Draft UK National Implementation Report to the Eighth Meeting of the Parties to the Aarhus Convention

Introduction

1. The Environment Links UK (**ELUK**) welcome the opportunity to comment on the UK's draft National Implementation Report (**NIR**) in advance of the Eighth Meeting of the Parties to the Aarhus Convention (Aarhus MoP) in November 2025. This response has been drafted by ELUK members with input from the Environmental Rights Centre Scotland (**ERCS**).

General Comments

2. Despite the consultation period for the draft NIR being cut by half (four weeks as opposed to eight weeks for the 2021 NIR), the UK will still miss the target of 1 February 2025 for the final report to be submitted to the Aarhus Secretariat.[1] We also note the Government has adopted a "*targeted approach*" to the consultation by only seeking the views of stakeholders who have previously responded to consultations. This approach conflicts with *The Guidance on Reporting Requirements*[2] (the "**Guidance**") prepared by the Compliance Committee, which recommends a multi-stage consultation process including: (i) early consultation on issues to be included in the NIR; (ii) follow-up consultation on the draft report; and (iii) publication on the agency's website with an invitation to provide comments. The Guidance also highlights the benefit of multi-stakeholder working groups involving representatives of various public authorities, judicial authorities and NGOs to ensure comprehensiveness of information.

3. We also note the Government has adopted a more streamlined approach to the NIR by preparing an Addendum to be read alongside the 2021 National implementation Report. Again, this format departs from the Guidance, which recognises that while the submission of new information is possible under decision II/10 (para 7), a report of this nature reflects "*only a small part of the overall picture*".[3] Given the Addendum is to be read alongside the 2021 NIR, we request our comments on the 2021 draft NIR be taken into account as part of this consultation exercise. Those comments are attached to this response and many of them apply equally to the Addendum. As far as we are aware, those comments were not reflected in the final NIR submitted to the Secretariat.

4. Our concerns about the split nature of the NIR are compounded by the fact that the Addendum omits substantial amounts of relevant information, focusing instead on positive, but discrete, initiatives, which (while welcome) mask a period of significant decline in the UK's compliance with the Convention.[4] This is not the first time the draft NIR has failed to reflect the deeply-held and widely

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1 The Meeting of the Parties request that reports be submitted to the Secretariat so as to arrive no more than 180 days before the MoP (decision II/10, para 9).

2 The Guidance can be found here

3 *Ibid*, para 24

4 As articulated in ELUK's Statement to the Twenty-eighth meeting of the Working Group of the Parties to the Aarhus Convention and Sixteenth Meeting of the Task Force on Access to Justice (2-4 July 2024)

expressed public concerns about the UK's implementation of the Convention, not only in relation to access to justice but more generally, including public participation in environmental decision-making.[5]

5. The following non-exhaustive examples represent just a few of the relevant developments in the 2021-2025 reporting cycle that we assumed would be included in the NIR, but have not.

6. First, no mention is made of the passage of the Police, Crime, Sentencing and Courts Act 2022 or the Public Order Act 2023, both of which include harsh and disproportionate punishments for those found guilty of peaceful environmental protest – a right protected under Article 3(8) of the Convention. The passage of these Acts of Parliament was highly controversial at the time – and remains so - generating ongoing and substantial concerns from ELUK[6] and (amongst others) the UN Special Rapporteur on Environmental Defenders under the Aarhus Convention, Mr Michel Forst (see, for example, his end of UK Mission Statement in January 2024 and a video statement delivered in London on 12 April 2024).[7] No reference is made to these legislative developments, or the opposition they continue to attract, in the draft NIR. **The NIR should be amended to reflect these developments before submission.**

7. Second, the NIR mentions the Independent Review of Administrative Law (**IRAL**) (paragraph 32). IRAL's measured, comprehensive and evidence-based Report proposed just two reforms to substantive law: to reverse the effects of the *Cart* judgment and to introduce Suspended Quashing Orders as a new remedy. The Report emphasised that any changes should only be made to JR after the most careful consideration, given the important role that it plays in the UK's constitutional arrangements and, in particular, in maintaining the rule of law. Wildlife and Countryside Link (**Link**) and others were therefore deeply disturbed by the raft of proposals subsequently consulted upon by the Government. It wasn't simply that there was scant evidence of the need for change – the IRAL Report provided cogent and compelling reasons not to proceed with proposals of such magnitude that may have significant unintended consequences. While the majority of those proposals received widespread opposition, proposals for Suspended Quashing Orders and Prospective Quashing Orders became law with the passage of the Judicial Review and Courts Act (**JRCA**) 2022. **The NIR contains no reference to the JRCA, or the concerns raised about the potential ramifications for UK compliance with Article 9(4) of the Convention. This should be corrected.**

8. Third, there is no reference to Lord Banner's 2024 Review of National Infrastructure Projects (**NSIPs**) and the ensuing public consultation. The central premise for the Review - that NSIP delays are being caused by "inappropriate" legal challenges – was not sustained by the statistics. Whilst there has been a slight rise in challenges in recent years (noting the small sample size) that is explained by the corresponding rise in Development Consent Order (**DCO**) decisions. In fact, only 20% of DCO decisions have faced legal challenge. And of those a very high proportion - 80% - were arguable cases which the claimants had a right to present for adjudication via a substantive hearing. Despite the absence of any

available here

5 See comments on the 2021 NIR attached to this response

6 *Ibid*

7 Concern over the legislation includes how it is being applied in terms of sentencing for peaceful protest-related offences. The live sentencing appeal (judgment is reserved) in *R v Hallam and Others* (Friends of the Earth and Greenpeace UK intervening) included legal argument about the rights afforded to environmental defenders under Article 3(8) of the Convention. Whilst it would not be appropriate to debate the substance of this appeal, it is important to identify it, given the references made to the Convention

evidence of systemic issues on the claimant side[8], the Government consulted on two proposals: (i) reducing the number of permission attempts for a JR of DCO decisions to two or even one; and (ii) raising the permission threshold for JR claims challenging DCOs. Link pointed out that both these proposals raised serious access to justice concerns, in particular around compliance with Articles 9(1), (2) and (3) (to provide adequate and effective remedies, including injunctive relief as appropriate) and Article 9(4) (fairness) of the Convention. Another factor is that it is a reality that judicial perspectives when it comes to climate cases vary enormously. One has only to consider the landmark *Finch* case to see that: the case was initially refused on the papers, refused at an oral hearing, and finally got permission through renewal to the Court of Appeal. The decisions to refuse permission were both, it ultimately transpired, incorrect, given that the case went on to succeed in the Supreme Court.

9. We therefore note with disappointment the Government's announcement on 23 January 2025 that the permission stage for DCO applications will be amended to remove the paper stage entirely and the possibility of an appeal to the Court of Appeal in cases deemed "Totally Without Merit" (**TWM**). As such, all applications will be dealt with in an oral hearing (including, ironically, TWM applications that would have previously been dealt with on the papers). Our view, as expressed in our response to the Review and the consultation, remains that a reduced number of opportunities for DCO Claimants to seek permission is ultimately unfair to environmental claimants (as opposed to JR claimants generally) and represents a breach of Article 9(4) of the Convention. It will also be the case that such an approach will increase costs and delay for the majority of claimants destined to be granted permission for their cases to proceed. These claimants previously would have gained permission faster under the initial paper stage, but now will have to diarise, prepare for, attend, and pay external legal teams to conduct, an oral hearing. In the context of a system which is currently suffering substantial pressures on court time, and is non-compliant with the Convention in relation to prohibitive expense and access to justice, this will only worsen matters.

10. The tone of the Prime Minister's article in the Daily Mail denigrating "*time-wasting Nimbys and zealots*" is not only deeply regrettable, the content is factually incorrect. A DCO is not used to "*repair roads and railways*", nor is it the mechanism used for housing. Sizewell C is not being held up by a JR (the case finished some time ago) – it is delayed by a lack of funding. JR Claimants do not bring cases "*for themselves*" – they are invariably representing the views of local communities and acting in the public interest. That the Prime Minister himself uses such language and has a disregard for the facts is astonishing, particularly given his background as a lawyer. **The NIR should be updated to include the Review, the subsequent consultation and the recent announcement regarding further changes to JR.**

11. Fourth, the NIR states that in July 2024, the UK Government launched a "*rapid review of the Environmental Improvement Plan"* (EIP) (paragraph 6). No mention is made of the fact that the review was prompted by critical commentary on the lack of progress by the Office for Environmental Protection (**OEP**) alongside a Judicial Review challenging the Secretary of State's decision not to review the Plan on the basis of catastrophic declines in wildlife brought by Link.

12. The failure to reflect the reality of implementation during this period is not purely presentational. The Parties are requested to submit a report on legislative, regulatory or other measures taken to implement the provisions of the Convention and their practical implementation. Recital 11 of the

[8] See Wildlife and Countryside Link's response to the consultation here

Convention expressly recognises the "*desirability of transparency in all branches of government*". The Guidance also recommends that, when preparing its report, Parties focus on those issues that are causing the most problems with implementation at the national level (para 39).[9] It is only in that way, the Secretariat can prepare a synthesis report that accurately identifies systemic challenges to the implementation of the Convention. **The NIR should be amended to include relevant regulatory and policy developments in the 2021-2025 reporting period (including, but not limited to, those highlighted above). It should also identify outstanding Communications in the relevant section concerning the UK's compliance with the Convention (some of which are referred to below).**

Detailed comments

Article 3, paragraph 8

13. The Addendum refers to the Legal Support Action Plan published in 2019, and outlines some support provided to litigations in person. However, it does not refer to the fact that the Crown's position in the recent sentencing appeal of *Hallam and Others*[10] was that this provision had not been implemented in UK domestic law and therefore it had no bearing whatsoever on the appeal. [11]

Article 5 – Collection and dissemination of environmental information

Legislative, Regulatory and other measures implementing the provisions on the collection and dissemination of environmental information in Article 5

14. This section of the NIR fails to record that, as of November 2024, the new IT system operated by the Ministry of Justice (**MoJ**) no longer records information on Aarhus cases. This inevitably means that neither the public nor the MoJ will be able to undertake any meaningful analysis on Aarhus cases in England and Wales either now or in the future (including the impact of legislative reforms on the number of cases being brought or how successful they are). There would appear to be no rationale for this decision.

15. Notwithstanding the above, the UK's Final Progress Report to the Compliance Committee in November 2024 confirms that the Northern Ireland Courts and Tribunals Service has been capturing data on Aarhus cases since June 2023. **The NIR should be amended to reflect these important changes and their implications for the monitoring and enforcement of the Convention.**

Article 6 – Public participation in decisions on specific activities
Article 7 – Public participation concerning plans, programmes and policies relating to the environment

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9 See also The Aarhus Convention Reporting Mechanism 2025 Reporting Cycle – Practical Considerations. See here

10 The hearing before the Lady Chief Justice took place on 29-30 January 2025 at the Court of Appeal (Criminal Division). Somewhat concerningly, the Crown's position in *Hallam* was that the only way that the Aarhus Convention had been implemented into UK domestic law was through amendment to the Civil Procedure Rules in relation to costs in legal cases

16. Link understands that the Government in England is intending to implement a programme of reforms replacing Environmental Impact Assessment (**EIA**) and Strategic Environmental Assessment (**SEA**) with Environmental Outcome Reports (**EORs**). While the Government has the power to implement such reforms through the Levelling Up and Regeneration Act 2023, and EORs were referred to in the Nature Recovery and Development working paper (which proposed the Nature Restoration Fund), no further details regarding content or timing have been published to date. **The NIR should be amended to clarify these proposals and their timing. Any reforms must not reduce the overall level of environmental protection afforded under the EIA/SEA.**

Article 8 – Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments
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

17. The NIR fails to reference two ongoing Communications concerning Article 8 of the Convention submitted by Friends of the Earth (England, Wales and Northern Ireland)[12] and WWF UK[13]. **While it would be inappropriate for the NIR to debate the substance of these Communications, the fact they have been submitted, declared admissible and that Findings are awaited should be recorded in the NIR so the public can see that legitimate concerns about implementation have been raised.**

Article 9 – Access to Justice
Legislative, regulatory and other measures implementing the provisions on access to justice in Article 9
Article 9, paragraph 4

18. Paragraph 29 of the draft NIR states: "*In Scotland, access to justice remains assured through the continuing provision of civil legal aid and provisions for exemption from court fees for those in receipt of specified state benefits*". We dispute that "*access to justice remains assured*" in Scotland. The reality is that accessing justice in environmental matters remains prohibitively expensive. There is no "*continuing provision of civil legal aid*". Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 makes it impossible to obtain civil legal aid in most environmental cases. The introduction of an exemption for court fees for Aarhus cases in Scotland is a welcome - but minor – change. It has not materially improved access to justice. **The NIR should be amended to reflect these concerns.**

19. The NIR also fails to reference ongoing Communications concerning Article 9 of the Convention. The first was submitted by the Royal Society for the Protection of Birds, Friends of the Earth (England, Wales and Northern Ireland), Friends of the Earth Scotland, and a law firm, Leigh Day Solicitors[14] and

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12 See Communication ACCC/C/2017/150 United Kingdom here. The Communication was submitted on 31 October 2017 and alleges non-compliance with Articles 3 (1) and 8 of the Convention in connection with a draft "Great Repeal Bill". The Communication was declared admissible on 5 January 2018.

13 See Communication ACCC/C/2022/194 United Kingdom here. The Communication was submitted on 10 August 2022 and alleges non-compliance with Article 8 of the Convention with respect to public participation in decision-making on free trade agreements. The Communication was declared admissible on 12 December 2022

14 See Communication ACCC/C/2017/156 United Kingdom here. The Communication was submitted on 7 December 2017 and alleges that the UK fails to comply with article 3 (1) and 9 (2)–(4) of the Convention by failing to ensure courts undertake an adequate review of the substantive legality of certain decisions,

the second by the Environmental Rights Centre Scotland and others.[15] **As above, the fact that Findings are awaited should be recorded in the NIR so the public can see that legitimate concerns about implementation have been raised and found admissible.**

Article 9, paragraph 5

20. Neither the NIR nor the 2021 Implementation Report explain the position with regard to legal aid (public funding) in any jurisdiction of the UK. Concerns about the position regarding Scotland are highlighted above. The availability of legal aid for environmental cases is similarly restricted in Northern Ireland. There are some exceptions for limited categories of applicant (e.g. people below a certain income threshold and who have good prospects for their case), but where the case is of a wider public interest or other parties equally impacted could take action, legal aid will not be available.[16] This is compounded by the continued prohibition of Conditional Fee Arrangements (CFAs) in Northern Ireland and explains why a significant number of applicants have felt obliged to bring applications to the High Court, in major environmental challenges, without the benefit of any legal representation.[17] **The NIR should be amended to explain the limitations with regard to legislative barriers and public funding in all jurisdictions of the UK.**

Obstacles encountered in the implementation of Article 9

21. Paragraph 33 refers to the recent Call for Evidence on access to justice hosted by the MoJ.[18] The Call for Evidence confirms that the Government will "*consider the responses received to the questions raised in this call for evidence and will aim to publish a response within three months of the closing date. This will set out the Government's decision with regards to each of the ACCC's recommendations in light of the responses received*". **We submit that it would be helpful for the NIR to confirm that commitment and, preferably, include a high-level summary of the points made by consultees.** Link, for example, submitted a detailed response, which identified multiple issues of what we consider to be non-compliance regarding the requirement to ensure that proceedings are not prohibitively expensive.

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acts and omissions. The Communication was declared admissible on 22 March 2018

15 See Communication ACCC/C/2022/196 United Kingdom here. The Communication was submitted on 29 August 2022 and alleges non-compliance by the UK with Articles 9(2) - (4) of the Convention with respect to access to justice regarding planning decisions. The Communication was declared admissible on 21 February 2023

16 See *Demystifying the Cost of Environmental Justice on the Island of Ireland – A Practical Guide and Recommendations for Reform* (2024). Environmental Justice Network Ireland (EJNI)

17 See ELUK Statement to the Twenty-eighth meeting of the Working Group of the Parties to the Aarhus Convention and Sixteenth Meeting of the Task Force on Access to Justice in July 2024

18 The Call for Evidence can be found here

For questions or further information please contact:

Niall Watson, Senior Policy Officer, Wildlife and Countryside Link E: niall@wcl.org.uk
Wildlife & Countryside Link, Vox Studios, 1 – 45 Durham Street, Vauxhall, London, SE11 5JH
www.wcl.org.uk

12 February 2025

This Environment Links UK statement is also supported by the following organisations:

Bat Conservation Trust
ClientEarth
Environmental Rights Centre Scotland
Friends of the Earth (England, Wales, Northern Ireland)
Institute of Fisheries Management
League Against Cruel Sports
Open Spaces Society
River Action
Royal Society for the Protection of Birds
Wild Justice
WWF-UK