matters and certain types of environmental appeals in Scotland, the following two assistance mechanisms exist to remove or reduce financial barriers to access to justice:

- Environmental Protective Expense Orders (PEOs) as established in amendments to the Rules of the Court of Session 1994. A PEO is a court order which regulates a party's liability in expenses. A party must apply for a PEO and meet certain criteria for it to be awarded. For eligible Aarhus cases¹ in Scotland, the default PEO cost caps are £5,000 for the applicant (the maximum they are liable to pay if the respondent wins the case) with a £30,000 "cross-cap" for the respondents (the maximum they must pay the applicants if the applicants win the case). These cost caps can be modified in certain situations.
- Legal Aid, following The Civil Legal Aid (Scotland) Regulations 2002 and Legal Aid (Scotland) Act 1986. This makes civil legal aid available to a person in court proceedings to assist in paying for representation by a solicitor or an advocate. The scheme is means-tested for applicants, not available to organisations, and typically not awarded when "other persons" have a joint interest with the applicant. The caps of legal aid expenses for judicial review proceedings are £7,000 for the Outer House of the Court of Session and £20,000 for the Inner House.

¹ "Aarhus cases" are court cases which challenge the legality of environmental decisions, acts, or omissions which are subject to the provisions of the Convention.

History of Scotland's efforts to comply with the requirements of the Convention

The UK's non-compliance with the Convention has been a long-standing issue. In 2007, the European Commission sent an initial warning to the UK Government about the "prohibitively expensive" barrier on accessing environmental justice. In March 2010, the European Commission issued a "reasoned opinion" that the cost protection rules in the UK were not compliant with the Public Participation Directive. In April 2011, the matter was referred to the European Court of Justice (ECJ) which ruled in September 2013 that the UK had failed to fulfil its obligations to ensure judicial proceedings were not prohibitively expensive².

In 2010, Friends of the Earth Scotland submitted a petition to the Scottish Parliament concerning Scotland's non-compliance with the Convention; this was considered by various committees over a 10 year period. The petition was closed in January 2021 with the Scottish Parliament's Equalities and Human Rights Committee noting that there had been "very little" progress made since the petition was opened.

The most significant reviews and judgements regarding the UK's and Scotland's compliance with the Convention have been delivered by the Compliance Committee³. The findings of the Compliance Committee which identified both UK-wide and Scotland-specific deficiencies with regards to access to justice have been adopted at Meeting of Parties (MoPs) four times to date: Decision IV/9i (MoP4, 2011); Decision V/9n (MoP5, 2014); Decision VI/8k (MoP6, 2017); and Decision VII/8s (MoP7, 2021). With respect to Scotland, the most significant, long-standing issue identified by the Compliance Committee has been that the Scottish legal system remains prohibitively expensive with regards to access to justice in environmental matters. The issues relevant to Scotland in the most recent decision (VII/8s) are summarised as follows:

² ECJ Case number C-530/11

³ Individuals and organisations can submit complaints to the Compliance Committee, who then decide whether or not a state is complying with the Convention. The Compliance Committee's findings and judgements are formalised at the Convention's Meeting of the Parties, which typically occur every three years. The Compliance Committee does not have powers of enforcement (e.g. the ability to issue fines) if they conclude a state is contravening the Convention requirements.

- The unnecessary requirements for PEO applicants to disclose their basis of representation, financial information, and their estimation of the other party's costs.
- The “chilling effect” from uncertainties over total liability when a PEO is in place – cost caps can be changed by the court; costs for appeals, interveners, and court fees are not explicitly covered.
- Aarhus cases held in Sheriff Court are ineligible for environmental PEOs.
- A broad recommendation to “further consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”

Despite the residual issues of non-compliance, improvements in access to justice have been implemented by SCJC and SG in response to past ECJ and Compliance Committee rulings:

- The environmental PEO regime was introduced in Scotland in March 2013, revised in January 2016, then revised again in November 2018. The latter iterations of the PEO regime expanded the types of cases which were eligible, increased transparency on the application and decision-making process, and introduced a liability cap for a refused PEO application.
- In June 2022, SG announced its intention to exempt Aarhus cases from fees in the Court of Session.
- Previous Scottish court rules to determine if the applicant has title (a legal relationship to the decision in question) and interest were replaced in 2014 with an evaluation of whether an applicant has “sufficient interest” – this improved the ability for parties such as NGOs to initiate public interest cases in support of the environment.

Decision VII/8s requires the UK to submit an Action Plan to set out their strategy to implement the Compliance Committee's recommendations, with a deadline of 01 October 2024. With input from SG, the UK Government submitted an Action Plan on 01 July 2022. Proposed actions of relevance to Scotland include:

- SCJC reviewing court rules governing PEOs, which is scheduled to be completed in March 2023.
- A Legal Aid Reform Bill is due to be introduced over the course of the current Parliament term (2021-2026) which may consider broadening the scope of Legal Aid to “legal persons” and public interest litigation “may also be considered.”
- A Human Rights Bill is also due in the current Parliament term, which will seek to incorporate the human right to a healthy environment with substantive and procedural elements.

In addition to the commitments above, Section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (“the Continuity Act”) concerns the duty of SG to consult on the effectiveness of environmental governance arrangements. This requires that Scottish Ministers prepare a report, part of which must consider “*whether the law in Scotland on access to justice on environmental matters is effective and sufficient*” and whether the establishment of an environmental court⁴ could enhance the governance arrangements following the withdrawal of the United Kingdom from the EU. Scottish Ministers must consult with parties (including ESS) after preparing the report, then lay before Parliament a statement with recommendations in response to the consultation. The Continuity Act stipulates that the consultation process must begin prior to 01 June 2023⁵; ESS would therefore anticipate the report should be completed by Autumn 2023.

The requirement of the governance review to consider the establishment of an environmental court follows the last review undertaken by SG in 2016-2017. Then, the majority of respondents to the consultation were in favour of establishing an environmental court, but SG decided against it at that time. The reasons given

⁴ Environmental courts and tribunals (ECTs) are a specialised forum for the resolution of disputes relating to the environment, natural resources and land use. These are increasing globally; in 2009, an initial study for the United Nations Environment Programme identified 350 ECTs; recent estimates indicate there to be approximately 1500 ECTs in 44 countries.

⁵ Based on the Continuity Act requirement to begin consultations no later than six months from the publication of ESS’ strategic plan, which occurred on 01 December 2022.

included uncertainty around Brexit, the advantage of local Sheriff Courts for certain environmental cases, environmental courts not being required by the Convention, and anticipating there would be insufficient cases to support a new environmental court.

Summary of concerns reviewed by ESS

An NGO submitted a representation to ESS concerning Scotland's continued non-compliance with the Convention. They assert that the existing assistance mechanisms to reduce financial barriers (the PEO regime and Legal Aid) are ineffective and deficient in providing access to justice. The NGO requested that ESS use our powers to pursue timely changes to bring Scotland into compliance with the Convention. The changes they suggest are:

1. Making Legal Aid available for organisations (such as NGOs) undertaking public interest litigation;
2. Replacing the PEO system with qualified one-way costs shifting (QOWCS) for environmental cases;
3. Reforming court fees⁶; and
4. Establishing an environmental court or tribunal (ECT) in Scotland.

The representation also raised concerns that judicial review in the Court of Session does not allow for challenging the substantive legality of decisions, acts, or omissions subject to the provisions of the Convention (i.e. the Court of Session allows for procedural legality review, but not merit-based review, contrary to the Convention requirements that both types of review be made available for eligible challenges). This issue had been referred to the Compliance Committee in 2017 with no decision yet made; however, the NGO contends this is a deficiency which can be addressed by establishing an ECT which allows for merit-based review.

⁶ A supporting document, dated November 2021, submitted by the NGO makes this recommendation; however this pre-dates SG's June 2022 announcement regarding the exemption of fees for Aarhus cases in the Court of Session. Therefore, some reform has already been announced. ESS observes that court fees remain in place for Aarhus cases heard in Sheriff Courts.

The submission provided examples of environmental cases in Scotland which the NGO believes to demonstrate prohibitively expensive legal costs. These include:

- A 2017 case where the John Muir Trust attempted to challenge a windfarm development in the Court of Session but was unsuccessful. The judge decided not to grant a PEO. The Trust incurred £150,000 in their own legal fees and faced a total of £539,000 for the legal fees of the respondent (SG) and the intervener (SSE). After settlement, the Trust paid a total of £125,000 to SG and SSE.
- An observer statement sent to the Compliance Committee, from the former Chairperson of the Aberdeenshire Environmental Forum (AEF). The individual applied in Sheriff Court for a Litter Abatement Order, but was unsuccessful. The defendant, Aberdeenshire Council, proposed to claim over £11,000 in legal expenses. Through a settlement, the AEF paid the remaining £9,000 of their funds and ceased operation.

Consultation with SCJC

In initial conversations with SCJC, they provided ESS with an update on the progress of their PEO revision work. The issues under review include:

- The types of claims covered by PEOs – whether these can be expanded to further types of environmental law cases e.g. Sheriff Court public nuisance cases.
- The differential in cost protection on appeal – reviewing the fairness of an applicant needing to apply for a new PEO on appeal.
- The disclosure of financial information – with an intention to keep confidential the financial information provided to the court in a PEO application.
- The recovery of intervener costs – with an intention to reinforce the policy that orders for expenses relating to intervener costs are not made except in exceptional circumstances.
- The recovery of court fees – noting a fee exemption for eligible cases was recently added in Court of Session cases, and SCJC's plan to respond to the

Compliance Committee to clarify the position regarding applicant's exposure to court fees.

- The level of cost caps - With regards to the court's ability to change PEO caps "on cause shown", SCJC indicated they intend to keep this in place, with a justification that it is needed to prevent abuse of process and would only be applicable in exceptional circumstances.

SCJC's Costs and Funding Committee has undertaken two meetings in 2022 (26 May and 31 October) to discuss the PEO regime changes. Minutes from the meetings are publicly available on SCJC's website; these summarise SCJC's interim position in advance of their completion of the review. After completion of the PEO review by March 2023, SCJC are aiming for mid-2023 to implement the outcome of the review and publish the changes to the PEO regime, but noted the commencement date for new court rules would be later.

Consultation with SG

ESS had initial conversations with the SG in October 2022. Further discussions took place in November 2022. As part of its ongoing participation in the review of environmental governance, ESS will assess whether the changes being sought by the NGO in their representation are being addressed. The merits of establishing an environmental court is an explicit reporting requirement in Section 41 of the Continuity Act. Beyond this, SG indicated the scope of the governance review would be developed with consideration of stakeholder and public input (including from NGOs with interests in access to justice) and expressed their willingness to keep ESS updated on the scope of the review as the work progresses.

In SG's view, SCJC remain the appropriate party for carrying out the PEO revisions in response to the Compliance Committee's decision. They also noted that the proposed Human Rights Bill will begin consultation in early 2023 and elements of this may improve access to environmental justice.

SG confirmed they expect NGO access to Legal Aid to form part of the considerations surrounding legal aid reform legislation during the current parliamentary term, per their Action Plan commitment. While unable to commit to a

specific outcome of this process, SG presented a general sentiment that improvements in public interest litigation would be favourable.

Assessment

Following our pre-investigation review, ESS have identified the following key points and considerations for this case:

1. Access to justice in environmental matters is an important principle; it gives power to individuals and organisations to protect and improve the environment. An accessible environmental justice system is vital to achieve this principle in practice.
2. The Aarhus Convention is an international agreement and its terms must be incorporated by signatories to the Convention. Furthermore, the Compliance Committee's recommendations must be implemented by the signatory countries.
3. The Compliance Committee's decisions and examples submitted by the NGO support that the current system in Scotland remains prohibitively expensive in some scenarios. Existing financial barriers and uncertainty over total liability can deter individuals and organisations from raising environmental challenges in court. Parties who raise environmental challenges in good faith may not be sufficiently protected from unreasonable financial burdens after losing a court case. ESS considers it is important to address these issues convincingly.
4. The Continuity Act requires specific actions on the topic of access to environmental justice by Scottish Ministers. Ministers must review whether the law is effective and sufficient in this area and must also consult with ESS on this matter. This provides ESS with a positive opportunity to contribute to the review of access to justice – whilst keeping open the option of using the investigation powers given to ESS by the Continuity Act.
5. The alleged lack of merit-based review of decision-making in judicial review is presently under consideration by the Compliance Committee. ESS does not consider that it would be appropriate for us to evaluate ahead of the Compliance Committee whether the system is compliant with the Convention

in this regard.

6. Regarding the NGO's preferred outcomes (establishment of an environmental court, changing the PEO system to a Qualified One Way Cost Shifting (QOWCS) system, and improvements to Legal Aid accessibility for public interest litigation), these are potential solutions to address the Compliance Committee's recommendation for Scotland to further consider the establishment of appropriate assistance mechanisms. These changes have not been explicitly requested by the Compliance Committee; their rulings point to examples of non-compliance but their recommendations are less prescriptive with regards to the changes which would be required to achieve compliance.

Conclusion

By Autumn 2023, ESS anticipates we will have greater clarity on SG's position towards improving access to environmental justice, because at this time:

- SG's environmental governance review should be complete;
- The consultation for the upcoming Human Rights Bill should be complete;
- SCJC review of the PEO regime will be complete and the changes of court rules should be known, if not already in place; and
- The UK Government (with input from SG) is required to submit a detailed progress report to the Compliance Committee by 1st October 2023 on measures taken towards addressing the outstanding recommendations.

At this point, ESS will determine whether any unresolved issues exist and, if so, consider intervention ahead of the October 2024 deadline for Scotland to implement the recommendations of the Compliance Committee/MoP decision.

Notwithstanding the above, ESS will seek to work constructively with SG in its ongoing environmental governance review and will scrutinise any proposals presented by SG to improve access to justice.

In conclusion, in light of the ongoing substantive work that is currently being undertaken by SG and SCJC in the field of access to justice, ESS has decided to monitor these developments. ESS will re-consider formal investigation in the future if ESS becomes concerned that:

- The revised PEO regime does not appear to fulfil the recommendations of the latest Compliance Committee/MoP decision;
- The SG environmental governance review does not sufficiently address access to justice;
- Required changes will not be in place prior to the Compliance Committee's October 2024 deadline; and/or
- The outcome of SG's and SCJC's work does not sufficiently address the "prohibitively expensive" barrier in Scotland.

December 2022