

Karen Adam MSP
Convener, Equalities, Human Rights & Civil Justice Committee
The Scottish Parliament

CC: Maggie Chapman MSP, Deputy Convener, Equalities, Human Rights & Civil Justice Committee

25 November 2024

Dear Convener

Compliance with access to justice requirements of the Aarhus Convention

We write to you regarding the Equalities, Human Rights & Civil Justice Committee's ('the Committee') recent call for evidence exploring the Scottish Government's lack of compliance with the UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters ('the Aarhus Convention').

ERCS thanks the Committee for the invitation to give oral evidence on 12 November 2024 alongside other stakeholders who shared concerns about the ongoing barriers to justice including excessive costs, unsuitable legal procedures and lack of access to legal aid. In the evidence session, Dr Ben Christman highlighted the many barriers to access justice in environmental cases, taken from the 325 enquiries made to ERCS's Advice Service.¹

ERCS looks forward to reading the Committee's recommendations following their call for evidence. We ask that the Committee advocate for four priority reforms, which we believe are of paramount importance for making Scotland's justice system affordable and ensuring legal remedies are available to all Aarhus cases.

1. Repeal regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 - the joint interest test, so that more individuals can access legal aid for Aarhus cases.

Regulation 15 restricts civil legal aid in cases where someone has a joint interest with others. This makes it very difficult to obtain legal aid in environmental cases including issues relating to the climate and biodiversity crises which affect us all.

Regulation 15(a) requires 'serious prejudice' to an individual. In the majority of breaches of environmental law, where public bodies are failing to discharge a general duty (e.g. in relation to climate policy, water regulations, publication of public registers) it is very difficult to meet this test. As a result, many individuals cannot afford to go to court to enforce

¹ ERCS (Sept 2024) [3-year Snapshot of Advice Service](#)

environmental laws. Regulation 15(b) requires SLAB to refuse legal aid if it is satisfied that it would be reasonable and proper for others concerned with the same matter to pay the applicant's legal costs. It is difficult to understand how Regulation 15(b) can work in practice. It effectively requires SLAB to (a) identify all of the individuals who are potentially interested in a case (but who will have had no direct contact with SLAB prior to that point about the case) and then (b) carry out a means assessment of all those individuals.

A simple amendment to the Regulations could remove the joint interest test for Aarhus cases.

We note that in her response to the Committee, the Minister for Victims and Community Safety stated that the absence of a Legal Aid Reform Bill *'does not prevent us from making further reforms that we can build on to simplify the legal aid system and reform fees within the current legislative framework,*² and while Scottish Government officials expressed concern about the 'knock-on effect' on other portfolio areas, there is no reason why an amendment could not be applied specifically to exclude Aarhus cases from the scope of regulation 15.

The Minister also commented that *'I think that there is scope to look at a different funding model that is about pursuing strategic litigation that is about the issue rather than the individual.'*³ We are supportive of any proposal to examine different funding models for strategic litigation undertaken by community groups and NGOs, but this is additional to, and does not detract from, the immediate need to repeal regulation 15 for joint interest environmental cases.

2. Overhaul the Protective Expenses Orders (PEO) regime to make access to justice affordable.

The Scottish Civil Justice Council (SCJC) published an amendment to Scotland's Protective Expenses Order ('PEO') rules in June 2024, following repeated criticism of the cost of litigation over the environment by the Aarhus Convention Compliance Committee (ACCC). The amendment fails to deal with all of the problematic features of the PEO regime and is near guaranteed to be subject to a further finding of non-compliance by the ACCC.

While ERCS welcomes the proposed reforms to court rules, we remain concerned that they do not go far enough.⁴ There remain unnecessary burdens placed on PEO applicants including disclosing the terms on which they are represented by their lawyer and providing an estimate of the expenses of other parties.⁵ The cost cap of £5,000 may be raised or lowered 'on cause shown,' which the Aarhus Convention Compliance Committee have

² Equalities, Human Rights and Civil Justice Committee (12 Nov 2024) [Official Report: Equalities, Human Rights and Civil Justice Committee, 24th Meeting 2024, Session 6](#), p.24

³ Ibid, p.25

⁴ ERCS (July 2024) [Scotland's new protective expenses rules remain non-compliant with the Aarhus Convention](#)

⁵ Ibid

already stated ‘introduces legal uncertainty and could have a chilling effect’.⁶ The scope of the PEO rules remains limited to public law litigation in the Court of Session only – private nuisance claims in that Court and all other litigation in different fora are not covered.

3. Replace the ‘loser pays’ rule with qualified one-way costs shifting (QOCS) for Aarhus cases.

The current system continues to expose prospective litigants to unaffordable legal expenses, through the requirement to pay their opponents fees if they lose the case.⁷ This acts as a deterrent to taking legal action even when it may be warranted to do so – often called ‘the chilling effect’.

Qualified one-way costs shifting (QOCS) were introduced for personal injury claims in Scotland and could be applied to environmental cases. If they were to be introduced in environmental judicial review proceedings, it would mean that in most cases a petitioner (e.g. a member of the public or an environmental NGO) would not be liable for the expenses of any other parties if the judicial review were unsuccessful. However, the petitioner would still be able to claim their expenses from the respondent if the petition was successful. QOCS is a much simpler system, and its introduction would remove the need for an application for a PEO. PEOs are expensive to apply for, time-consuming and the PEO system continues to fail to meet the requirements of the Aarhus Convention.

4. Establish a dedicated Scottish Environment Court to improve access to justice in Aarhus cases.

The current legal system is complex, intimidating and expensive. We have previously outlined how a dedicated environment court with a comprehensive jurisdiction would offer an appropriate judicial route to remedy for Aarhus cases, make environmental litigation affordable, and ensure access to justice is based on the needs and merits of the case, not on the parties’ ability to pay.⁸ It would provide a one-stop shop to address the current fragmentation in routes to remedy, develop judicial expertise, and improve effectiveness and efficiency.

Under section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, the Scottish Government had a duty to consider whether the establishment of an environment court could enhance governance arrangements, but the subsequent report into effectiveness of environmental governance arrangements was flawed and failed to consider the full body of evidence relating to environmental courts and tribunals. Our recommendation is for the establishment of a specialist committee or working group to revisit evidence for such a court to comply with section 41 of the Continuity Act.

⁶ Ibid

⁷ ERCS/Christman (Nov 2021) [Recommendations for a plan of action on judicial expenses](#), p.9

⁸ ERCS (May 2023) [Briefing: The clear and urgent case for a Scottish Environment Court](#); ERCS/Christman (Oct 2021) [Why Scotland needs an environmental court or tribunal](#)

We would be grateful if you could confirm when the Committee intends to publish its recommendations on this subject. We would be happy to provide any further evidence to assist the Committee's consideration of this subject.

We look forward to hearing from you.

Yours sincerely,

Dr Shivali Fifiield
Chief Officer, Environmental Rights Centre for Scotland