Meeting of the Parties to the Aarhus Convention (MoP-7)

Statement on behalf of Environment Links UK

Introduction

Environment Links UK (ELUK) collectively represents voluntary organisations with more than 8 million members across the UK. It comprises the combined memberships of Wildlife and Countryside Link (WCL), Scottish Environment Link (SEL), Wales Environment Link (WEL) and Northern Ireland Environment Link (NIEL). Each is a coalition of environmental voluntary organisations, united by common interest in the conservation and restoration of nature and the promotion of sustainable development across the terrestrial, freshwater and marine environments.

ELUK welcomes the opportunity to submit a Statement to MoP-7 on the UK's compliance with the Aarhus Convention. In the context of the current climate and ecological emergency the need for robust environmental rights has never been stronger – whether that is seeking information, effectively engaging in planning and decision-making processes or bringing legal cases to court. And yet, all jurisdictions in the UK are failing, as yet, to fully implement these rights and, in some cases, the trajectory is to weaken these rights. This Statement raises issues of particular concern at devolved national and UK level.

National Implementation Report (NIR)

ELUK members submitted detailed comments on the UK's draft NIR in Autumn 2020. Despite this engagement, the NIR is substantially out of date and fails to reflect ongoing public concerns about the UK's implementation of the Convention in relation to many issues (some of which are highlighted here). The NIR also fails to consistently specify the geographical extent of the legislation or other measures referred to - reference is made to existing measures, or to the UK Parliament passing new legislation, without specifying its extent, which might lead some to assume wrongly that it applies throughout the UK. Such precision will become more important as the Brexit transition period comes to an end and the likelihood of regulatory divergence between the devolved administrations and the UK Government grows. The NIR is also incomplete, failing to include communications made but not determined and imminent legislative changes such as the Environment Bill.

General provisions - Article 3(3)

We are unaware of any UK measures to inform and educate the public about their Convention rights. There is online guidance about environmental Judicial Reviews (JR) in England/Wales and Northern Ireland, but it does not provide the lay person with an understanding of the system and their Aarhus rights. Similarly, there is no UK-wide, government run or supported Aarhus Centre providing information and/or education about the Convention. The new Environmental Rights Centre for Scotland (ERCS) is a third-sector initiative aiming to increase public awareness and facilitate the realisation of environmental rights, including Aarhus rights (it receives limited funding from the Scottish Government). Two groups in Ireland are currently working (separately) to set up an ad hoc mobile version of an Aarhus centre covering Ireland and Northern Ireland.

While the UK provides for general environmental and citizenship education in the National Curriculum (as does Scotland in its Curriculum for Excellence), it neither covers rights under the Convention and there is no provision for people leaving school or in higher education. The Aarhus Implementation Guide makes clear that the education requirement is directed towards people at all levels. All nations

of the UK need to do more to fully implement the Convention, raise public awareness, support and facilitate its application, and educate and encourage its full use.

Access to Information

Transparency and accountability in public decision-making are essential components of a functioning democracy and the rights exercised under the Environmental Information Regulations (EIRs) 2004 are a mainstay for those engaged in environmental protection. The EIRs reflect the main requirements of the Convention but we highlight the following concerns:

- **Definition of public authorities** – the EIRs do not currently reflect the requirement in the Convention[2] that bodies performing public administrative functions (including privatised bodies having public functions in relation to the environment) are bound by their requirements.

- **Provision of environmental information** – public bodies routinely rely on (and seek to extend) the statutory time-period of 20 working days in the EIRs, which makes it challenging for claimants contemplating JR to obtain the information they need to comply with the Pre-Action Protocol. There is also late reliance on exemptions under the Regulations, with requests for an extension being made at the very end of the 20-day period. For example, Friends of the Earth England, Wales and Northern Ireland (FoE EWNI) has two extant complaints against Defra and the Health and Safety Executive (HSE) before the Information Commissioner (IC) concerning extensive delays in responding to information requests into the Government's decision in January 2021 to grant an emergency authorisation for the use of neonicotinoids for the treatment of sugar beet seeds. In June, the IC found that the HSE had breached the EIRs by not undertaking an internal review following FoE EWNI's request[3], requiring HSE to provide this by 4 August 2021. However, HSE did not do this until 16 August 2021; 3 months after the 40 working day deadline for a review expired.[4]

- **Publication of data on the environment** – Article 5(4) of the Convention requires contracting Parties to: "*… at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment*". While an English report was published in 2020 there were no equivalent reports in the devolved administrations - or a UK-wide report.

- **Monitoring and compliance** – while Government bodies publish quarterly and annual statistics and reports on the Government's obligations under the EIRs, there is no assessment of the extent to which the UK complies with Article 4 of the Convention or the provision of public services relating to the environment (at all levels) in accordance with Article 5(7).

Public Participation in Decision-Making

Planning reforms in England

The Aarhus Convention guarantees the public rights of participation in established democratic processes such as the town and country planning system and Parliamentary procedures, focusing on the procedures for Environmental Impact Assessment (EIA), Strategic Environmental Assessment

2 Or the 2015 ruling of the English Upper Tribunal (following a reference to the ECJ) that water companies in England & Wales are "public authorities" for the purposes of the EIRs: *Fish Legal v Information Commissioner* [2015] UKUT 0052 (AAC)

3 Available here. The ICO is continuing to investigate other aspects of FoE EWNI's complaint against the HSE and is also continuing to investigate the complaint against Defra

4 FoE EWNI had requested an internal review by HSE on 18 March 2021

(SEA) and the preparation of legislation and normative instruments in Articles 6, 7 and 8 respectively. We are concerned about the UK Government's intention to review EIA and SEA as part of a programme of wider planning reforms[5]. More generally, the proposed reforms to the planning system as set out in the White Paper '*Planning for the Future"* have significant repercussions for UK compliance. Despite recent suggestions that many of the original reform proposals will be scrapped (including the removal of public participation rights and local democracy and the zonal system) we remain concerned about the replacement of Sustainability Appraisals by a simplified process for assessing the environmental impact of plans and the removal of SEA in relation to Local Plans and certain Neighbourhood Plans. Changes to the Permitted Development Rights regime have also removed swathes of development from the public's right to object to site specific proposals.

Third Party Right of Appeal

We welcome the Findings of the Compliance Committee in Communication ACCC/C/2013/90 (Northern Ireland), which concludes that the UK has failed to ensure that review procedures under Article 9(2) of the Convention are fair because developers of proposed activities subject to Article 6 are entitled to a full merits review of the decision on the proposed activity - but that members of the public who seek to challenge the same decision are not. We note that this is the case not just in Northern Ireland but across the jurisdictions of the UK.

Pesticides

The EU regime for the approval of pesticides aims to ensure a high level of protection of both human and animal health and the environment, only authorising products that "*shall not have any unacceptable effect on the environment*". Post Brexit, decisions on pesticide authorisations are a matter for the UK Government and Devolved Administrations[6]. These decisions are taken by Defra and/or the Health & Safety Executive (HSE) (the framework for decision taking is not explained so the decision maker in any particular case is not clear to the public) based on expert assessment by the HSE with occasional advice from the UK Expert Committee on Pesticides (ECP), when requested[7].

We are concerned that public consultation is restricted to the approval of new pesticides, and not to derogations that allow the use of pesticides that have failed to meet the criteria for approval. We are also concerned that, to-date, the only available document prior to authorisation is the applicant's Draft Assessment Report (DAR), a summary dossier may follow, but as yet the format and content of such a dossier are unknown. The first DAR consultation (which was not effectively publicly announced, being circulated only to a pre-existing HSE mailing list) extended to 2,500 pages of highly technical material and posed 360 questions [8] . There has to-date been no consultation on any expert risk assessment based on the DAR (or additional evidence) or on the decision maker's proposed decision. This process is the antithesis of the Cabinet Office Consultation Principles, which require consultations to be clear and concise and questions to be necessary, easy to understand and easy to answer[9]. It also fails to comply with the requirements of Article 6(2)-(5) of the Convention concerning public participation in decision-making on specific activities[10]. Finally, despite its length, the DAR failed to fulfil any of the

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5 WCL briefing (February 2021) here

6 Regulation (EC) 1107/2009 as it has effect in Great Britain. EU pesticides legislation continues to apply in Northern Ireland under the terms of the NI Protocol

7 We are also concerned that the ECP does not conduct itself in a transparent way. For example, the latest advice to ministers on the neonicotinoid emergency authorisations for sugar beet was only made public through FoE EWNI's EIR requests (see comments above on access to information)

8 See here

9 See here

10 While not listed under Annex 1, pesticides decisions are covered by Article 6(1)(b) of the Aarhus Convention because "*they may have a significant effect on the environment*"

requirements of Article 6(6) of the Convention concerning a description of the site, significant effects on the environment, a description of the measures envisaged to prevent and/or reduce the effects, a non-technical summary, an outline of the main alternatives studied or the main reports and advice issued to the public authority. In bringing these regulatory processes into UK statute there does not appear to have been any attempt to ensure that the authorities reconsidered the application of Article 6 or made any appropriate changes to secure compliance with the Convention (in accordance with Article 6(10) of the Convention).

Consultation Principles

We are also concerned that Cabinet Office Consultation Principles[11] introduced in 2012 have been progressively weakened. An early revision limited consultation to targeted "stakeholders" and reduced consultation periods from a general practice of 12 weeks to between 2-12 weeks (with no consultation at all in some cases). Further revisions in 2016 and 2018 encouraged officials to consult primarily only where there is a legal duty to do so and removed safeguards regarding duration of consultation. Moreover, the Principles do not require compliance with Article 8 of the Convention, which concerns public participation during the preparation of laws and normative acts that may have a significant effect on the environment. As a general point, it should be noted that the requirements of Article 8 of the Convention have never been incorporated into UK law[12].

Access to Justice

In light of the UK's ongoing failure to comply with Article 9 requirements regarding the high costs of legal action, MoP-6 endorsed Decision VI/8k[13]:

> *"The Meeting of the Parties …*
> *2. Reaffirms its decision V/9n and requests the Party concerned to, as a matter of urgency, take the necessary legislative, regulatory, administrative and practical measures to:*
> *(a) Ensure that the allocation of costs in all court procedures subject to article 9 is fair and equitable and not prohibitively expensive;*
> *(b) Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;*
> *(c) Further review its rules regarding the time frame for the bringing of applications for judicial review in Northern Ireland to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework;*
> *(d) Establish a clear, transparent and consistent framework to implement article 9, paragraph 4, of the Convention;*
> *…*
> *6. Recommends that the Party concerned 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 109 to 114 of the Committee's findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 to ensure that such procedures, where there is no fully adequate alternative procedure, are not prohibitively expensive;"*

11 See here for England. Corresponding Scottish Principles with minor differences can be found here, pages 14-15. Nidirect has consultation guidelines here, which appear to be based on those recommended by the Northern Ireland Equality Commission here

12 See Communication ACCC/C/2017/150 submitted by FoE England, Wales and Northern Ireland.

13 See Communications 23, 27, 33, 77, 85 and 86, all of which can be accessed via this link

The Compliance Committee's Report to MoP-7 reaffirms decision VI/8k and recommends the UK urgently takes the necessary measures to ensure compliance. We welcome the call for the UK to submit a timed plan of action and provide detailed progress reports thereafter.

The Ministry of Justice in England failed to undertake a promised review of the Environmental Cost Protection Regime (ECPR) in 2020, despite finding resource and capacity to undertake a broader Independent Review of Administrative Law (including certain aspects of JR) during the same time period. Similarly, no reviews of the ECPR have been conducted in Scotland or Northern Ireland. Indeed, it is regrettable that the Compliance Committee has been unable to reach a conclusive view on some issues due to a lack of data. We urge jurisdictions of the UK to collect and publish data on environmental claims so that the Compliance Committee, and civil society, can gauge UK compliance. Further concerns are highlighted below.

England

Prospective only remedies

Clause 1 of the Judicial Review and Courts Bill gives judges the power to issue prospective only quashing orders[14], thus prohibiting future unlawful decisions without invalidating any prior action(s) based on that decision. In deciding whether to exercise these powers, the court must have regard to a non-exhaustive list of factors, including the interests or expectations of persons who have relied on the impugned act. This apparently broad discretion is contradicted elsewhere in the Bill, which states that where a prospective-only quashing order would *"offer adequate redress in relation to the relevant defect",* then it must exercise these new powers *"unless it sees good reason not to do so".* We are concerned that this proposal undermines the value of procedural environmental rights (which is what the Aarhus Convention is concerned with), offends the legal principle of fairness, preventing claimants from achieving meaningful redress as required by Article 13 of the European Convention on Human Rights (the right to an effective remedy) and Article 9(4) of the Aarhus Convention (which confirms a right to timely and effective remedies). It may also allow adverse and irreversible effects on the environment and human health arising from improperly made decisions to stand.

Other concerns persist in relation to environmental JR including:

- **Type and eligibility of claims covered** – private law environmental claims in all jurisdictions of the UK are still not covered by the ECPR. The application of costs caps to certain groups, such as unincorporated associations and individuals representing them, also remains unclear.

- **Variation of costs caps** – the default costs cap are rarely, if ever, varied downwards for a claimant and, as far as we are aware, they have never been varied upwards for a defendant. Default cap levels for a claimant of £5,000 (individuals) and £10,000 (other) can only be acceptable if variation downwards is not only theoretically available but can be predictably relied upon in practice. Meanwhile, defendants frequently apply to vary cost caps upwards for claimants. This creates uncertainty, and time-consuming satellite litigation; the very outcomes that the changes to the Civil Procedure Rules which introduced the default costs caps were purportedly seeking to avoid.

[14] Clause 1(1)(a) and clause 1(1)(b) of the Bill respectively – see here

- **Costs for procedures with multiple claimants** – there is no basis for the rule requiring separate default costs caps for each claimant, particularly where claimants make the same legal arguments on the same factual basis.

- **Costs protection on appeal** – the lack of any cost caps in CPR 52.19A and in the Rules and Practice Directions of the Supreme Court fails to ensure sufficient clarity or costs protection for claimants in appeals regarding Aarhus claims.

- **Cross-undertakings for damages** - the 2017 CPR amendments do not give any further clarity to applicants seeking interim injunctions as to: (a) whether a cross-undertaking will be required, and (b) if a cross-undertaking is required, what its level will be.

- **Costs orders against or in favour of interveners** – members of the public who join proceedings as interveners in support of the claimant should be entitled to benefit from the Convention's requirement that proceedings must not be prohibitively expensive. At present, only interveners who join proceedings in support of the defendant are protected in this way. This is a further example of where access to justice is skewed/unequal.

- **Costs for procedures with multiple defendants –** the Supreme Court has recently handed down its judgment in *CPRE Kent v Secretary of State for Communities and Local Government*[15], clarifying the costs position for unsuccessful claimants in JRs and statutory reviews involving multiple defendants. When permission is refused, a claimant may now be liable to pay the costs of more than one defendant and/or Interested Party (IP) to prepare and file an Acknowledgement of Service and summary grounds. It is not necessary to show 'exceptional' or 'special' circumstances apply, although costs must be reasonable and proportionate. The effect has been immediate, with an IP in one case immediately seeking costs of just under £24,000 for simply preparing both documents. We fear aggressive IPs will be encouraged to routinely request high costs, with consequential chilling effects for potential claimants.

Scotland

- **Own legal costs** - the Protected Expenses Order (PEO) regime is fundamentally flawed in failing to recognise that the actual costs incurred by an unsuccessful petitioner are not limited to the £5,000 default cap on adverse costs liability, but also include their own legal costs. Furthermore, in the event of a successful judicial review, a PEO limits the amount the petitioner can recover from the other side to only £30,000 (costs often amount to much higher than £30,000).

- **Level of cost caps** – the introduction of powers under the 2018 PEO rules to vary the default costs cap up or down "on cause shown" has introduced legal uncertainty. The default levels of the cap and the cross cap are arbitrary and fail to reflect a realistic assessment of the overall costs faced by an Aarhus petitioner.

- **Cost protection on appeal** – when a respondent appeals, the petitioner's total costs remain capped at £5,000 and the respondent's cross-cap at £30,000. When a petitioner appeals, they must re-apply for a new PEO and if successful, a new cap of £5,000 and cross-cap of £30,000 will apply. This is unfair and renders proceedings prohibitively expensive for petitioners.

[15] *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC36

- **Interveners** – third-party interveners may be found liable for other parties' costs; likewise, petitioners may be liable for costs of third party interveners. The quantum of liability is entirely at the courts discretion and may remain undetermined until the conclusion of proceedings.

- **Court fees** – the requirement to ensure that costs are not prohibitively expensive applies to the costs of the proceedings in their entirety. It should be clear that the £5,000 and £30,000 caps include liability for court fees and the caps should be set at an appropriate level given the high cost for Aarhus litigants. Court fees have more than doubled in recent years as a result of the Scottish Government's policy of full cost recovery, meaning that court fees can run into 5 figures for a complex JR. This policy should be reviewed to avoid the chilling effect and ensure Aarhus litigants who lose their case are not faced with prohibitive costs from court fees on top of their own solicitor and counsel fees.

- **Legal aid:** there are significant barriers to accessing legal aid in environmental matters. Civil legal aid is available only to 'persons' and therefore environmental NGOs and community groups are ineligible. Individuals applying for legal aid also face difficulties. The Civil Legal Aid (Scotland) Regulations 2002 limit any grant of legal aid where a person applying has a 'joint interest' in the matter with others. It is likely that in most environmental litigation there will be a number of individuals with similar concerns about the issue in dispute (e.g. in the case of a large development in a conservation area, or air pollution in a city).

There is an urgent need to review and overhaul the costs regime in its entirety. Consideration should be given to the overall costs faced by an Aarhus litigant, with options including introducing one-way cost shifting, exemption from court fees, and the reform of legal aid for Aarhus cases.

Northern Ireland

- Regulation 5 of The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 gives the court the power to require applicants to provide a cross-undertaking in damages to obtain an interim or emergency injunction. The Court has the discretion not to require such an undertaking, but potential applicants cannot know until the end of the interim hearing how, and if, that will be exercised. This is a major deterrent to applicants.

- In common with other jurisdictions of the UK, the above Regulations do not address the difficulty unsuccessful applicants may have in being able to afford their own legal costs, which explains why a significant number of environmental applicants have felt obliged to bring applications to the High Court without the benefit of legal representation.

- The absence of Conditional Fee Arrangements and scant provision of legal aid for environmental cases in Northern Ireland make the burden of an applicant's own legal costs prohibitively expensive regardless of any cost capping arrangements.

Intensity of review (UK-wide)

Article 9(2) of the Convention requires Parties to provide a review of procedural and substantive legality for decisions, acts and omissions falling within the scope of Article 6 of the Convention. Article 9(3) of the Convention requires public access to administrative and judicial procedures to challenge acts and omissions which contravene national environmental law. Across all jurisdictions, 'conventional/strict' *Wednesbury* unreasonableness is the usual test for administrative action in the absence of illegality or procedural impropriety or where proportionality is explicitly required.

However, the threshold for meeting the test is very high and, in reality, a court will not intervene and set aside an administrative decision unless it is perverse. There is no difference in approach for environmental cases – the courts apply the 'strict *Wednesbury*' threshold throughout.

In 2017, ELUK members the RSPB, FoE EWNI and FoE Scotland submitted a Communication to the Compliance Committee arguing that the standard of review applied in UK courts fails to provide a review of procedural and substantive legality in accordance with Article 9(2) and (3) of the Convention. A substantive hearing took place before the Compliance Committee in November 2019, and their findings are awaited. However, in the interim we note the Committee found that the failure by the High Court of Northern Ireland to undertake its own assessment of whether particular legal tests relating to an Environmental Impact Assessment were adhered to, amounted to non-compliance with the Article 9(2) requirement to provide for a review of the substantive legality of those decisions[16]. Should the Committee subsequently find the UK in non-compliance with Article 9(2) at a wider level, we call upon the Governments of the UK to introduce measures to ensure the appropriate intensity of review in JR and statutory reviews.

September 2021

[16] See Communication ACCC/C/2013/90, paras 115-141