Draft findings and recommendations with regard to communications ACCC/C/2013/85 and ACCC/C/2013/86 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

Adopted by the Compliance Committee on …

1. Introduction
2. Communication ACCC/C/2013/85
3. On 18 September 2012 the Environmental Law Foundation submitted a communication to the Compliance Committee alleging that the United Kingdom of Great Britain and Northern Ireland (United Kingdom) had failed to comply with its obligations under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter “the Aarhus Convention” or “the Convention”).
4. The communication alleges that the Party concerned has failed to comply with the provisions of the Convention on access to justice in connection with section 46 of the Legal Aid, Sentencing and the Punishment of Offenders Act 2012 (LASPOA), in force since April 2013, which it alleged would result in prohibitive expensive costs in private nuisance proceedings because it would no longer be possible for successful claimants to recover the premium for after-the-event (ATE) insurance. It is alleged that because of the new provision, private nuisance procedures would be unfair, inequitable and prohibitively expensive and therefore that the Party concerned fails to comply with article 9, paragraphs 3 and 4 of the Convention. In addition, the communication alleges that section 46 of the LASPOA adds or increases financial and other barriers to access to justice and that the Party concerned is not in compliance with article 9, paragraph 5, of the Convention.
5. At its forty-first meeting (25-28 June 2013), the Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision 1/7. The Committee also provisionally decided that it would possibly consider this communication jointly with communication ACCC/C/2013/86 (United Kingdom).
6. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 22 July 2013.
7. Communication ACCC/C/2013/86
8. On 28 February 2013, a member of the public, Alyson Austin, submitted a communication to the Compliance Committee alleging that the United Kingdom had failed to comply with its obligations under the Convention.
9. The communication alleges that the Party concerned fails to comply with article 9, paragraphs 3 and 4, of the Convention by not ensuring that the costs of access to justice in private nuisance cases are fair, equitable, timely and not prohibitively expensive. The communication specifically concerns the communicant’s experience with attempting to bring private nuisance proceedings regarding continuing and excessive noise and dust emanating from opencast coal mining operations located within 500 metres from her home. The communicant also alleges that since the opencast operations permitting procedure is subject to an environmental impact assessment procedure, the Party concerned may have failed to comply with article 9, paragraph 2, as well.
10. At its forty-first meeting (25-28 June 2013), the Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision I/7. At the meeting, the Committee considered that further to its discussion with representatives of the Party concerned on decision IV/9i of the Meeting of the·Parties during the same meeting, the Party concerned appeared to interpret the recommendations of the Committee, endorsed by decision IV/9i, as applying only to procedures for judicial review but not private nuisance proceedings. . The Committee noted that paragraph 3(a) of decision IV/9i concerned costs for all court procedures covered by article 9 and thus stressed that it did not agree in general with the above position of the Party concerned, but in the light of the Party’s position, the Committee agreed to consider the present communication under the ordinary, and not the summary, proceedings procedure. The Committee also provisionally decided that it would possibly consider this communication jointly with communication ACCC/C/2013/85 (United Kingdom).
11. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 22 July 2013.
12. On 29 November 2013, the communicant sent a letter to the Party, informing it that the Court of Appeal had granted a limited protective costs order (PCO) to enable her to proceed to a full appeal hearing of her substantive application for costs protection in private nuisance proceedings relating to environmental harm by dust and noise. The communicant informed the Party that the Civil Appeals Office had set a target date for the appeal to be listed between 17 February and 17 June 2014.

C. Joint consideration of the two communications

1. The Party concerned provided its joint response to both communications ACCC/C/2013/85 and ACCC/C/2013/86 on 20 December 2013.
2. On 14 January 2014, the communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86 provided a joint note commenting on the Party concerned’s response of 20 December 2013.
3. At its forty-third meeting (Geneva, 17-20 December 2013), the Committee provisionally scheduled that it would discuss the substance of communications ACCC/C/2013/85 and ACCC/C/2013/86 at its forty-fourth meeting (Geneva, 25-28 March 2014), possibly jointly.
4. The Committee discussed the communications at its forty-fourth meeting (Geneva, 25-28 March 2014), with the participation of representatives of the communicants and the Party concerned. At the start of the discussion, the Committee confirmed that it would proceed to discuss the communications jointly. At the same meeting, the Committee confirmed the admissibility of communication ACCC/C/2013/85. It also confirmed that communication ACCC/C/2013/86 was admissible to the extent that it raised systemic issues also within the scope of ACCC/C/2013/85 but that it would not consider the allegations concerning the case pending before the national courts.
5. At its forty-fifth meeting (Maastricht, 29 June–2 July 2014), the Committee decided to put additional questions to the communicants and to the Party concerned.
6. The communicants and the Party concerned provided their responses on 5 September 2014. In the responses, the communicants and the Party concerned informed the Committee that on 21 July 2014, the Court of Appeal dismissed the application of Mrs Austin (the communicant of ACCC/C/2013/86) for costs protection in her private nuisance proceedings relating to environmental harm by dust and noise.
7. The Committee prepared joint draft findings at its forty-fourth to forty-seventh meetings inclusive, completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicants on …. All were invited to provide comments by ….
8. The Party concerned and the communicants provided comments on … and ….
9. At its … meeting (*dates*), the Committee adopted its findings and agreed that they should be published as addendum to the Committee’s report to …. It requested the secretariat to send the findings to the Party concerned and the communicants.]

II. Summary of facts, evidence and issues[[1]](#footnote-2)

1. Legal framework

Private nuisance

1. The Court of Appeal in *Coventry v Lawrence, No 1*, at paragraph 3 of its judgment, defined public nuisance as:

“an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land”.[[2]](#footnote-3)

Costs

1. The general legal framework with respect to costs under the Party concerned’s legal system has been examined by the Committee in its findings on communication ACCC/C/2008/33[[3]](#footnote-4) and its report to the Meeting of the Parties on the implementation of decision IV/9i.[[4]](#footnote-5) In summary, the general rule is “costs follow the event”.
2. In England and Wales, Practice Direction 45 to the Civil Procedure Rules, in force since 1 April 2013, provides for a protective costs order in ‘Aarhus Convention claims’ of “£5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person; in all other cases, £10,000”.[[5]](#footnote-6) The liability of the defendant for a successful claimant’s costs is capped at £35,000. Rule 45.41 defines an ‘Aarhus Convention claim’ as “a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the [Aarhus Convention], including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.”
3. Section. 46 of the Legal Aid, Sentencing and the Punishment of Offenders Act 2012 (LASPOA 2012) amends the Courts & Legal Services Act 1990 by inserting a new section:

58C (l). A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).

1. These changes repealed section 29 of the Access to Justice Act 1999. That provision had previously enabled the recovery, as part of a costs order in favour of a successful party to proceedings, of the premium of an “After the Event” insurance policy – a policy to insure against the risk of incurring a liability for costs, in particular for their opponent’s costs – in those proceedings. The changes restored the status to that which existed prior to 1 April 2000 (when section 29 of the 1999 Act came into force), when such premiums had not been recoverable from the unsuccessful party.

B. Facts

***Communication ACCC/C/2013/85***

1. Since the allegations in communication ACCC/C/2013/85 concern the legal framework only, the facts concerning that communication are presented in section C, “Substantive Issues” below).

***Communication ACCC/C/2013/86***

1. The communicant of communication ACCC/C/2013/86 has since 2008, acting by herself and with others, raised concerns of continuing and excessive noise and dust deposition emanating from opencast coal mining operations located within 500 metres from her home. The communicant has sought to resolve the nuisance through correspondence and attempted negotiation with the opencast operator, Miller Argent (South Wales) Ltd (the operator). She has also raised concerns with the environmental regulator, Merthyr Tydfil County Borough Council, who has not itself so far taken any action against the operator.
2. In June 2010, the communicant and 491 other residents applied to the High Court for a pre-action group litigation order in order to manage a large number of proposed claimants in one legal claim. On 11 November 2010, the High Court dismissed the application due to uncertainty as to the proposed claimants’ funding provisions.[[6]](#footnote-7) The claimants sought to appeal the order of 11 November 2010. On 2 December 2010, the operator sought payment of £257,104 for its legal costs of the pre-action application. On 29 July 2011, the Court of Appeal dismissed the appeal against the High Court decision when, on the day of the appeal, the operator gave an undertaking to the court that it would only claim costs on a *pro rata* basis, that it would limit those costs to a total of £553 per claimant and that it would not pursue any proposed claimant for those costs unlessthey recommenced legal proceedings.[[7]](#footnote-8) The consequence of the judgment meant that residents were, in fact, prevented by the financial constraint from pursuing their claim further. Meanwhile the noise and dust pollution continued.
3. After the July 2011 appeal, the communicant sought to resolve the problems as an individual, seeking to reach a negotiated solution with the operator. This failed and on 1 November 2012, the communicant issued a further pre-action application to the High Court, seeking costs protection for the hearing on costs on the basis of either ‘no order for costs’ or ‘each party pay their own costs’. On 31 January 2013, the High Court refused to direct that the one day pre-action costs protection hearing should be on an ‘each party pays their own costs’ but that instead it should be on the basis of ‘costs in the application’, i.e. costs to be awarded to the successful party.
4. The communicant appealed and on 18 November 2013, the Court of Appeal granted a limited protective costs order of £2,500 with a cross-cap on the respondent’s cost liability of £15,000 for the appeal hearing of the communicant’s application for costs protection in private nuisance proceedings relating to environmental harm by dust and noise. By judgment of 21 July 2014, the Court of Appeal dismissed the communicant’s application for costs protection, chiefly on the ground that the case did not involve ‘significant environmental benefit’. The communicant has applied to the Supreme Court for permission to appeal the Court of Appeal judgment.
5. The communicant contends that she has been prevented to date from actually issuing legal proceedings, notwithstanding that she has been trying to resolve dust and noise pollution since 2008 and also, that she has: (a) had to appear or be represented at six High Court hearings since 2010, and (b) issued three separate sets of Court of Appeal proceedings (all relating to costs). Despite this, it has not been possible to actually issue legal proceedings to stop the pollution precisely because of the costs concerns. She submits that this has prevented her having timely access to justice as required by article 9, paragraph 4, of the Convention.

C. Substantive issues

***ACCC/C/2013/85***

1. The communicant of ACCC/C/2013/85 alleges that the availability of ATE insurance to: (a) fund the costs and expenses of private nuisance proceedings; and (b) cover the risk of exposure to an opponent's costs, is critical to ensuring that private nuisance proceedings can be pursued. The potential costs risk of the opponent's costs is severe as is evident from the case of *Austin v Miller Argent* (see para. 26 above), where the operator sought costs of over £250,000. The costs of environmental nuisance cases almost always exceed £100,000 per party and often can exceed £2 million. The communicant cited a number of cases regarding which it alleged that but for ATE insurance it is almost certain that the claimants would have been prevented from taking any effective legal action.[[8]](#footnote-9)
2. The communicant of ACCC/C/2013/85 alleges that the introduction by the Party of section 46 of the LASPOA 2012 breaches articles 9, paragraphs 3, 4 and 5, of the Convention. Taken together, article 9, paragraphs 3 and 4, require the Party concerned to ensure that members of the public have access to judicial procedures to challenge acts or omissions by private persons and public bodies which contravene national environmental laws and further, that those procedures shall provide adequate and effective remedies, and be fair, equitable, timely and not prohibitively expensive. In removing the ability to recover the premium of ATE insurance policy in private nuisance proceedings, the Party concerned has made a critical judicial procedure for challenging acts and omissions resulting in environmental harm (i.e. private nuisance claims) unfair, inequitable and prohibitively expensive.
3. The communicant alleges that in enacting s.46 of the LASPOA 2012, the Party concerned will also be in breach of article 9, paragraph 5 of the Convention, as contrary to that provision of the Convention, s.46 of the LASPOA 2012 will add or increase financial and other barriers to environmental justice.
4. The communicant submits that the Party’s non-compliance with article 9, paragraphs 3-5 could be resolved through one or more of the following:
   1. A commitment not to bring into force section 46 of LASPOA;
   2. The introduction of regulations to permit the use of ATE insurance recovery in environmental nuisance claims, as has already occurred in the field of personal injury;
   3. The express inclusion of environmental nuisance claims within the PCO regime, without a reciprocal cap being placed on the claimant’s costs;
   4. The introduction of qualified one way costs shifting (QUOCS) in private nuisance litigation.

***ACCC/C/2013/86***

1. The communicant of communication ACCC/C/2013/86 alleges that the Party concerned fails to ensure that judicial procedures, including private nuisance proceedings, are fair, equitable, timely and not prohibitively expensive as required under article 9, paragraph 4 of the Convention.
2. The communicant also alleges that the Party concerned fails to recognise that, contrary to Rule 45.41(2) of the Civil Procedure Rules,[[9]](#footnote-10) an “Aarhus Convention claim” should not be limited to claims for judicial review and should include, for instance, private nuisance claims such as the present case.
3. The communicant asks the Committee to, inter alia, make findings that:
   1. Private nuisance proceedings fall clearly within the Aarhus Convention and that if there is any doubt as to whether a private nuisance claim may fall within the Convention a purposive, inclusive approach should be taken such that the Convention is assumed to apply.
   2. If the Party will continue to rely upon PCOs as a mechanism for costs protection in environmental cases, then the application of PCOs must apply to all cases falling within the Aarhus Convention without qualification and to private nuisance proceeding that fall within the remit of the Convention. Further, if the Party is to rely upon PCOs as a mechanism for costs protection then that mechanism must not in itself be prohibitively expensive.
   3. Section 46 of the LASPOA unduly restricts access to justice in environmental matters such that the Party is failing to comply with the Convention and the Party should take action to remedy that failure; the simplest way being to stipulate that section 46 does not apply to cases within the scope of the Convention, including claims for private nuisance.

***Response of the Party concerned***

1. In its reply of 20 December 2013, the Party concerned states that the provision of private nuisance claims is not required by article 9, paragraph 3, of the Convention. Even if it is argued that some provision for private nuisance claims is required by article 9, paragraph 3, it cannot be required for private nuisance claims as a class, covering every type of claim. The requirements of article 9, paragraph 3, of the Convention are met by the availability of access to other procedures; and those procedures meet the requirements of article 9, paragraph 4. Similarly, there is no breach of article 9, paragraph 5.
2. The Party concerned cites the following procedures as possible alternatives to private nuisance proceedings for those experiencing environmental problems:
   1. A complaint to the relevant regulator local authority with a view to the authority’s taking action under section 80 of the Environmental Protection Act 1990 (EPA);
   2. A complaint to the Parliamentary Ombudsman or Local Government Ombudsman;
   3. Statutory nuisance proceedings under section 82 of the EPA;
   4. Judicial review;
   5. Seeking a prosecution of the person responsible, or mounting a private prosecution.
3. The Party concerned submits that possible alternatives to ATE insurance to reduce the costs of private nuisance proceedings include:
4. Before the event insurance;
5. Conditional fee agreements.

These alternatives are discussed in more detail in paragraphs 62-64 below.

***Substantive issues common to both communications***

1. In the light of the above, the following substantive issues appear to be raised through the two communications and the Party’s joint response:
2. Should private nuisance proceedings, in general, be considered as “judicial procedures to challenge acts or omissions by private persons and public authorities which contravene national law relating to the environment” under article 9, paragraph 3 of the Convention?
3. If the private nuisance proceedings are to be considered as procedures under article 9, paragraph 3 of the Convention (or to the extent that they should be so considered), does it mean that they must meet the requirements of article 9, paragraph 4 of the Convention, including being not prohibitively expensive, or may compliance with the requirements of article 9, paragraph 4, be achieved through access to alternative procedures?
4. If the requirements of article 9, paragraph 4 indeed apply to private nuisance proceedings, does section 46 of LASPOA actually make private nuisance claims prohibitively expensive under article 9, paragraph 4, or impose a financial barrier under article 9, paragraph 5 of the Convention?

A summary of the submissions made by each party on each of the above points is set out below:

**(a) Are private nuisance proceedings “judicial procedures to challenge acts or omissions by private persons and public authorities which contravene national law relating to the environment” under article 9, para. 3?**

1. Both communicants submit that the Party concerned’s courts have recognised that private nuisance may fall within the ambit of the Aarhus Convention. For example, in *Morgan v. Hinton Organics (Wessex) Ltd*,[[10]](#footnote-11) the Court of Appeal was content to proceed on the basis that the Convention was capable of applying to private nuisance proceedings. The role of private nuisance in securing environmental redress was also affirmed in the Court of Appeal case of *Barr v Biffa Waste Services Ltd*.[[11]](#footnote-12) Both communicants also point to the findings of the Committee in ACCC/C/2007/23, in which the Committee held:

“Private nuisance is a tort (civil wrong) under the United Kingdom's common law system. A private nuisance is defined as an act or omission generally connected with the use or occupation of land which causes damage to another person in connection with that other’s use of land or interference with the enjoyment of land or of some right connected with the land. The Committee finds that in the context of the present case, the law of private nuisance is part of the law relating to the environment of the Party concerned, and therefore within the scope of article 9, paragraph 3, of the Convention.”

1. The Party concerned disputes that article 9, paragraph 3, necessarily applies to private nuisance claims. It contends that, as stated by the High Court of England and Wales in *Austin v Miller Argent*,[[12]](#footnote-13) “[t]he question has not been decided in the courts of England and Wales”. The Court of Appeal in *Morgan v Hinton*[[13]](#footnote-14) did not determine the issue, but merely assumed for the purposes of the argument before it that the Convention was capable of applying to some private nuisance cases. The Court also accepted that, for the purposes of the Convention, the particular remedy sought in a particular case needed to be seen in the wider context of available remedies generally, which would need to be considered individually not only in terms of costs but of legal efficacy (which it did not do in the context of the case before it).
2. The Party concerned submits that, as noted in the Jackson Report,[[14]](#footnote-15) the tort of nuisance covers a wide variety of matters. Nuisance was defined in *Bamford v Turnley* as “any continuous activity or state of affairs causing a substantial and unreasonable interference with a [claimant's] land or his use or enjoyment of that land”.[[15]](#footnote-16) Private nuisance is therefore primarily concerned with protecting the rights of individual property owners to enjoy their land. On occasion, an instance of private nuisance will have a wider effect such as to constitute an environmental threat to the public more widely, but the essence of private nuisance under the law of England and Wales remains the protection of private property rights. Many nuisance claims involve encroachment, which is akin to trespass, and it is very difficult to see how such interference would constitute a breach of national law relating to the environment. Even where the interference takes the form of noise or dust, a distinction may be drawn between actions for private nuisance mounted to protect private property rights and actions which more clearly vindicate general public rights to a clean environment – or, as it was put in the Jackson Report, where the acts complained of are “damaging to the environment, in particular toxic torts such as pollution of watercourses”.
3. To the extent that the Convention may be argued to apply to private nuisance, the Party concerned endorses the Jackson Report’s conclusion that it would apply only to those cases where the alleged nuisance is an activity: (a) damaging the environment; and (b) adversely affecting the wider public. The Party considers, therefore, that only a small proportion of private nuisance claims involve matters which may be argued to bring them within the scope of the Convention. Private nuisance claims as a class do not come within the scope of the Convention.
4. The communicants submit that the application of the Convention to private nuisance is wider than that suggested in the Jackson Report. Moreover, the Party is wrong to suggest that if the issue under challenge has an impact on the environment which may affect only one or a few individuals nuisance is not part of national law relating to the environment.[[16]](#footnote-17) The communicants add that the Aarhus Convention Implementation Guide confers a wide meaning to the environment including the state of human health and life.

**(b) Does compliance with the Convention require that private nuisance proceedings meet the requirements of article 9, paragraph 4** **or may compliance be achieved through access to alternative procedures?**

1. The Party concerned submits that compliance with article 9, paragraphs 3 and 4, is achieved through the public having access to a number of other types of procedures (see para. 38) and access to private nuisance proceedings is not necessarily required.
2. The communicants concede that some of the alternative procedures available may be appropriate in some instances. However, the alternatives do not, individually or collectively, ensure compliance with the Aarhus Convention. Indeed, many options provide little or no effective remedy at all. The significant shortcomings in each or all of the alternatives suggested (either individually or collectively) is such that private nuisance has to play a role and be part of the judicial provisions of national law relating to the environment. Moreover, the availability of adequate and effective remedies under article 9, paragraph 4 includes the possibility of injunctive relief. Under the Party’s legal system, private nuisance is the main way through which such relief can be secured.
3. The parties’ submissions regarding the adequacy, or otherwise, of the possible alternative procedures available are summarized below:

(i) Complaint to the relevant regulator or local authority, including with a view to the authority’s taking action under section 80 of the Environmental Protection Act

1. The Party concerned asserts that members of the public can report potential or alleged breaches of environmental legislation to the appropriate regulator (for example, in England, the Environment Agency), for the regulator to investigate and consider whether there is a need to take enforcement action, for example under section 80 of the EPA.
2. The communicants submit that the right to make a complaint to an authority which may or may not then take administrative action does not provide access to relevant procedures in any meaningful sense.

(ii) Complaint to the Parliamentary Ombudsman or Local Government Ombudsman

1. The Party concerned contends that if members of the public are dissatisfied with the responsible regulator, complaints may be made to the relevant ombudsman, usually after complaining to the regulator itself. The Party concerned states that the Parliamentary and Health Service Ombudsman hears complaints about government departments and agencies, including those acting as regulators for environmental licences. If the Ombudsman takes up the complaint it will normally report to the complainer and the organisation complained about once it has concluded its investigations. The Ombudsman may make a report to Parliament if the investigation raises an important public policy issue or if the organisation complained about does not accept the recommendations. The Local Government Ombudsman (concerning local authorities in England) and the Public Services Ombudsman (concerning the Welsh Government, Natural Resources Wales and local authorities in Wales) may also carry out investigations, compile reports and make recommendations to the authority concerned.
2. The communicants submit that a complaint to an Ombudsman is limited to a review as to the maladministration of a regulator. He or she cannot consider complaints about environmental pollution by an individual or corporate body. Even if the ombudsman finds maladministration, he or she has no power to order a remedy for the environmental harm but can only recommend the public body to act.[[17]](#footnote-18)

(iii) Statutory nuisance proceedings under section 82 of the EPA

1. The Party concerned submits that there are strong judicial statements[[18]](#footnote-19) endorsing section 82 of the EPA (and proceedings under it) as: “a statute specifically directed to the protection of the environment and contemplating action taken by the aggrieved layman” and “intended to provide ordinary people, numbered amongst whom are those who are disadvantaged … with a speedy and effective remedy”. The Party points out that the ACCC/C/2013/86 communicant’s domestic proceedings could have been brought as statutory nuisance proceedings and adds that the Jackson Report noted that costs recovery under section 82 is “somewhat more generous than costs recovery on the standard basis in the civil courts”.
2. The communicants accept that proceedings under section 82 could provide an alternative mechanism to private nuisance proceedings in some instances. However, proceedings under section 82 have a number of limitations including: (a) the many types of environmental nuisances outside the statutory nuisance definition;[[19]](#footnote-20) (b) the defence of Best Practicable Means; (c) the defence of reasonable excuse; (d) the stricter procedural and evidential limitations of section 82 proceedings, which are due to their being governed by the Criminal Procedural Rules and which also mean that costs issues cannot be settled in advance; (e) the defence that the nuisance is not on-going; (f) the Prosecution of Offenders Act 1985, which does not make provision for multiple claimants (though does not expressly exclude them); (h) the limits on the level of compensation payable; and (i) the potential for a costs claim by a successful defendant.[[20]](#footnote-21)

(iv) Judicial review

1. The Party concerned submits that, in many cases, the breach of national law at issue will relate to an alleged breach of a condition or licence or will concern an offence for which a regulator or local authority is responsible for enforcement. In such cases, where the breach or nuisance is clear, so will be the duty of action (for example, the duty to investigate a complaint under section 79 of the EPA or to serve an abatement notice under section 80). Such matters will clearly be capable of founding a claim for judicial review.
2. The communicants submit that an application for judicial review challenging administrative actions or failing to take such actions e.g. by the Environment Agency or a local authority, does not provide any realistic means of review. A failure to act is subject to challenge on *Wednesbury* grounds[[21]](#footnote-22) which the Party concerned’s courts consider to be a high hurdle, even in cases where a precautionary approach to environmental protection applies.[[22]](#footnote-23) The communicants point out that the Compliance Committee has previously expressed concern regarding the use of the *Wednesbury* standard.[[23]](#footnote-24) In *Evans v Secretary of State*,[[24]](#footnote-25) the applicant made reference to the Compliance Committee’s findings but the Court of Appeal rejected an alternative to the *Wednesbury* standard. Moreover, judicial review of a regulator is expensive and it is unlikely that the Court would require a regulator to take effective enforcement action.

(v) Mounting a private prosecution for public nuisance.

1. The Party concerned submits that conduct alleged to constitute a criminal offence – including offences constituting statutory nuisance under the EPA or the common law offence of public nuisance – may be remedied by bringing a private prosecution. The Party concerned contends that a public nuisance may arise in respect of a person’s act not warranted by law or the omission of a legal duty that endangers the health, property or comfort of the public. This differs from private nuisance in that the damage, injury or inconvenience affects everyone or a class of people (for example, those within a particular neighbourhood), and is ordinarily available in circumstances where a statutory offence is not.
2. The communicants point out that there are virtually no instances where the public concerned has successfully pursued a prosecution of public nuisance. Thus, mounting a private prosecution for public nuisance cannot be considered as providing any realistic mechanism of review.

**(c) If requirements of article 9, paragraph 4, indeed apply to private nuisance proceedings, does section 46 of LASPOA in fact render private nuisance claims prohibitively expensive (article 9, paragraph 4), or impose a financial barrier (article 9, paragraph 5)?**

1. The communicants submit that section 46 LASPOA, which removes the right to recover an ATE insurance premium, makes private nuisance claims prohibitively expensive under article 9, paragraph 4. In addition, by introducing a barrier to access to justice that did not exist before it is in direct conflict with article 9, paragraph 5, of the Convention which refers to the removal or reduction of such barriers. The communicants provide a list of private nuisance claims which they allege cannot be pursued after the possibility to claim the ATE insurance premium from the defendant was cancelled.[[25]](#footnote-26)
2. The Party concerned contends that section 46 of LASPOA gives effect to a primary recommendation of the Jackson Report. The issue of the recoverability of ATE insurance premiums was given full consideration by Lord Justice Jackson and subsequently in Parliament. Lord Justice Jackson concluded that in relation to private nuisance claims, to the extent that there was any problem, the problem was not so widespread as to be in breach of the Convention.
3. With respect to article 9, paragraph 5, of the Convention, the Party submits that that provision requires Parties to consider the extension of appropriate assistance mechanisms to remove or reduce financial or other barriers – and is not a prohibition on any changes which may be argued not to be for the benefit of claimants.
4. Moreover, the Party concerned contends that “Before the Event” (BTE) insurance is a potential alternative mechanism to ATE insurance for funding private nuisance claims.
5. The communicants submit that BTE insurance is an inadequate answer to non-compliance with the Convention, because the practical reality is that the overwhelming majority of proposed claimants in private nuisance proceedings do not have BTE insurance in place before the event giving rise to the nuisance occurs. For example, in *Austin & others v Miller Argent (South Wales) Ltd*[[26]](#footnote-27) only two out of more than 500 claimants had BTE insurance in place. Even when persons have BTE insurance in place, every effort is made by a BTE insurer to prevent the policy covering environmental nuisance claims.
6. The Party concerned also submits that claimants will still be able to engage solicitors on Conditional Fee Agreements, even if they do not have BTE insurance. The communicant of ACCC/C/2013/86 points out, in this respect, that she has instructed her legal representatives by way of a Conditional Fee Agreement and in that way she could afford to be legally represented, but she still could not afford to issue private nuisance proceedings without a pre-action order providing costs protection.

C. Domestic remedies

***ACCC/C/2013/85***

1. The communicant of ACCC/C/2013/85 provides no information about the exhaustion of domestic remedies; nor does the Party concerned contend that the communicant has failed to exhaust any available remedies.

***ACCC/C/2013/86***

1. The Party submits that since the communicant of ACCC/C/2013/86 is still making active use of domestic procedures it would not be appropriate for the Committee to consider the communication at this stage. The Party invites the Committee to suspend consideration of the communication until domestic remedies have been exhausted.
2. The Party adds it has raised the issue of domestic remedies with respect to a number of communications, including most recently communications ACCC/C/2010/53, ACCC/C/2012/77 and ACCC/C/2013/83.

III. Consideration and evaluation by the Committee

1. The United Kingdom ratified the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.
2. As mentioned above (para. 13), the Committee decided at its forty-fourth meeting to consider communications ACCC/C/2013/85 and ACCC/C/2013/86 jointly. After the discussion with the representatives of the parties, the Committee further decided to focus its considerations on the allegations of both communicants that private nuisance proceedings in the Party concerned are, in general, prohibitively expensive, especially due to the legislative change making it impossible for successful claimants to recover the premium for the ATE insurance (section 46 of LASPOA).
3. The Committee decides not to consider the specific allegations of the ACCC/C/2011/86 communicant concerning her private nuisance case regarding noise and dust deposition emanating from opencast coal mining operations because at the time of submitting the communication, the domestic remedies had not been exhausted by the communicant and at the time of the Committee’s deliberations the case was still ongoing at the domestic level. The Committee however takes this case into account as one of the examples illustrating the practice of private nuisance proceedings in the Party concerned.
4. The Committee also decides not to deal with the allegations of the ACCC/C/2013/86 communicant concerning the Party concerned’s non-compliance with article 9, paragraph 2 of the Convention, as these allegations were not sufficiently substantiated and moreover were related to the case still ongoing at the domestic level.
5. The Committee recalls its findings on communication ACCC/C/2008/33 (United Kingdom), in which it concluded that “by failing to ensure that *the costs for all court procedures subject to article 9*are not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, the Party concerned fails to comply with article 9, paragraph 4, of the Convention” (para 141, emphasis added). Subsequently, the Committee recommended the Party concerned “to review its system for allocating *costs in environmental cases within the scope of the Convention* and undertake practical and legislative measures … to ensure that *such procedures* are fair and equitable and not prohibitively expensive and provide a clear and transparent framework” (para 145, emphasis added). This conclusion was subsequently endorsed by decisions IV/9i and V/9n of the Meeting of the Parties. As noted in paragraph 7 above, the Party concerned appeared to interpret the above conclusions and recommendations as applying only to judicial review procedures and not private nuisance proceedings. The Committee stresses that the findings and recommendations endorsed by decisions IV/9i and V/9n of the Meeting of the Parties apply to all court procedures subject to article 9 of the Convention, not only judicial review procedures. However, in the light of the position taken by the Party concerned on this point, the communications have been considered under the Committee’s ordinary, not summary proceedings, procedure.
6. The Committee will examine each of the substantive issues set out in paragraph 40 above.

**(a) Private nuisance proceedings as national law relating to the environment – article 9, paragraph 3**

1. The communicants submit that private nuisance cases in general, as a category, or “as a class”, fall within the scope of article 9, paragraph 3, of the Convention. On the contrary, the Party concerned argues that the essence of private nuisance proceedings is to protect private property (land), not the environment. According to the Party concerned, article 9, paragraph 3, does not therefore apply to private nuisance claims “as a class”. In this respect, the Party concerned adds that it is for its national law to define what should be considered as “national law relating to the environment”.
2. As a preliminary matter, the Committee stresses, that the terms used in the Convention, as an international agreement, must be interpreted in the context of international law and the Convention itself, in the light of its object and purpose.[[27]](#footnote-28) To this end, what constitutes “national law relating to the environment” must be interpreted in accordance with the object and purpose of the Convention.
3. The Convention does not define the term “national law relating to the environment”. It does, however, contains a definition of “environmental information” in its article 2, paragraph 3. This definition is broad and includes, inter alia, “factors such as noise”, “conditions of human life”, and “built structures”. As the Committee pointed out in paragraph 64 of its findings on communication ACCC/C/2011/63 (Austria), this also implies a broad understanding of the term “environment” in article 9, paragraph 3.
4. In this vein, in paragraph 62 of the findings on communication ACCC/C/2011/63, the Committee found that “the text of the Convention does not refer to “environmental laws”, but to “laws relating to the environment””, and consequently 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”. The Aarhus Convention Implementation Guide states that “The provisions on access to justice essentially apply to all matters of environmental law”[[28]](#footnote-29) and that “national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment.”[[29]](#footnote-30) The Committee finds that the broad interpretation of term “national law relating to the environment” should likewise be applied when considering whether article 9, paragraph 3, of the Convention applies to private nuisance proceedings.
5. In its findings on communication ACCC/C/2008/23 (United Kingdom), the Committee concluded that in the context of that case, which related to offensive odours from a waste composting site, the law on private nuisance was part of the national law relating to the environment of the Party concerned, and therefore was within the scope of article 9, paragraph 3, of the Convention. The Committee considers that the same conclusion should apply to cases of private nuisance resulting from noise, odours, smoke, dust, vibrations, chemicals, waste or other similar pollutants. The case law of the courts of the Party concerned presented in the scope of the present case supports the view that in general, the Convention is applicable to private nuisance cases. For example, in *Coventry v Lawrence, No 1,* the Supreme Court held that “since the middle of the 19th Century common law nuisance has played an important complementary role to regulatory controls, on the one hand stimulating industry to find better technical solutions to environmental problems, and, on the other, stimulating the legislature to fill gaps in the regulatory system.”[[30]](#footnote-31) The fact that the law of private nuisance primarily relates to the protection of the rights of individual property owners to enjoy their land does not exclude that it, at the same time, regularly, relates to various components of the environment and aims to protect them.
6. The Committee therefore concludes that private nuisance proceedings, in general, should be considered as judicial procedures aimed to challenge acts or omissions by private persons and public authorities which contravene national law relating to the environment, in the sense of article 9, paragraph 3, of the Convention. This does not mean that the Convention must necessarily apply to each and every private nuisance proceeding. In practice, the principal criteria for assessing the applicability of the Convention to a specific private nuisance case would be, whether the nuisance complained of affects the “environment”, in the broad meaning of this term (see paras. 73 and 74 above). The number of people affected and the motivation of the claimant to bring private nuisance proceedings or the proceedings’ possible significance for the public interest are not decisive to the assessment of whether the procedure falls within the scope of national law relating to the environment.

**(b) Alternatives to private nuisance proceedings – article 9, paragraphs 3 and 4**

1. The communicants submit that if private nuisance proceedings are within the scope of article 9, paragraph 3, of the Convention, they must necessarily meet the requirements of article 9, paragraph 4, as that provision’s requirements apply to all procedures referred to in paragraphs 1, 2 and 3 of article 9. Therefore, private nuisance procedures must not be prohibitively expensive. However, according to the Party concerned, members of the public have access to alternative low cost procedures to challenge the same acts and omissions which contravene national law provisions relating to the environment and consequently, even if private nuisance proceedings are within the scope of article 9, paragraph 3, they would not have to meet the requirements of paragraph 4. On this view, there would only be non-compliance if the alternative procedures were either not available to the members of the public or they would not provide for effective remedies.
2. The Committee must therefore consider at first, if the requirements of article 9, paragraph 4, of the Convention must be met for all procedures falling within the ambit of paragraph 3, or if the Party concerned can achieve compliance with the Convention so long as members of the public have access to even one alternative procedure through which they could challenge the specific acts and omissions, and which would provide for adequate and effective remedies.
3. In its findings, the Committee has repeatedly held that when evaluating compliance with article 9 of the Convention, it pays attention to the general picture regarding access to justice in the Party concerned, in the light of the purpose reflected in the preamble of the Convention that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced” (see e.g. findings on communication ACCC/C/2006/18 (Denmark), para. 30). On this basis, the Committee noted with regard to communication ACCC/C/2006/18 that the lack of opportunity for the communicant in that case to initiate penal proceedings did not in itself amount to non-compliance with 9, paragraph 3, so long as there were other means for challenging those acts and omissions.
4. Similarly, in its findings on communication ACCC/C/2011/63 (Austria), the Committee found, at paragraph 63, that “whereas lack of access to criminal or administrative penal procedures as such does not amount to non-compliance, the lack of any administrative or judicial procedures to challenge acts and omissions contravening national law relating to the environment such as in this case amounts to non-compliance with article 9, paragraph 3, in conjunction with article 9, paragraph 4, of the Convention.”
5. Following this line of reasoning, it is apparent to the Committee that if the legal system of the Party concerned provides for more than one procedure through which members of the public can challenge a particular act or omission that contravenes national law related to environment, it is sufficient for compliance with the Convention that at least one of these procedures meets all the requirements of article 9, paragraphs 3 and 4. The Committee points out, however, that it would be in keeping with the goals and spirit of the Convention to maintain several such procedures meeting all these requirements.
6. At the same time, however, the Committee stresses that for any procedure to be considered as a fully adequate alternative to another, it must be available to at least the same scope of members of the public, enable them to challenge at least the same range of acts and omissions, provide for at least as adequate and effective remedies, and meet all the other requirements of article 9, paragraphs 3 and 4 of the Convention.
7. In this regard, the Committee refers back to the definition of private nuisance set out in paragraph 19 above) It follows from this definition that the scope of the members of the public entitled to bring private nuisance proceedings is limited to the users or occupiers of land or to those entitled to enjoy the land or some right connected with that land. The range of acts and omissions which can be subject to a private nuisance claim is wide and includes various kinds of interferences, usually related to different aspects of the environment (see para 78 above). Moreover, private nuisance claims can be used to challenge acts and omissions infringing the rights of the applicant in various kinds of situations: continuous and long lasting interference, “one-off” activities causing serious harms,[[31]](#footnote-32) disturbing activities ongoing for a certain period and subsequently ceased,[[32]](#footnote-33) or even in cases when the harm has not yet commenced, but there is a reasonable presumption that if the activity goes ahead, it will result in an “substantial and imminent damage.[[33]](#footnote-34) The remedies available in the private nuisance proceedings include injunctions, inter alia, to terminate or limit the nuisance, to take some other action to redress the nuisance and, under some circumstances, the award of damages. Remedies are discussed in more detail below.
8. The Committee must determine whether the administrative and judicial procedures presented by the Party concerned (see paragraph 38 above), individually or collectively, represent adequate alternatives to private nuisance proceedings, bearing in mind the characteristics summarized in the above paragraph.

Complaints to the relevant regulator, local authority or ombudsmen

1. The Party concerned asserts that where the alleged nuisance is associated with a breach of a condition of a license permitting the disturbing activity or where the activity amounts to an offence, any member of the public can report it to the appropriate regulator (administrative authority) which should consider whether there is a need to take enforcement action. If members of the public are not satisfied with the actions taken by the authority, or with its refusal to take such measures, they can complain to the relevant ombudsman.
2. As the Committee stated at paragraph 28 of its findings on communication ACCC/C/2006/18 (Denmark), article 9, paragraph 3, of the Convention requires more than a right to address an administrative agency about an illegal activity. It is intended to provide members of the public with access to adequate remedies regarding acts and omissions which contravene environmental laws, and with the means to have existing environmental laws enforced and made effective. Parties to the Convention are therefore obliged to ensure that members of the public meeting the criteria, if any, laid down in national law, have access to administrative or judicial procedures to directly challenge the acts and omissions of private persons or public authorities which they allege to contravene national environmental law.
3. The right to ask a public authority to take action does not amount to a “challenge” in the sense of article 9, paragraph, 3, and especially not if the commencement of action is at the discretion of the authority, as is the case in the Party concerned. Rather, members of the public must be able to actively participate in the process of reviewing the acts or omissions, the legality of which they question.[[34]](#footnote-35) The process must also meet all the requirements of article 9, paragraph 4, of the Convention. If the Party opts to provide for access to justice via administrative review procedures, those procedures must fully compensate for any absence of judicial procedures (see the findings of the Committee on communication ACCC/C/2008/32 (European Union), para. 92).
4. The Committee does not consider that the possibility for members of the public to report alleged nuisances to the responsible administrative authorities (regulators), and then subsequently to complain to the ombudsman, provide for adequate alternatives to private nuisance proceedings. These possibilities are not connected with any procedural rights enabling members of the public to effectively commence a procedure to review the act or omission allegedly causing the nuisance, to actively participate in such proceedings, or to enforce adequate remedies. Furthermore, the ombudsman cannot deal with the alleged nuisance as such, but may only review the actions of the regulator and provide recommendations.

Judicial review of complaints to the relevant regulator, local authority or ombudsmen

1. The Party concerned submits that, if an alleged nuisance constitutes a breach of a condition of licence or an offence, this may require a duty of action by responsible administrative authority, and should the authority fail to take appropriate action, members of the public can claim for judicial review of this failure. This, according to the Party concerned, should be considered as one of the alternatives to the private nuisance proceedings.
2. As stated above, article 9, paragraph 3, of the Convention requires that members of the public have access to administrative or judicial procedures to challenge acts and omissions which they allege to contravene national environmental law. Such procedures must meet the requirements of article 9, paragraph 4, of the Convention, namely to provide for adequate and effective remedies. In this vein, private nuisance proceedings aim to challenge acts or omissions by users of land (usually private persons) that have allegedly caused, or are causing, harm to their neighbours.
3. Only some, and by no means all, of private nuisances involve a breach of a licence or amount to an offence. Moreover, even if an alleged private nuisance would also constitute a breach of a licence or an offence, the focus of any ensuing review would be confined to examining allegations regarding the breached licence condition or elements that make up the offence, rather than any wider consideration of the act or omission causing the nuisance itself and its effects. Consequently, the subject of any judicial review would not be the private nuisance itself, but rather an act or omission by the public authority related to its regulatory powers, and limited to the possible breach of duties imposed by the licence or by applicable law. As the Court of Appeal pointed out in its decision in *Austin v Miller Argent* (in which the communicant of ACCC/C/2013/86 was the applicant), “It seems to us unrealistic to believe that the powers conferred upon public authorities will suffice to achieve the Convention's objectives”.[[35]](#footnote-36)
4. The Committee therefore concludes that judicial review of a failure by the responsible administrative authority to take appropriate action in case of breaching of licence or an offence by an operator does not represent an adequate alternative to private nuisance proceedings.

Statutory nuisance proceedings

1. The Party concerned claims that the “statutory nuisance proceedings” under section 82 of the EPA likewise represent an alternative to private nuisance claims. Under section 82, any person aggrieved by a statutory nuisance is entitled to start judicial proceedings against the responsible person. If the existence of the statutory nuisance is proved, the court may make an abatement order requiring that the nuisance is stopped and may also impose a fine.
2. The Committee has no doubt that statutory nuisance proceedings represent a judicial procedure in the sense of article 9, paragraph 3, through which members of the public, aggrieved by acts or omissions amounting to a statutory nuisance, can challenge those acts or omissions. It is also clear from the submissions of the communicants and the Party concerned that there is a considerable overlap between the scope of private and statutory nuisance proceedings. The communicants concede that in some cases statutory nuisance proceedings might indeed provide an adequate alternative to a private nuisance claim. Yet they allege that many types of environmental nuisances fall outside the scope of the statutory nuisance definition and furthermore that claimants face a number of barriers in statutory nuisance proceedings that are not present in private nuisance claims. The Committee must therefore consider to what extent the existence of these alleged differences and barriers prevent statutory nuisance proceedings from being a fully adequate alternative to a private nuisance claim.
3. Concerning the scope of environmental nuisances which may be challenged through a private nuisance claim as compared to a statutory nuisance procedure, the communicants have provided a list of environmental nuisances that would not constitute a statutory nuisance but could be challenged through a private nuisance claim (including smoke emissions, fumes and gases from business premises, noise from traffic, harm caused by contamination of land or shadowing). The Party concerned has not disputed this list.[[36]](#footnote-37) Moreover, the communicants submit that the scope of private nuisance has evolved through case law over time (see para. 78 above), and continues to evolve, and thus the exact range of acts or omissions falling into this category cannot be precisely determined. In contrast, the categories of statutory nuisances are explicitly defined in section 79(1) of the EPA.
4. Based on the information provided by the communicants and the Party concerned, the Committee finds that while the majority of environmental nuisances would appear to fall within both the scope of private nuisance and the categories of statutory nuisance under the EPA, a number of environmental nuisances could only be challenged by a private nuisance claim. In such cases, statutory nuisance cannot be considered to be an adequate alternative to private nuisance proceedings.
5. Another aspect related to the scope of the two procedures concerns the issue of whether the nuisance must be ongoing (existing) at the date of the complaint. According to section 82 of the EPA, this is a necessary condition for a statutory nuisance procedure. On the contrary, a private nuisance claim can in certain circumstances be used to challenge serious harms caused by “one-off” activities,[[37]](#footnote-38) as well as activities that were ongoing for a certain period but that have subsequently ceased,[[38]](#footnote-39) or as a means of protection against substantial and imminent damage which can reasonably be presumed if an activity goes ahead.[[39]](#footnote-40)
6. The Committee finds that in all these situations, if the particular nuisance concerns the environment, the nuisance should be considered as falling into the scope of article 9, paragraph 3. Therefore, statutory nuisance proceedings would not represent an adequate alternative to a private nuisance claim in these cases either.
7. The communicants submit that a further deficiency of statutory nuisance proceedings is that the possibility for the applicant to claim compensation (damages) as a remedy is more limited than in private nuisance proceedings.
8. In both types of proceedings, the primary remedy sought by claimants is to stop or diminish the nuisance. In private nuisance cases, as a rule, a finding of nuisance should normally be followed by an injunction, unless specific circumstances provide otherwise.[[40]](#footnote-41)
9. However, in some circumstances the courts in private nuisance cases can award damages to compensate the harm instead of an injunction. According to the communicants, the judgment of the Supreme Court in *Coventry v. Lawrence, No. 1,* indicates that the award of damages in private nuisance cases may become more common in the future.[[41]](#footnote-42)
10. In statutory nuisance proceedings, when the nuisance is proved, the court issues an abatement order. In addition, the courts can make a compensation order for personal injury, loss or damage arising from the statutory nuisance. This order, however, can only compensate for damage that has occurred during the period of the proceedings and is therefore, according to the communicants, generally very modest. More importantly, in contrast to private nuisance cases, compensation can only accompany, and not substitute, the abatement order.
11. In this respect, the Party concerned submits that, according to the Aarhus Convention Implementation Guide,[[42]](#footnote-43) article 9, paragraph 3, of the Convention envisages that members of the public may bring court proceedings to have the law enforced, rather than to redress any personal harm. The Party concerned argues that it follows from this statement that compensation or damages should not be considered as remedies in the sense of article 9, paragraph 4, of the Convention for procedures under article 9, paragraph 3.
12. From the information provided, the Committee understands that injunctions or abatement orders are, in practice, the most common and adequate remedies of enforcing the law in the case of environmental nuisances. However, as the judgment of *Coventry v. Lawrence, No. 1* cited in paragraphs 103 and 104 above illustrates - there are cases in which an injunction or abatement order is not, for various reasons, a reasonable solution. In such cases, compensating the claimant with damages may be the only adequate and effective remedy. This does not mean that the case is not related to the environment any more. As the Aarhus Convention Implementation Guide in its commentary on article 9, paragraph 4 states: “Adequacy requires the relief to ensure the intended effect of the review procedure. This may be to compensate past damage, prevent future damage and/or to provide for restoration.” and “Although monetary compensation is often inadequate to remedy the harm to the environment, it may still provide some satisfaction for the persons harmed.”[[43]](#footnote-44)
13. The Committee therefore concludes that, with respect to those environmental nuisances for which monetary compensation for the damage occurring before the case was brought to the court would be the only available or reasonable remedy, statutory nuisance proceedings do not amount to an adequate alternative to a private nuisance claim, as they do not provide for such a remedy.
14. The communicants referred to a number of other limiting aspects of statutory nuisance proceedings, namely the defences of ‘best practicable means’ and ‘reasonable excuse’, the stricter procedural and evidential limitations, the inability to use such proceedings in cases of multiple claimants, and the possibility of a costs claim by a successful defendant. The Committee decides not to deal with these aspects, as it does not find them necessary for considering the question of whether statutory nuisance proceedings represent a fully adequate alternative to private nuisance claims, since for the reasons set out in paragraphs 99 - 108 above it has already ready found that such proceedings do not.
15. Based on the above findings, and without making any finding regarding the aspects set out in paragraph 109 above, the Committee is of the view that statutory nuisance proceedings may to a considerable extent provide an alternative to private nuisance claims. However, it finds that for a number of cases, this conclusion would not apply, since:
16. The definition of statutory nuisance does not cover all the kinds of environmental nuisances which can be challenged by means of a private nuisance claim;
17. Statutory nuisance proceedings cannot be used in situations when the nuisances are not ongoing; and
18. Statutory nuisance does not provide the possibility for compensation through the award of damages in cases where this would be the only available or reasonable remedy.

For these reasons, the Committee finds that statutory nuisance proceedings do not represent a fully adequate alternative to private nuisance claims.

Private prosecution

1. The Party concerned alleges that, in cases when a nuisance amounts to a criminal offence, in addition to statutory nuisance proceedings, which as such are criminal in nature, any person can institute criminal proceedings. However, the Party concerned does not provide any details about the scope of private nuisance cases which might be challenged by means of a private prosecution, nor about the specific conditions and requirements for starting such a prosecution. Neither does it provide any examples of successful private prosecutions for environmental nuisance. Therefore, the Committee does not find private prosecution to be an adequate alternative to a private nuisance claim.

Conclusion regarding the alternatives to private nuisance proceedings

1. It follows from the above examination that with respect to the requirements of article 9, paragraphs 3 and 4, of the Convention, only statutory nuisance proceedings may be considered to be a viable alternative to a private nuisance claim. However, in a number of respects, statutory nuisance does not provide an adequate alternative either (see para 110 above). The Committee thus finds that the administrative and judicial procedures presented by the Party concerned do not either individually or collectively provide for a fully adequate alternative to the private nuisance proceedings.[[44]](#footnote-45)

**(c) Costs of private nuisance proceedings – article 9, paragraph 4**

1. Having found that there is no fully adequate alternative to private nuisance proceedings, the Committee must next determine whether private nuisance proceedings in the legal system of the Party concerned are in fact prohibitively expensive under article 9, paragraph 4, of the Convention.
2. When assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee considers the cost system of the Party concerned, or its relevant parts, as a whole and in a systemic manner (see findings on communication ACCC/C/2008/33 (United Kingdom), para. 128). Therefore, the Committee considers whether, taking into account the effects of entry into force of section 46 of LASPOA, the legal system of the Party concerned as a whole, makes the costs of private nuisance proceedings within the scope of article 9, paragraph 3 of the Convention, prohibitively expensive.
3. In its findings on communication ACCC/C/2008/33 (United Kingdom), the Committee found that the usual “costs follow the event” rule (which according to section 44.3 (2) of the Civil Procedure Rules applies as a general rule in private nuisance proceedings in England and Wales) is not inherently objectionable under the Convention, and the compatibility of this rule with the Convention depends on the availability of other aspects of the legal system to modify the effects of the basic rule in cases involving members of the public as litigants. The Committee finds that the above conclusion is equally applicable to private nuisance cases.
4. Also in its findings on communication ACCC/C/2008/33 (United Kingdom), the Committee found that without a clear rule to prevent prohibitively expensive court procedures, the measures then available under the legal system of the Party concerned, including a wide discretion for courts regarding the award of costs, did not ensure that the costs remained at a level which met the requirements of the Convention (para. 129). The Committee therefore concluded that “by failing to ensure that the costs for all court procedures subject to article 9are not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, the Party concerned fails to comply with article 9, paragraph 4, of the Convention” (para. 141).
5. The Committee considers that a similar conclusion must apply to private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention. Such a conclusion is supported by the communicants’ submission that the costs of private nuisance cases almost always exceed £100,000 per party (see para. 30 above). This figure has not been disputed by the Party concerned.
6. In the scope of its findings on the communication ACCC/C/2008/33 (United Kingdom), the Committee recommended the Party concerned “to review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures … to ensure that such procedures are fair and equitable and not prohibitively expensive and provide a clear and transparent framework” (para. 145). This recommendation was subsequently endorsed by the decisions IV/9i and V/9n of the Meetings of Parties.
7. The Party concerned subsequently amended its procedural rules to introduce costs limits for proceedings defined as “Aarhus Convention Claims”.[[45]](#footnote-46) However, according to the Party concerned’s submissions to the Committee, these costs limits apply only to judicial review cases, not to private nuisance claims. This position appears to be held by the Party concerned’s judiciary also.[[46]](#footnote-47)
8. Given that (i) the Party concerned takes the view that private nuisance proceedings falls outside the costs limits introduced through the procedural rules;[[47]](#footnote-48) (ii) the Party has not put before the Committee any other means (besides those already examined in the Committee’s findings on communication ACCC/C/2008/33) through which it ensures private nuisance proceedings are not prohibitively expensive; and (iii) the costs in private nuisance proceedings typically exceed £100,000, the Committee finds that its earlier finding concerning the failure of the Party concerned to ensure that the costs for all court procedures subject to article 9are not prohibitively expensive is applicable also to the case of private nuisance proceedings falling within the scope of article 9, paragraph 3, of the Convention and for which there is no fully adequate alternative procedure.
9. This conclusion is further strengthened by the entry into force of section 46 of LASPOA, since its prohibition on successful claimants recovering the premium for ATE insurance introduces an additional financial burden for members of the public seeking to have access to private nuisance procedures. On the basis of the information put before it, the Committee considers that it is presently not possible for the Party concerned to rely on BTE insurance as a mechanism to eliminate this additional burden as BTE insurance is not held by the vast majority of the public, i.e. potential private nuisance claimants. Moreover, the Committee does not consider any kind of private insurance scheme, whose general availability is not guaranteed by law, to be capable of ensuring the compliance of a Party concerned with the Convention’s requirement that members of the public have access to procedures which are not prohibitively expensive. The same reasoning applies to the possibility for claimants to engage solicitors on Conditional Fee Agreements, an option which is likewise not guaranteed by law but rather depends on the willingness of the solicitor involved, and which furthermore does not prevent claimants from the risks of other high costs in the proceedings.
10. The Committee accordingly finds that, by failing to ensure that private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention and for which there is no fully adequate alternative procedure are not prohibitively expensive, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.

**(d) Article 9, paragraph 5**

1. In its findings on communication ACCC/C/2008/33 (United Kingdom), the Committee further found that that the system of the Party concerned as a whole was not such as “to remove or reduce financial […] barriers to access to justice”, as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider.[[48]](#footnote-49) Through decision V/9n, the Meeting of the Parties endorsed the Committee’s finding that the Party concerned was still not in full compliance with this provision of the Convention. Bearing in mind its findings in paragraphs 117-122 above, the Committee considers that this finding applies also in the case of private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention for which there is no fully adequate alternative procedure. The Committee therefore finds that, with respect to private nuisance proceedings within the scope of article 9, paragraph 3 of the Convention and for which there is no fully adequate alternative procedure, the Party concerned has failed to sufficiently consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice..

IV. Conclusions and recommendations

1. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.
2. Main findings with regard to non-compliance
3. The Committee finds that
   1. by failing to ensure that private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention and for which there is no fully adequate alternative procedure are not prohibitively expensive, the Party concerned fails to comply with article 9, paragraph 4, of the Convention (para. 122).
   2. with respect to private nuisance proceedings within the scope of article 9, paragraph 3 of the Convention and for which there is no fully adequate alternative procedure, the Party concerned has failed to sufficiently consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice as required by article 9, paragraph 5, of the Convention (para. 123).

B. Recommendations

1. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties to the Convention, [and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7,] recommends that the Party concerned:

(a) review its system for allocating costs in private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention and undertake practical and legislative measures to overcome the problems identified in paragraphs XX above to ensure that such procedures, at least where there is no fully adequate alternative procedure, are not prohibitively expensive;

(b) further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice with respect to private nuisance proceedings within the scope of article 9, paragraph 3 of the Convention for which there is no fully adequate alternative procedure.

1. [↑](#footnote-ref-2)
2. [2014] UKSC 13, judgment of 26 February 2014. [↑](#footnote-ref-3)
3. ECE/MP.PP/C.1/2010/6/Add.3, paras. 34-71. [↑](#footnote-ref-4)
4. ECE/MP.PP/2014/23, paras. 41-58. [↑](#footnote-ref-5)
5. See <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs>. The changes to the Practice Direction relating to Aarhus Convention claims came into force on 1 April 2013. [↑](#footnote-ref-6)
6. *Austin & others v Miller Argent* (decision of 11 November 2010) (unreported). [↑](#footnote-ref-7)
7. *Austin & others v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928. [↑](#footnote-ref-8)
8. *Barr v Biffa Waste Services Ltd* (2012] EWCA Civ 490; *Bontoft & others v East Lindsey DC* [2008] EWHC 2923; *Thornhill v others v SITA* [2009] EWHC 2037 (QB), and *Thornhill v others v NMR* [2011] EWCA Civ 919; *Watson v Croft Promo-sport Ltd* [2009] EWCA Civ 15. [↑](#footnote-ref-9)
9. As amended by the Civil Procedure (Amendment) Rules 2013 that entered into force on 1 April 2013. [↑](#footnote-ref-10)
10. [2009] EWCA Civ 107 [2009] Env LR 30, paras 22 and 44. [↑](#footnote-ref-11)
11. [2012] EWCA Civ 312. [↑](#footnote-ref-12)
12. [2013] EWHC 2622 at paragraph 7. [↑](#footnote-ref-13)
13. [2009] EWCA Civ 107 (available at: http://www.bailii.org/ew/cases/EWCA/Civ/2009/107.html). [↑](#footnote-ref-14)
14. Lord Justice Jackson, Review of Litigation Costs; Final report, December 2009, available from http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf. [↑](#footnote-ref-15)
15. (1860) 3 B & S 62; 122 ER 25. [↑](#footnote-ref-16)
16. See by way of analogy, Case C-420/111 *Leth v Republik Österreich* [2013], CJEU. [↑](#footnote-ref-17)
17. See for example, the extensive criticism of the Ombudsman referred to in the case of *R (Thomas) v Carmarthenshire CC* [2013] EWHC 783 (Admin). [↑](#footnote-ref-18)
18. A number of these are cited in *Hewlings v McLean Homes East Anglia Ltd,* [2001] 2 All ER 281*.* [↑](#footnote-ref-19)
19. See pages 14-17 of the communication for an overview of what categories of nuisance would and would not come within the definition of statutory nuisance. [↑](#footnote-ref-20)
20. These are each discussed in more detail in the communications. [↑](#footnote-ref-21)
21. *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223. [↑](#footnote-ref-22)
22. See e.g. *Aston v Secretary of State for Comm. & Local Govt.* [2013] EWHC 1936 (Admin). [↑](#footnote-ref-23)
23. Findings on communication ACCC/C/2008/33, para 125. [↑](#footnote-ref-24)
24. [2013] EWCA Civ 87. [↑](#footnote-ref-25)
25. See para. 27 of the communication ACCC/C/2013/85. [↑](#footnote-ref-26)
26. [2011] EWCA Civ 92. [↑](#footnote-ref-27)
27. Article 31 of the Vienna Convention on the Law of Treaties. [↑](#footnote-ref-28)
28. Aarhus Convention Implementation Guide, second edition, 2014, p. 187. [↑](#footnote-ref-29)
29. Ibid., p. 197. [↑](#footnote-ref-30)
30. Para 176; see also the judgment of the Court of Appeal in *Barr v Biffa Waste Services Ltd;* [2009] EWCA Civ 107 [2009] Env LR 30, paras 22 and 44; [↑](#footnote-ref-31)
31. *Vernon Knights Associates v Cornval Council (2014)* – communicants 12/08/2014, 11. [↑](#footnote-ref-32)
32. *Thomas v Merthyr Tydfil Car Auction Ltd, Barr v Biffa Waste Services Ltd (2013) -* communicants 12/08/2014, 3,. [↑](#footnote-ref-33)
33. *Fletcher v. Bealey (1884)* communicants 12/08/2014, 16 [↑](#footnote-ref-34)
34. See also the Aarhus Convention Implementation Guide, second edition, 2014, p.: “Regardless of the particular mechanism, the Convention makes it abundantly clear that it is not only the province of environmental authorities and public prosecutors to enforce environmental law, but the public also has an important role to play.” [↑](#footnote-ref-35)
35. *Miller v Argent*, pages 16-17. [↑](#footnote-ref-36)
36. See paragraph 23. of the Party concerned’s letter of 5 September 2014, in which the Party states that “these categories would, to the extent that they are actually within the scope of the Convention, in principle be capable of being remedied by the administrative and judicial procedures listed in paragraph 9(a) to (c) of the United Kingdom’s oral submission to the Committee.” [↑](#footnote-ref-37)
37. *Vernon Knights Associates v Cornval Council (2014)* – communicants 12/08/2014, 11. [↑](#footnote-ref-38)
38. *Thomas v Merthyr Tydfil Car Auction Ltd, Barr v Biffa Waste Services Ltd (2013) -* communicants 12/08/2014, 13, 14. [↑](#footnote-ref-39)
39. *Fletcher v. Bealey (1884)* communicants 12/08/2014, 16 [↑](#footnote-ref-40)
40. *Coventry v. Lawrence, No. 1*, [2014] UKSC 13, judgment of 26 February 2014, para. 101– 115, and case law cited therein. [↑](#footnote-ref-41)
41. Ibid., paras 120 – 132, 154 - 161. [↑](#footnote-ref-42)
42. Aarhus Convention Implementation Guide, second edition, 2014, page 197. [↑](#footnote-ref-43)
43. Aarhus Convention Implementation Guide, second edition, 2014, page 200. In that context, the Committee refers also to the judgment of the Court of Justice of the European Union in case C-420/11, *Juta Leth*, (para 36.), in which the Court concluded that “prevention of pecuniary damage, in so far as that damage is the direct economic consequence of the environmental effects of a public or private project, is covered by the objective of protection pursued by [the EIA directive].” [↑](#footnote-ref-44)
44. See in this respect also the Court of Appeal judgment in *Austin v Miller Argent (South Wales) Limited* of 21 July 2014, para. 24. [↑](#footnote-ref-45)
45. Civil Procedure Rule 45.41, para. 2, see ECE/MP.PP/2014/23, para. 27(a). [↑](#footnote-ref-46)
46. See e.g, the Appeal Court judgment of 21 July 2014 in the ACCC/C/2013/86 case, para 6. [↑](#footnote-ref-47)
47. See footnote 45. [↑](#footnote-ref-48)
48. Findings on communication ACCC/C/2008/33, para. 136. [↑](#footnote-ref-49)