Wildlife and Countryside Link response to Draft Aarhus National Implementation Report

October 2013

Introduction

Wildlife and Countryside Link (Link) brings together 42 voluntary organisations concerned with the conservation and protection of wildlife, countryside and the marine environment. Our members practise and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together our members have the support of over eight million people in the UK and manage over 750,000 hectares of land.

This submission is supported by the following 14 organisations:

- Amphibian and Reptile Conservation
- Badger Trust
- Buglife
- Butterfly Conservation
- Campaign to Protect Rural England
- Client Earth
- Friends of the Earth
- Open Spaces Society
- The Ramblers
- RSPB
- Salmon & Trout Association
- Wildfowl and Wetlands Trust
- Woodland Trust
- WWF-UK

Executive Summary

While Link welcomes the opportunity to comment on the draft Aarhus NIR, our view is that it fails to provide an accurate reflection of the implementation of the Aarhus Convention in the UK. Furthermore, in light of ongoing proposals in relation to Judicial Review (to which we return), it is wholly likely that the UK's ability to comply with the Aarhus Convention will be undermined still further.

We are concerned about the impacts of the Cabinet Office Consultation Principles on the ability of civil society to engage with the Government. The current scale and pace of legislative and policy change in the UK is quite unprecedented. It is becoming apparent that both individuals and organisations are struggling to keep abreast of the proposed changes or to submit properly considered responses to them. This is particularly the case with coalitions of organisations (such as Link), which may be submitting joint responses in addition to individual ones. These concerns have been made known to Government and it is therefore regrettable that the NIR fails to reflect them under its performance with regard to the second pillar of the Convention.

Similarly, significant developments in the field of access to information (specifically with regard to the role of public bodies and pesticides) are not reflected in the NIR – neither are substantial changes to public engagement in the planning regime.

Link has strong concerns about the Government's ongoing proposals in relation to Judicial Review. Many of these undermine the procedure in relation to environmental cases, yet none of them are

even mentioned in the Aarhus NIR. The Government's proposals in relation to standing typify a mistaken belief that judicial review is nothing more than an irritant to economic growth and recovery. The Government has mounted what can only be interpreted as a sustained attack on Judicial Review in recent months, which wholly fails to recognise that the foundations of democracy require that citizens have access to effective mechanisms to ensure the decisions of public bodies are lawful. Moreover, that a lawful process of decision making is a minimum requirement for environmental protection. Link will be responding to these proposals separately – and we strongly believe they should be highlighted in the Aarhus NIR.

Finally, Link remains deeply concerned about the UK's ability to comply with the access to justice pillar of the Convention. We refer to concerns in relation to Article 9(2) (substantive review) and Article 9(4) (prohibitive expense) which, together with current proposals on standing (Article 9(3)) will combine to seriously undermine the UK's compliance with the Convention. The Aarhus NIR fails to make reference to the effect of a number of directly relevant developments in the field of legal aid, fees for Judicial Review and time limits – all of which are being promulgated in the absence of any empirical data to support the Government's assertion that there is a 'problem' with the process of JR.

Link urges Defra to amend the NIR as highlighted below to give a fair and accurate representation of the UK situation with regard to the implementation of the Convention.

Introduction

Link welcomes the opportunity to comment on the draft Aarhus National Implementation Report (NIR). However, as a general comment, we are concerned that the Report fails to refer to a substantial number of both actual and proposed changes (many of which will undermine the UK's ability to comply with the Aarhus Convention) and to explain the context within which these changes are being made. These concerns are developed below.

Detailed Comments on the NIR

Article 3, paragraph 2

Cabinet Office Consultation Principles

Paragraph 5 of the NIR provides a mechanism general Freedom of Information (FOI) requests at the bottom of the general Defra webpage. We would note that while the Protection of Freedoms Act has expanded FoI requests to cover datasets (though its commencement has been delayed), no such change has been applied to the EIR. Given technological change, the right to request a dataset should be extended to EIR – and in the interim the discrepancy between the two should be noted in the NIR.

Paragraph 8 of the NIR refers to the introduction of the Cabinet Office Consultation Principles in July 2012[1] (which were, somewhat ironically, introduced in the absence of consultation). The Report states that the "*Principles outline what the public can expect from the Government when it runs formal, written consultation exercises on matters of policy or policy implementation. Key areas of the new Principles are early and sustained stakeholder engagement, consultation periods which can range from 2 to 12 weeks, and a digital by default consultation process*".

We do not believe this to be an accurate description of what the Principles sought to do – or their effect in practice. The Cabinet Office website acknowledges that the objectives of the Principles include a move towards a "*more proportionate and targeted approach*" and a clear mandate to move away from a 12 week norm for consultation.

[1] https://www.gov.uk/government/publications/consultation-principles-guidance

These concerns have been borne out in practice. Many environmental NGOs (and coalitions of organisations in particular) have struggled to form a cogent response to a slew of consultation papers in the last 12 months. Moreover, when responding to consultation papers environmental NGOs often need to obtain information and feedback from networks of volunteers, in respect of which adequate time to obtain and collate that information is vital.

Link has articulated these concerns to Government. For example, on 5th September 2013, Link wrote to Robin Mortimer[2] to express concerns about the truncated timescale for responding to a proposed simplification of government guidance on wildlife protection. This letter made direct reference to the UK's ability to comply with the second pillar of the Aarhus Convention and was supported by 16 members of Link.

Given the above concerns, we believe the NIR should make direct reference to widespread and public concerns about the impact of the new Consultation Principles and their effect on the UK's ability to comply with the Aarhus Convention.

EIA and National Planning Practice Guidance

Link has responded separately to DCLG's beta version of the online National Planning Practice Guidance, which will replace the 1999 guide to EIA. In our comments on EIA, we said:

The statement that Environmental Impact Assessment (EIA) should not be a barrier to growth is unhelpful, as that is not a determining issue in itself for whether to carry out an EIA. The purpose of EIA is not simply related to the local planning authority decision making process, as stated. A DCLG guidance note made clear that the House of Lords has also stressed that the purpose of the EIA process is to provide individual citizens with sufficient information about the possible effects and give them the opportunity to make representations (Berkeley v Secretary of State for the Environment, Transport and the Regions [2000]).
a "seismic shift".

Sustainable Development

Paragraph 15 of the NIR refers to the Government's new vision for Sustainable Development (2011) and states that it is "*mainstreaming Sustainable Development so that it is central to the way that policy is made, its buildings are run, and goods and services are purchased*".

However, the NIR fails to clarify that, in embracing a new vision for sustainable development, existing measures were summarily dispensed with. For example, the Sustainable Development Commission (SDC), an independent advisory body on sustainable development established by the former Government, was abolished as of March 2011 and the UK Government's Sustainable Development Strategy '*Securing the Future'* (2005), which embodied key environmental principles (such as environmental limits) arising from the Rio process, was withdrawn from use.

In November 2010, the Environmental Audit Committee (EAC) held an inquiry into the Government's performance with regard to sustainable development. The Committee's subsequent Report '*Embedding Sustainable Development across Government*[3]' confirmed that sustainable development had not been fully embedded across Government because the political will to do so had not been maintained.

In light of the above, we would expect the NIR to refer to pivotal structural and policy reforms on this issue that have occurred since the publication of the previous Implementation Report in 2011.

Article 3, paragraph 7

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2 Director, Sustainable Land Management and Livestock Farming at Defra

3 http://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/publications/?type=&session=3&sort=false&inquiry=763

Paragraph 21 of the NIR refers to the UK as a member of the Partnership for Principle 10 (www.pp10.org), under which "*the UK Foreign and Commonwealth Office donated approximately £1 million for the period 2007-2008 for various projects throughout the world which aim to improve access to information, public participation and access to justice in environmental matters*". A search of the PP10 and the Gov.uk websites reveals no reference to the UK's ongoing membership of PP10. If the UK is still a member, it would be helpful if the figure for aid could be updated post 2007-2008.

We also note that the UK Environment for Europe Fund appeared to cease in 2008. If there has been no subsequent Governmental support this reference should be removed from the NIR. Similarly, it would be helpful if the Report could confirm whether the other initiatives referred to in paragraph 21 are ongoing and, if so, clarify in what way the UK continues to support them.

Legislative, Regulatory and other measures implementing the provisions on Access to Environmental Information in Article 4 of the Convention

Link would like to make a general observation in respect of access to information and transparency in the field of pesticides and the placing the placing of plant protection products on the market in accordance with the Plant Protection Products Directive Council Directive 91/414/EEC and Regulation (EC) No 1107/2009.

In Case T‑545/11, *Stichting Greenpeace Nederland and PAN Europe v European Commission*[4], the Court of Justice of the European Union (CJEU), the applicants requested access to several documents relating to the authorisation of glyphosate on the market as an active substance granted under Council Directive 91/414/EEC. The request was based on Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents and on Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. The Secretary General of the Commission subsequently refused access to the document in issue on the basis of the Federal Republic of Germany's view that the document contained confidential information relating to the intellectual property rights of the operators. In particular, the Secretary General pointed out that: (i) there was no evidence of an overriding public interest in disclosure, within the meaning of Regulation No 1049/2001 (in her view, such an interest lay in protecting the commercial interests and intellectual property rights of the glyphosate manufacturers); and (ii) Article 6(1) of Regulation No 1367/2006 was not applicable to the document at issue as it did not contain information which could be regarded as relating to emissions into the environment.

However, in finding for the applicant, the CJEU held that "*none of the Commission's arguments are capable of calling into question the findings made in paragraphs 69 to 73 above, since they fail to show that the information requested does not relate to emissions into the environment*[5]".

In the domestic context, earlier this year the Environmental Audit Committee (EAC) examined the effect of systemic neonicotinoid pesticides on pollinators. The Committee's Report on Pesticides and Pollinators concluded that the "*system for approving pesticides is opaque*[6]" and that, in particular "*The agrochemical industry should place the results of its risk assessment trials in the public domain to inform academic research and increase transparency for the public. Defra should*

4 Judgment available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=142701&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=395776

5 *Ibid*, paragraph 74

6 http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvaud/668/66803.htm

work with industry and academics to establish which, if any, genuinely commercially sensitive details should be redacted to make that possible[7]".

While such an approach is clearly necessary in order to ensure compliance with the Aarhus Convention and European case-law, we note that the Government's response to the EAC Report does nothing to advance transparency in this field[8]. In particular, the Government's suggestion that "*Interested parties are able to read the studies at the offices of the Chemicals Regulation Directorate*" does not reflect the EAC's desire to see such information more readily available in the public domain

Obstacles encountered in the implementation of Article 4

Paragraph 35 of the NIR refers to Defra's report to the European Commission on the experience gained in the application of European Directive 2003/4/EC on public access to information[9]. The report identified a number of issues including, *inter alia*, the definition of public authorities.

While the Court of Justice of the European Union (CJEU) is yet to rule in Case C-279/12[10], Advocate General Villalón's Opinion in *Fish Legal and Emily Shirley v The Information Commissioner and United Utilities, Yorkshire and Southern Water* essentially holds that:

- An individual is under the control of a body or person falling within Article 2(2)(a) or (b) of the EIA Directive if his actions are subject to a degree of control exercised by that body or person which prevents him from acting with real autonomy in private affairs, thereby reducing him to the status of an instrument of the will of the State (a matter for the referring tribunal to determine); and

- Bodies or persons falling within Article 2(2)(b) of Directive 2003/4 must be subject to the obligation to disclose information on the same terms as the public authorities in the strict sense. The same obligation applies to the bodies and persons referred to in Article 2(2)(c), where their activities are limited to the management of a service under conditions which mean that they must be regarded as 'public authorities' for the purposes of Directive 2003/4….Where there is doubt, the obligation of disclosure must prevail.

In light of the implications of this case for the UK's obligations under the Convention, Link believes that it would be appropriate for the NIR to refer to the AG's Opinion in paragraph 35.

Legislative, Regulatory and other measures implementing the provisions on Public Participation in Decisions on Specific Activities in Article 6

Article 6, paragraph 1 – Environmental Impact Assessment

Paragraph 57 of the NIR refers to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. Link is concerned that there are a number of cases in which EIA information has not been gathered at the appropriate point. One such example is *R oao Buglife – The Invertebrate Conservation Trust v Medway Council* (National Grid Holdings Limited and Natural England as interested parties), in which the Hon. Justice Thornton agreed that Buglife was entitled to request appropriate EA information before a decision was made and awarded costs against

7 See Recommendation 14 available at: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvaud/668/66809.htm

8 See paragraphs 20-22 of the Response available at http://www.publications.parliament.uk/pa/cm201314/cmselect/cmenvaud/631/63104.htm

9 Note that the report can no longer be accessed on the URL cited

10 See http://curia.europa.eu/juris/document/document.jsf?text=&docid=140624&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=690527

Medway Council[11]. Another example is the Cairngorms National Park Plan, in which data for the requisite Appropriate Assessment (AA) has not been gathered prior to decisions being taken on the Local Plan.

We would also note that the planning practice guidance does not have a specific section on public participation, nor does the planning practice guidance on EIA properly explain the public's right to be involved.

Planning Act 2008

Paragraph 58 of the NIR records that in November 2008, the UK Parliament passed new legislation in the form of the Planning Act, which introduced a 'fast-track' system for major infrastructure proposals which, up until then, had often been debated in public inquiries. Similarly, there had always been provision for a Minister to "call-in" significant proposals for his/her own determination, thus prompting a public inquiry (which were often a vitally important safeguard for local communities faced with a powerful developer).

The Planning Act 2008 was subsequently amended by the Localism Act 2011, which abolished the Infrastructure Planning Commission (IPC) and transferred responsibility for decision making on major infrastructure projects to the Secretary of State. The Planning Act was again amended by the Growth and Infrastructure Act 2013 (provisions for certification requirements and for special categories of land), designed to "*deliver a more efficient, streamlined and democratically-accountable planning system for major infrastructure projects*". However, in effect this means that more projects will be dealt with (if the developer so chooses) by the somewhat remote Planning Inspectorate rather than the democratically elected local authority. Concerns over ability for public participation to be conducted in the same way were raised during the passage of the Growth and Infrastructure Act.

We would also note, in relation to paragraph 58 of the NIR, that the Government is due to update the Planning Act 2008 regime in relation to pre-application consultation (due in 2014). CAJE members would refer to best practice in France and the need for the consultation regime to include: (i) an independent body to carry out the consultation (rather than developer); (ii) better engagement, e.g. public debate hearing not just write in comments; and (iii) better remedies where a pre-application process is not up to scratch.

Practical and/or other provisions made for the public to Participate during the Preparation of Plans and Programmes relating to the environment pursuant to Article 7 of the Convention

We note that paragraph 69 of the NIR refers to the now abolished regional planning regime.

Paragraph 71 of the NIR discusses National Policy Statements (NPSs). We would, however, point out that the process for NPS designation has not been receptive to criticism. For example, while the Committee tasked with examining the consultation on the Ports NPS (the Transport Committee in the House of Commons) criticised it strongly, there were very limited changes between the draft and final version. We would therefore call for better public engagement on the NPSs in future including, for example, the forthcoming National Networks (Road & Rail) NPS due at the end of 2013.

The Government has revised the suite of planning guidance without formally consulting on any part of this. Initially through an unrepresentative review group of 4/5 members led by the peer, Lord Taylor of Goss Moor, a report into the planning guidance remaining after the publication of the National Planning Policy Framework (NPPF) was published, and comments invited. However, the Government then published two sets of planning guidance on onshore oil and gas and another on renewable energy without any consultation in July 2013. In August, the Government also published

[11] See http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2011/746.html&query=buglife+and+grain&method=boolean

new planning practice guidance, revising 7,000 pages of existing guidance and introducing new policies as part of the Government's planning reform agenda – asking for feedback but not an official consultation. As Lord Woolf MR said in *R v North and East Devon Health Authority ex parte Coughlan*[12]*:*

> "*To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken*."

Efforts made to promote effective Public Participation during the preparation by public authorities of Executive Regulations and other generally applicable legally binding rules that may have a significant effect on the environment pursuant to Article 8 of the Convention

Please see comments made in relation to Article 3(2) regarding the new Cabinet Office Consultation Principles (2012) with reference to paragraph 78 of the NIR and comments in relation to the Localism Act 2011 regarding paragraph 80 of the NIR.

In addition, the Government failed to conduct any consultation before introducing the Growth and Infrastructure Bill – and proceeded to fast-track the Bill with such speed that during public bill committee meetings, MPs were given on the day documents relating to consultations, Some consultations were not even concluded before the issues were debated by MPs.

Legislative, Regulatory and other measures implementing the Provisions on Access to Justice in Article 9 of the Convention

General comment

While Link welcomes recent amendments to the Civil Procedure Rules (CPR) to address "prohibitive expense", we acknowledge the situation will not be fully resolved until the CJEU has ruled in Case C-530/11 (*Commission v UK*) and the Supreme Court has ruled in the case of *Edwards*[13]. It will also be necessary to evaluate the practical effect of changes to the Civil Procedure Rules (indeed we hope such arrangements are being put into place in order to monitor the effect of the CPR amendments for inclusion in future NIRs).

However, there have been a number of actual and proposed changes to the procedure for Judicial Review that will undermine these improvements - and the UK's ability to comply with the Convention more widely. These are discussed below.

Standing

Paragraphs 85-87 and 93-95 of the NIR address standing (i.e. the requirement to show sufficient interest in the matter to which the application relates in order to progress judicial review[14]). The NIR states that this "interest" is interpreted "very widely" in the UK and cites research from the European Commission which puts the UK among those Member States that take an "extensive approach" to legal standing before the administrative courts.

However, the NIR would more accurately refer to research published by the Commission in 2012 (as opposed to 2002), which does not characterize the UK's approach to standing as extensive,

12 [2001] QB 213 at §108

13 See Case C-260/11 - *R oao David Edwards, Lilian Pallikaropoulos v (i) Environment Agency, (ii) First Secretary of State, (iii) Secretary of State for Environment, Food and Rural Affairs*

14 Section 31(3) Supreme Court Act 1981

albeit noting that "*there are very few modern examples of individuals or environmental groups being refused standing*[15]".

We are also concerned that the NIR omits to mention that the UK's "extensive approach" to standing is under review. The current (September 2013) Ministry of Justice consultation paper[16] states that "*The Government is concerned that too wide an approach is taken to who may bring a claim, allowing judicial reviews to be brought by individuals or groups without a direct and tangible interest in the subject matter to which the claim relates, sometimes for reasons only of publicity or to cause delay*". Moreover, it is claimed that the "*wide approach to standing … is allowing judicial review to be used to seek publicity or otherwise to hinder the process of proper decision-making*".

In particular, paragraph 73 of the consultation paper notes that while the Aarhus Convention gives members of the "public concerned" and certain NGOs access to procedure to challenge environmental matters (subject to requirements of national law), the current interpretation of "sufficient interest" as including those with a public interest provides a "*more generous approach than is required by Aarhus*". We do not accept this assertion.

While the Government accepts that the requirements of EU law and the Aarhus Convention justify a different approach for environmental cases (essentially environmental NGOs are guaranteed rights of standing even if they are not directly affected), it is argued that this does not extend to individuals, unless they can demonstrate that they have both a genuine interest in the environmental matter at issue and that they have sufficient knowledge to be able act on behalf of the public interest[17]. Various approaches are discussed, all of which would result in a more restrictive approach than that currently applied by the courts. This approach is regrettable and LINK will be responding separately to the consultation proposals.

The Government's proposals in relation to standing typify a mistaken belief that judicial review is nothing more than an irritant to economic growth and recovery. The Government has mounted what can only be interpreted as a sustained attack on JR in recent months, which wholly fails to recognize that the foundations of democracy require that citizens have access to effective mechanisms to ensure the decisions of public bodies are lawful. Moreover, that a lawful process of decision making is a minimum requirement for environmental protection.

Whilst we recognize that the UK's approach to standing is only under review at this stage, we believe the NIR's failure to make any reference to the Government's current proposals is misrepresentative of the UK's position on this issue. We therefore request the NIR be amended to include the Government's proposals in this area.

Article 9, paragraph 2

Paragraphs 92-94 of the NIR discuss standing (see comments above) in the context of Article 9(2) of the Convention. However, no mention is made of the requirement under Article 9(2) to ensure that "*members of the public concerned … have access to a review procedure … to challenge substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention*".

The UK's obligations in this respect were examined by the Aarhus Compliance Committee in the context of Communication C33 concerning costs[18]. The Committee concluded that the UK allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to Articles 9(2) and (3) including, for example, material errors of fact, errors of

15 See http://ec.europa.eu/environment/aarhus/access_studies.htm

16 See Judicial Review: Proposals for further reform (paragraphs 67-90) available at https://consult.justice.gov.uk/digital-communications/judicial-review

17 *Ibid*, paragraph 81

18 See http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html

law, regard to irrelevant considerations, failure to have regard to relevant considerations, jurisdictional error and *Wednesbury* unreasonableness.

However, the Committee was not convinced that the UK, despite these exceptions, meets the standards for review required by the Convention as regards substantive legality. While on the basis of the information before it in C33 the Committee did not go as far as to find the UK in non-compliance with Article 9(2) or (3), it did suggest that the application of the 'proportionality principle' by the courts in England and Wales could provide a more appropriate standard of review in cases within the scope of the Convention.

However, shortly afterwards in the case of *Evans*[19], the Court of Appeal confirmed that *Wednesbury* unreasonableness is the correct standard of review to apply in cases concerning EIA screening decisions. We are aware that at least one of Link's members made submissions on this point to the Compliance Committee.

While we recognise the UK has not yet been found to be in non-compliance with Article 9(2) of the Convention concerning substantive review, it is clear that the UK's position on this issue is unclear. We urge Defra to acknowledge these concerns in the NIR.

Article 9, paragraph 4

This section of the NIR concerns the obligation on Parties to the Convention to provide review procedures that provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. In this respect, the NIR asserts that "*the UK treats any member of the public equally, regardless of nationality, citizenship and domicile*" and that "*Any legal person has equal access to the courts*".

With respect to costs, it is now the considered case-law of the CJEU following *Edwards* that all people are *not* to be treated equally. The application of both an objective and subjective test in order to determine what is prohibitively expensive for a claimant requires (as discussed later) the UK to implement measures that enable each person – irrespective of their means – to access the courts in order to protect the environment. This may require the court to reduce the adverse caps imposed on individuals and groups below £5,000 and £10,000 respectively where they are clearly of limited means. It would be helpful if the NIR could be updated to reflect the judgment of the CJEU in *Edwards*.

Legal Aid

Paragraph 96 of the NIR refers to legal aid[20] and proposals contained within a recent consultation paper entitled: "*Transforming Legal Aid: delivering a more credible and efficient system"*.

In responding to these proposals, at least four Link members pointed out that restricting access to legal aid still further will undermine the government's ability to meet its obligations under the Aarhus Convention. Specifically, when taken as a package with cuts introduced through the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012, and previous changes to judicial review announced by MOJ on 23 April 2013, there is a real risk of a significant and harmful impact on access to justice for the environment.

In particular, by proposing to abolish Legal Aid for borderline cases and introducing a residency test (as referred to in paragraph 96 of the NIR), we believe the Government is at risk of disregarding both the objective and the subjective tests for "prohibitive expense" laid down by the CJEU in *Edwards*[21], since the change would expose claimants to the costs of the entire proceedings (as well

19 *Evans –v- Secretary of State for Communities and Local Government* [2013] EWCA Civ 115

20 Further reference is made in paragraphs 101-105 of the NIR

21 Supra, n.12

the risk of paying their opponent's costs should they lose) which potentially exceed any notion, whether objective or subjective, of what may be reasonable.

The NIR makes no reference to widespread and very public concerns about ongoing cuts to the legal aid budget – either in the context of environmental protection or more widely. Given the breadth and depth of concern across the UK, LINK believes an appropriate record of those concerns should be recorded in the NIR.

Fees for Judicial Review

Paragraph 97 of the NIR refers to the current court fees for bringing a judicial review in England and Wales. Again, we are concerned to note the NIR makes no reference to imminent changes in this regard.

In December 2012, the Government sought views on a series of proposals to reform judicial review[22]. On 23 April 2013 the Government published its response to the consultation setting out the reforms it intended to take forward. They included introducing a fee for an oral renewal hearing (where permission has already been refused by a judge on the papers but the claimant asks for the decision to be reconsidered at a hearing). The Government has stated publicly that it is committed to implementing the fee change as soon as practicable[23].

While the NIR states the Government will "*continue to look for ways to improve access to justice and to provide fair and simple means of resolving disputes*[24]" the Government has reported that it will "*revisit whether judicial review fees are set at the appropriate level as part of a wider review of fees across the civil courts*[25]". In reality, the Government is going in the opposite direction of travel to that purported in the NIR.

Amendments to the Civil Procedure Rules

Paragraph 113 of the NIR refers to recent amendments to the CPR relating to costs and injunctive relief for Aarhus Convention claims which came into effect on 1st April 2013. We return to this issue in the section headed 'Follow up on issues of Compliance' below.

Paragraph 116 of the NIR refers to the fact that redress through the courts is only one of the many routes open to the public in their search for environmental justice. It is worth noting, however, that there tends to be no alternative to Judicial Review other than Ombudsman. Similarly, in the absence of a third party right of appeal, there are no alternatives in the planning context as none of the appeal mechanisms mentioned are available to civil society.

"Fair, equitable, timely"

As mentioned above, Article 9(4) of the Convention requires contracting Parties to provide review procedures that are "*fair, equitable, timely and not prohibitively expensive*".

In December 2012 the Government sought views on a series of proposals to reform judicial review, including reducing the time limit for bringing a JR from 3 months to 6 weeks in certain planning cases (thus bringing it into line with the time limits for statutory appeals).

LINK do not support the proposal to shorten the time limit for planning cases on the basis that this would undermine the requirement for review procedures to be fair and equitable. We also do not concur that the Courts' discretion to allow an extension of time to bring a claim is sufficient to ensure that access to justice is protected. Such discretion is at present only exercised in very rare

22 See https://consult.justice.gov.uk/digital-communications/judicial-review-reform

23 See Judicial Review: Proposals for further reform (2013), page 5, paragraph 3, available at: https://consult.justice.gov.uk/digital-communications/judicial-review

24 Paragraph 100 of the NIR

25 See https://consult.justice.gov.uk/digital-communications/judicial-review

circumstances. On 23rd April 2013 the Government published its response to the consultation setting out the reforms it intended to take forward. An amendment to the time limits for planning cases was swiftly given effect on 1st July 2013 by an amendment to the Civil Procedure Rules.

Paragraph 127 of the NIR refers briefly to an 'amendment' to the time limit for planning cases so that it is in 'alignment' with that for the statutory appeal procedure. However, in doing so it fails to clarify that it has been reduced from 3 months to 6 weeks – or to record that two-thirds of the stakeholders responding to the proposals opposed this amendment[26].

Article 9, paragraph 5

Article 9(5) of the Convention requires contracting Parties to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. We would refer to earlier comments in relation to legal aid in this respect.

Obstacles encountered in the implementation of Article 9

Paragraph 126 of the NIR refers to recent changes to the CPR in England and Wales concerning cross undertakings in damages and interim relief in environmental judicial review claims. LINK notes that in Case C-530/11 (*Commission v UK*) concerning the UK and costs, Advocate-General Kokott[27] found that in making the grant of interim relief conditional on an undertaking to pay damages, the UK is in breach of its obligations under Articles 3(7) and 4(4) of Directive 2003/35/EC (the EC Public Participation Directive or PPD). While the judgment of the CJEU is awaited, LINK believes that it would be appropriate to update the NIR to refer to AG Kokott's Opinion.

Follow-up on issues of Compliance

Paragraph 147 of the NIR refers to recent changes to the CPR concerning costs[28]. While the NIR confirms that similar amendments have been introduced in Scotland and Northern Ireland there are, in fact, notable disparities in the measures introduced between the jurisdictions of the UK. We would highlight in particular that PCOs in England and Wales are not codified for s288/9 challenges TCPA 1990, as they are in Northern Ireland.

We urge Defra and the devolved administrations to work together to resolve these inconsistencies as a matter of urgency in order to ensure a coherent UK-wide position on costs and access to justice.

LINK also notes that the recent amendments to the CPR may not have gone far enough. In Case C-530/11 (*Commission v UK*), AG Kokott holds, amongst other things, that reciprocal caps which prevent claimant lawyers from recovering a reasonable success fee are in breach of the access to justice requirements of the PPD[29]. Again, while we await the judgment of the CJEU it would be appropriate to highlight the AG's findings as they highlight that further reforms to the CPR may be necessary.

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26 See '*Reform of Judicial Review: The Government Response'* page 32 available at https://consult.justice.gov.uk/digital-communications/judicial-review-reform

27 Opinion available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=140962&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=727709

28 These are essentially that where a claimant indicates in their claim form that it is an Aarhus Convention claim (and this is not successfully challenged by the defendant) the parties may not be ordered, throughout first instance proceedings, to pay costs exceeding the following amounts: an individual claimant: £5,000; other claimants: £10,000; a defendant: £35,000. The Rules were also amended to require the court to have particular regard to avoiding making continuing with a claim prohibitively expensive when making an order requiring an undertaking in damages.

29 Supra, n. 24, paragraph 80

Wildlife and Countryside Link
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Wildlife and Countryside Link
89 Albert Embankment, London, SE1 7TP
W: www.wcl.org.uk