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26th November 2020

Dear Ms Angelopulou,

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

Introduction

1. We welcome the opportunity to comment on the UK's draft National Implementation Report (NIR) in advance of the Seventh Meeting of the Parties to the Aarhus Convention (Aarhus MoP) in October 2021.

2. This response has been drafted by Friends of the Earth (which covers England, Wales and Northern Ireland), Friends of the Earth Scotland, the RSPB and the Environmental Rights Centre Scotland. We are also grateful to have received views from experts in the field of access to environmental information.

General Comments

3. We note that Defra has given stakeholders nearly 8 weeks to respond to the draft NIR. This is a substantial improvement on the 10 working days provided in 2017, and it fulfils the 1-2 months consultation period recommended by the Secretariat in the 2021 Reporting Cycle.[1] We note the UK would appear to have skipped the first step of the recommended process (consultation on the content of the first preliminary draft outline of the report, which is advised to run between May – July 2020). However, we recognise the onset of the Covid 19 global pandemic in Spring 2020 presented the Government with profound challenges during that period and we recognise the progress made in respect of consultation on the draft NIR.

4. We hope that timely consultation on the draft document will enable the UK to meaningfully take into account the views and evidence received and submit its final NIR on the recommended submission deadline of 1 February 2021 or, at the latest, the formal deadline of 21 April 2021 (the latter date being 180 days in advance of the MoP). This will enable the Secretariat to include the findings of the UK NIR

[1] In accordance with Decision IV/4 of the Fourth Meeting of the Parties (ECE/MP.PP/2011/2/Add.1) here

in the Synthesis Report of the Status of Implementation of the Convention. The late submission of the NIR in 2017 meant that the UK's findings were unfortunately omitted from the important overview presented to the MoP.

5. We outline our observations on the draft NIR below. In order to avoid unnecessary duplication, we append our recent (October 2020) comments on the UK's final report on the implementation of Decision VI/8k to the Meeting of the Parties to the Convention, which concerns Article 9(4) of the Convention and prohibitive expense.

6. As a general point, we wish to point out that (as in previous years) the draft NIR fails to reflect the considerable, and ongoing, 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.

7. In this respect, it would be helpful for the UK NIR to refer to Communications concerning the UK's compliance with the Convention in the relevant sections of the Report and not just at the end. This is particularly relevant where the UK has been found to be in non-compliance with the Convention. For example, there is one out of date reference to Decision V/9n of the Meeting of the Parties to the Convention (arising from Communication ACCC/C/2008/33 and others) in paragraph 136. It would be easy for anyone reading this report to assume the UK complies with the Convention in its entirety unless they read right until the end. Having a brief reference, or even a footnote, to ongoing and concluded Communications would enable the reader to obtain a much more informed and accurate picture of compliance.

8. It is also an unfortunate consequence of the submission process that previous reports are updated (with clean and track-changes versions available). Some sections of the report are now significantly out of date, which can also give another misleading impression.

9. As a final general comment, it would be helpful, given that the three devolved administrations in the UK each have devolved powers in relation to the environment, if the NIR consistently specified the geographical extent of the legislation or other measures it refers to. Too often reference is made to existing measures, or to the UK Parliament passing new legislation, without specifying its extent, which might lead many readers 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.

10. On a related note, we wish to highlight a recent positive development in Wales that should be reflected in the final NIR. In July 2019, the Minister for Environment, Energy and Rural Affairs in Wales, Lesley Griffiths MS, convened the Environmental Governance Stakeholder Task Group to assist with the development of options for environmental governance in Wales once the UK leaves the European Union. The Task Group provided a set of recommendations in March 2020[2] and in April the Minister commissioned a wider options appraisal exercise to inform a considered decision on the right approach for Wales. On 19th November 2020, the Minister advised Members of the Senedd that the options appraisal work was complete and that she had accepted the majority of the Task Group

[2] See ENVIRONMENTAL GOVERNANCE IN WALES POST EXIT FROM THE EUROPEAN UNION: REPORT from the ENVIRONMENTAL GOVERNANCE STAKEHOLDER GROUP here

recommendations. This includes Recommendation 4, which states: "*The Aarhus Convention rights (access to information, public participation and access to justice) should be articulated in any forthcoming legislation for environmental governance*". We are pleased to note this welcome recognition of the importance of the Convention in ensuring environmental governance in Wales and would hope to see a similar level of commitment in the other administrations of the UK.

Detailed comments on the Draft NIR

LEGISLATIVE, REGULATORY AND OTHER MEASURES IMPLEMENTING THE GENERAL PROVISIONS IN ARTICLE 3(2), (3), (4), (7) AND (8)

Article 3(2)

11. Paragraph 5 of the draft NIR states that several general measures have been taken to comply with this provision "in the UK" and gives as examples measures taken in the jurisdictions of England and Wales and Northern Ireland. Paragraph 10 does likewise. Paragraph 9 refers to guidance relevant only in England. If any similar measures have been taken in Scotland, these should be specified. Otherwise, it should be made clear in the NIR that the measures cited do not apply in Scotland and that no relevant measures have been taken there.

12. There is some provision in Wales through Planning Aid Wales, a charity supported by the Welsh Government to enable community engagement in planning matters. In England, there is limited (insufficient) funding provided for Planning Aid London, which is run by the Town and Country Planning Association (TCPA). The experience of Friends of the Earth England, Wales and Northern Ireland in terms of supporting communities on the ground in England, is that planning officers have no dedicated, funded time to support communities through the planning process. Planning services have been severely cut in the last decade in England.

13. We would further add that whilst some measures are referenced for some jurisdictions in the UK, there is no analysis or evidence provided as to their efficacy or quality. For example, it is our direct experience of the system for the administration of justice that it is not easy to use or understand and that people do not receive much assistance from the court service or other public bodies, and indeed, legal aid has been significantly cut back in recent years. No measures appear to be listed that either specifically deal with guidance for access to justice, nor any analysis provided of whether any measure that may be listed is effective and meets the Convention requirements. The requirement in Article 3(2) is to 'endeavour to ensure', which necessitates review and updating, in order to ensure achievement.

14. Paragraph 8 of the draft NIR explains that the UK's Consultation Principles were revised in 2018[3] (again, it should be clarified that these principles do not apply in relation to devolved matters in Scotland). The Consultation Principles were introduced in 2012 and then revised in 2016 and 2018. In responding to the 2014 draft NIR, concern was expressed that the introduction of the 2012 Principles would restrict participation in policy-making by limiting consultation to targeted "stakeholders" and reducing consultation periods from a general practice of 12 weeks to between 2-12 weeks (with no consultation at all in some cases). In 2017, FoE (England, Wales and Northern Ireland) and the RSPB pointed out that the 2016 Principles weakened the position further as they appeared to encourage officials to consult primarily only where there is a legal duty to do so and remove safeguards regarding duration

[3] See here

of consultation (and it is worth noting here that there is no legal duty to comply with Article 8 of the Convention, further as to which please see below). The 2018 consultation principles continue that same trajectory. Public bodies are urged not to "*consult for the sake of it*" and to ask departmental lawyers whether there is a legal duty to consult. They point out that consulting for too long "*will unnecessarily delay policy development*" and Government Departments should consider targeting specific groups where appropriate.

15. The Principles also urge officials to consider whether representative groups exist. However, our experience remains that insufficient weight can be given to representative bodies responding to consultations. They are often treated as one response of normal weight, rather than noting that they are the collective view of numerous individuals and/or organisations that for practicality or strength in unity are expressed in one place. One way to avoid this would be for the Consultation Principles to make specific reference to the weight to be afforded to joint submissions.

16. A further concern is that the Consultation Principles do not require compliance with Article 8 of the Convention, which has not been implemented/incorporated into domestic law. No other codified legal provision requires compliance either, and so consultation or other engagement with the public in the formulation of new laws that could have a significant impact on the environment is not legally and consistently mandated. There are situations where it could be *lawful* under current UK law – because the Convention has not been implemented in this regard – for Government departments not to consult, despite the requirements of the Convention. Whilst the Consultation Principles may be helpful to some extent in guiding *how* consultation should be done once it is decided that consultation should occur, they do not mandate a consultation when Article 8 is engaged (and neither is there any other legislative provision that does so). This deficiency should be recognised and acknowledged in the final NIR. In addition, given that the Consultation Principles are a non-binding code of conduct (the documents states that it "*does not have legal force*"), and aside from concerns regarding the sometimes unhelpful approach to consultation which they promote, they cannot achieve on their own the consistent framework which is required to implement Article 8 rights, as required by Article 3(1) of the Convention.

17. There is an existing Communication from FoE (England, Wales and Northern Ireland) before the Aarhus Convention Compliance Committee on exactly this point: ACCC/C2017/150[4]. Whilst this Communication is an alleged breach of Articles 3(1) and 8 of the Convention, it cannot be said that the UK has endeavoured to ensure adequate assistance and facilitation to the public via public bodies in this regard as per Article 3(2) requires, whilst Article 8 is not implemented at all.

18. We would further note that the Aarhus Implementation Guide makes clear that simply the provision of information is not enough to comply with this provision when read with Article 3(3).[5] Furthermore,

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4 See here

5 See here, page 62: "*Because officials are in the public service, it is reasonable to expect that they should help to facilitate the public's use of their rights under the Convention, by providing information, guidance and encouragement. Providing information alone is not enough, as can be seen by reading this provision together with article 3, paragraph 3. That paragraph concerns environmental education and awareness-raising, especially about the subject matters of the Convention. Paragraph 2 can only be read to go beyond the general information-oriented obligation found in paragraph 3, to require a closer form of assistance by authorities faced with the specific needs of members of the public in a particular case*."

the UK is considered out of compliance with Article 9 of the Convention, and so any information it provides detailing access to justice measures will likely be similarly deficient.

Article 3 (3)

19. We are not aware of – and the UK does not set out any information on - any specific training programmes provided by the UK Government to inform and educate the public about their rights of access to information, public participation or access to justice under the Convention. We note again that simply providing information is not necessarily sufficient for compliance and that proactive additional steps may be required as described by the Aarhus Implementation Guide.

20. We appreciate that (as it is enabled to do so[6]) Defra has created a code of practice for the EIRs[7] and the Information Commissioners have a responsibility to provide advice and guidance for those seeking (and providing) information. In England, the Information Commissioner has also set a strategic aim to "*Improve standards of information rights practice through clear, inspiring and targeted engagement and influence".*[8]

21. In addition, non-Aarhus Convention specific Court guidance has been published online about environmental judicial reviews.[9] However in our view, although useful, codes of practice and written guidance are not enough to educate and raise awareness, or to ensure accurate understanding by the lay person of the system and their Aarhus rights. Promotion and out-reach efforts are required for each Convention 'pillar' to meet Convention requirements.

22. The Northern Ireland Courts and Tribunals Service have published a similar Guide for Litigants in Person.[10] However, there is only one paragraph covering the "Judicial Review court", which is not listed in the index and is wholly inadequate for the complex nature of environmental judicial reviews and Aarhus Convention rights. In response to the lack of available information FoE (England, Wales and Northern Ireland) worked with numerous lawyers in NI at the end of 2019 to develop a bespoke and detailed Guide for environmental and planning judicial reviews. The Guide was endorsed by the Lord Chief Justice (who wrote the foreword) but has not yet been adopted by the NI Courts and Tribunal Service as an official information tool. So, while some information will hopefully be available soon, it has certainly not been provided by the UK as a Party to the Convention.

23. As a wider point, there is no UK-wide, Government run or supported Aarhus Centre providing information and/or education about the Aarhus Convention. The new Environmental Rights Centre for Scotland is a third-sector initiative aiming to increase public awareness and facilitate the realisation of environmental rights in Scotland, including Aarhus rights. It has received no government support or funding.

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6 EIRs 2004, Regulation 16: "*The Secretary of State may issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would, in the Secretary of State's opinion, be desirable for them to follow in connection with the discharge of their functions under these Regulations*."

7 See here

8 See here, page 8

9 For example, for English and Welsh cases please see here

10 Northern Ireland Courts and Tribunals Service - *A guide to proceedings in the High Court for people without a legal representative*. See page 18, available here

24. Paragraph 13 of the draft NIR repeats and expands on information included in the 2017 NIR about the 'Scotland's Environment' website, but this multi-agency resource still contains no information about Aarhus rights.

25. There are two groups in Ireland currently working (separately) to set up an *ad hoc* mobile version of an Aarhus centre covering Ireland and Northern Ireland. One of the groups is located in Northern Ireland and is in receipt of funding from another civic society to scope out this task. Plans are at an early stage but, as far as we are aware, there is no involvement or support for this initiative from any Government bodies.

26. Whilst the UK may well provide 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.[11]

27. It is therefore clear that all nations of the UK need to do more to fully implement the Aarhus Convention, raise public awareness, support and facilitate its application, and educate and encourage its full use.

28. Where measures are reported on in the NIR report, they should specifically identify how they address the Aarhus Convention and the relevant specific provisions, as applied for each jurisdiction.

Article 3(4)

29. Tax relief for charities applies across the UK, but paragraphs 21 and 22 of the draft NIR also refer to civil service reforms and Defra activities that do not affect Scotland. If any similar initiatives have been taken in Scotland, these should be specified. If not, it should be made clear that those cited do not apply in Scotland and that no relevant initiatives have been taken there.

Article 3(7)

30. We welcome the UK's continuing commitment to the international environmental agreements to which it is a Party in paragraph 23 of the draft NIR. The UK stands on the brink of substantial institutional and legislative reform and the ongoing climate of uncertainty arising from the UK's decision to leave the EU permeates every field. Within the environmental sphere, there are deep concerns about access to justice and the sufficiency of measures proposed to fill the enforcement deficit arising from the loss of the EU Commission's oversight role as well as the Court of Justice of the European Union (CJEU) and the EU complaints mechanism. We therefore view the UK's commitment to (pending full implementation of and compliance with) the Aarhus Convention to be of the utmost importance.

31. Despite the UK's commitment to international environmental agreements and stated ambition to be world leading in its environmental protection, with environmental policy and governance being mostly

11 Aarhus Implementation Guide, page 64

devolved, the almost complete lack of completed Common Frameworks on environmental matters to guide and govern the four nations of the UK environmental protection, is extremely concerning. Whilst a member of the EU there were of course directly applicable legal requirements and therefore little scope for the UK nations to diverge.

32. In addition, despite devolution and the Ireland and Northern Ireland Protocol[12], a UK Internal Markets Bill was introduced and is being fast tracked through the Westminster Parliamentary process. The UK Government had stated that the UK's existing high standards across areas including environmental standards, workers' rights, animal welfare and food standards would underpin the functioning of the internal market and committed not to regress existing standards. However, the Bill does not give legislative effect to these commitments. On the contrary, the measures set out in the Bill could affect the ability of all administrations within the UK to achieve their environmental ambitions and potentially parts of the UK could be forced to accept lower standards or be faced with legal challenges as to whether a particular measure was a "necessary" means of pursuing a legitimate public policy objective. For these and other reasons, the Scottish and Welsh Parliaments withheld their legislative consent to the Bill.

33. As explained by the Institute for Government's Raphael Hogarth[13], the Bill includes the potential to break international law, as it gives ministers powers to make regulations about state aid and customs procedures for trade from Northern Ireland to Great Britain, and would allow ministers to make regulations inconsistent with the UK's obligations under the Withdrawal Agreement including the Northern Ireland Protocol. The existence of those powers is a breach of Article 4 of the Withdrawal Agreement, which provides that the UK must use primary legislation to give full effect to the Withdrawal Agreement in domestic law. The Bill is therefore concerning as it breaches international law, lays the ground for much more extensive breaches of international law, and tries to insulate ministers from judicial scrutiny at home. All of which, of course, can have a very considerable negative impact in the environmental field relevant to the Aarhus Convention, its implementation, and promotion in other international frameworks. It demonstrates that UK adherence with international law may - intentionally - not always be consistent. The UK should address this in its final NIR.

34. Paragraph 23 also refers to the UK Government's 25 Year Environment Plan. In attempting to address pollution, protect and enhance wildlife and deliver a more sustainable farming system, the Plan has significant green intentions. In the first year since the Plan was published, there have been encouraging announcements from Defra on resources and waste, net biodiversity gain and nature recovery networks. However, it should be noted that the 25 Year Plan only covers England and there are residual concerns as to whether the funds, legal underpinning, binding targets and enforcement needed to make these plans a reality will be provided in time.[14] During its second year, NGOs are pressing for the Plan to be underpinned in law by a Westminster Environment Bill, which includes ambitious targets

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12 In summary, the Protocol governs relations between Ireland and NI to remove the need for a hard border between them, recognising Ireland continued membership of the EU. It includes a requirement for NI to continue to be bound by 18 pieces of EU legislation.

13 See here

14 Further concerns are set out in the Natural Capital Committee's two reviews of the Plan 2019 available here and here

for nature's recovery, to reduce the UK's global carbon and environmental footprints and to establish a robust enforcement body.[15] We urge the UK to reflect these widespread concerns in the final NIR.

Article 3(8)

35. As this provision aims to ensure that persons exercising their Aarhus rights are not penalised, persecuted or harassed, it is unclear why paragraphs 25 and 26 of the draft NIR comment on access to review procedures under Article 9(1) of the Convention. As they do, however, we wish to make the following comment.

36. The last sentence of paragraph 25 distinguishes the appeal procedures in Scotland from those in the rest of the UK: the NIR should also clarify that the need for appellants in Scotland to employ Counsel in the Court of Session is likely to make the process of appealing against the regulator's decision far more complex (and prohibitively expensive) than in the rest of the UK, where such appeals are to less formal tribunals. This means that, in Scotland, except in the unlikely event that they can obtain Legal Aid, members of the public seeking access to environmental information are far less likely to appeal against the regulator's decision than are public authorities seeking to avoid disclosure of such information. In the regard, the Scottish Information Commissioner noted in 2017 that "*although the EIRs came into force in January 2005, none of the decisions issued by the Commissioner have been appealed by applicants (we issued 151 decisions under the EIRs in the last three years alone). The cost of appealing is likely to have been a major reason for a number of applicants."*[16]

LEGISLATIVE, REGULATORY AND OTHER MEASURES IMPLEMENTING THE PROVISIONS ON ACCESS TO ENVIRONMENTAL INFORMATION IN ARTICLE 4

37. Paragraph 40 of the draft NIR clarifies that the Cabinet Office publishes quarterly and annual statistics and reports on the Government's obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations (EIRs) 2004.[17] The draft NIR highlights that the latest annual bulletin shows that nearly 49,500 requests were received in 2019, of which 1647 were handled under the EIRs 2004. However, the draft NIR contains no analysis of these data bulletins to provide an assessment of the extent to which the UK is complying with the requirements of Article 4 of the Convention in this respect. For example, the draft NIR does not quantify how often requested environmental information is made available "*as soon as possible and at the latest within one month after it has been submitted"* (Article 4(2)) or how often the exemptions in Article 4(3) of the Convention are employed (and if done correctly or incorrectly).

38. In our experience, Government Departments and Local Planning Authorities routinely rely on (and seek to extend) the statutory time-period of 20 working days to provide information under the EIRs 2004. This makes it extremely challenging for potential claimants in Judicial Review to obtain the information they need in order to comply with the Pre-Action Protocol and decide whether to issue proceedings or not. We urge Defra to not only provide the link to the data bulletins but, in accordance with the requirements of the 2021 Reporting Cycle, to include an official interpretation of the data to

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15 For more information, see T*he 25 Year Environment Plan: One year on A Wildlife and Countryside Link report* available here

16 See here

17 See here

inform understanding as to whether the requirements of the Convention are being fulfilled.[18] Provision of statistics from the Information Commissioner's Office relating to compliance and decision notices would also be informative, as would a consultation with the public on their experiences of using the EIRs 2004 in practice. As above, our experience is that public authorities will often do what they can to withhold information and delay disclosure when it suits them (and this is an issue of compliance that may well not reach the ICO by way of formal complaint and can go largely unseen from an enforcement perspective). This is a key obstacle to the implementation of Article 4 and should be acknowledged in the final NIR.

39. We also draw attention to concerns regarding the late reliance on exemptions under the EIRs 2004 and the Environmental Information (Scotland) Regulations 2004. The judgment in *Department for The Environment, Food and Rural Affairs v Information Commissioner* (*Birkett*)[19] is being interpreted as meaning that an exception can always be raised late by a public authority, with no penalty. For example, late exceptions are being raised at internal review, at the stage of the Commissioner investigations,[20] or even at the stage of appeals to the Tribunal (England and Wales) or to the Court of Session (Scotland) against Commissioners' decisions.[21]

40. It is obvious to requesters for information that to allow public authorities to introduce further and different exceptions at late stages, upon which basis a refusal to disclose could be upheld on appeal, in practice undermines the regime for access to environmental information.

41. Public authorities might and do delay, for many months or even years, addressing themselves properly to the exceptions that could be applied, safe in the knowledge that, if the matter ever made it to appeal, it could then, even at that very late stage, invoke any exception or any number of exceptions it wanted to, that it then thought it had a chance, however slim, of substantiating.

42. As the Tribunal stated in *Department for Business, Enterprise and Regulatory Reform v ICO and Friends of the Earth:* "*it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations. This is a public policy issue which goes to the underlying purpose of FOIA*".[22]

43. Put another way, late reliance on exceptions allows a public authority not one, not two, not even three, but four bites at the cherry, with those bites capable of being taken over a prolonged period of time,

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18 See key tips on the content here

19 [2011] EWCA Civ 1606, [2012] PTSR 1299

20 In Scotland, Application for Decision by the Scottish Information Commissioner, Scottish Environment Protection Agency, 201902107S, a new exception has been raised at the stage of the Scottish Information Commissioner's investigation, but only after the Commissioner indicated to the authority that the previously relied-upon exception was disapplied by the 'exception to the exceptions' on information on emissions.

21 In England and Wales, Appeal EA/2019/0412, *Department For Environment, Food and Rural Affairs v. Information Commissioner and Guy Linley-Adams*, involved late reliance on two completely new exemptions under FOIA , raised for the first time at the appeal stage.

22 EA/2007/0072, 29 April 2008

without penalty, introducing a high degree of uncertainty for applicants for information. This uncertainty undermines the right in Article 4 and, hence the Article 1 objective.

44. Finally, we draw your attention to concerns about the implication of the current Environment Bill for the operation of the EIRs 2004. The Bill establishes the Office for Environmental Protection (OEP) with a range of environmental functions including the investigation of complaints of serious failure by public authorities to comply with environmental law. Clause 40 of the bill prohibits the disclosure of specified information relating to these functions. Concerns have been raised that these prohibitions might be intended to override the right of access to environmental information under the EIRs 2004.[23] The Explanatory Notes to the Bill say these prohibitions do not affect the public's right to information under the EIRs 2004 except in one specified way.[24] However, the Bill itself does not provide for this. It contains a substantial list of exceptions to the prohibitions, none of which states that the prohibitions do not affect the operation of the EIR.

45. The Bill would prohibit disclosure of information about OEP investigations into suspected failures by public authorities to comply with environmental law. The prohibition would only be lifted once the OEP decides to take no further action. However, the status of the information in question would be changed to allow a particular EIR exception that might not otherwise apply to be invoked. This would make it more likely that the information could be withheld under the EIRs 2004. That should not be necessary. Existing EIRs exceptions protect information whose disclosure is shown to be harmful and not in the public interest.

46. A prohibition would also apply to information which public bodies supply to the OEP to assist it with its functions. The information could only be disclosed with the consent of the body supplying it. If the prohibition on disclosure trumps the EIR right of access, this information could be withheld indefinitely, preventing public access to information about matters such as progress toward meeting environmental targets.

47. We believe these concerns should be reflected in the final NIR.

LEGISLATIVE, REGULATORY AND OTHER MEASURES IMPLEMENTING THE PROVISIONS ON THE COLLECTION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION IN ARTICLE 5

48. Paragraph 43 of the draft NIR refers to the Find Open Data service which brings together data published by central government, local authorities and public bodies, links to download data files, and help on creating an account to publish data. It also specifically highlights MAGIC,[25] a web-based interactive map service bringing together authoritative geographic information about the rural, urban, coastal and marine environments across Great Britain. The draft NIR reports that the website has over 2500 user sessions daily. We commend the listed partners involved in MAGIC as is, indeed, a truly excellent resource, enabling the user to access information about designated areas of environmental importance.

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23 See briefing by the Campaign for the Freedom of Information here

24 Paragraph 347 of the Explanatory Notes states: 'The only way in which the provisions affect the application of the EIR is in the manner set out in subsection (7): that is, that information mentioned in subsections (1) and (3) is capable of attracting the exception relating to the confidentiality of proceedings of a public authority where such confidentiality is provided for by law.'

25 See http://www.magic.gov.uk

49. However, we would observe that many environmental data of appropriate granularity and accuracy are managed by Local Environmental Records Centres and other members of the National Biodiversity Network, but the systems and baseline data are not yet adequate to achieve the aspirations of the 25 Year Environment Plan. Environmental data are not available for all areas. Despite industry guidance, most data generated due to development are not made available for re-use; where accessible, there is a lack of obligation to use the evidence base, and often lack of skills to interpret it. There is also a serious dearth of up-to-date information on the condition of protected sites (statutory and non-statutory), and the location of important habitat types. We believe the Government improvements could be made enhancing strategic considerations and enriching and sharing the data available to inform the process. This could be done by, *inter alia*:
    - Updating the Ancient Woodland Inventory, the Ancient Grassland Inventory, the Open Mosaic Habitats Inventory and the Priority Habitat Inventory;
    - Updating designation information on historic features including Scheduled Ancient Monuments;
    - Mapping other critical, irreplaceable habitats such as peatlands, including shallow and degraded peat; and
    - Increasing support for Local Environmental Records Centres Historic Environment Records and Local Wildlife Site partnerships.

50. We also note that 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, including information on the quality of the environment and information on pressures on the environment*". We note that a report covering England was published in September 2020 but there do not appear to be equivalent reports in the devolved administrations of a UK-wide report.[26]

51. We would also question whether the UK provides information in an appropriate form on the performance of public functions or the provision of public services relating to the environment by government at all levels in accordance with Article 5(7) of the Convention.

LEGISLATIVE, REGULATORY AND OTHER MEASURES IMPLEMENTING THE PROVISIONS ON PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES IN ARTICLE 6

and

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

52. The numbering of paragraphs in the draft NIR goes askew at this point, with numbers 34-50 repeated. This response nevertheless uses the numbers used in the draft NIR.

53. The list of statutory instruments at paragraph 34 of the draft NIR contains duplicate entries at m and dd.

54. Paragraph 35 of the draft NIR mentions 'national' regulations that satisfy the UK's obligations under this provision, but these do not cover the whole UK: the equivalent Scottish (and any other relevant) legislation should also be identified.

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26 See here

55. Paragraphs 36 to 42 go into some detail about how major infrastructure projects are consented in both England and Wales. Apart from the Electricity Act 1989, none of the legislation mentioned in those paragraphs applies in Scotland, and this should be made clear.

56. We are surprised the draft NIR makes no mention of proposed reforms to the English planning system as set out in the White Paper '*Planning for the Future*'.[27] While the Government maintains the proposals will "*streamline and modernise the planning process, bring a new focus to design and sustainability, improve the system of developer contributions to infrastructure, and ensure more land is available for development where it is needed*", many perceive the White Paper to be a devastating removal of public participation rights and local democracy. The proposals in paragraph 2.48 of the White Paper suggest a change to people's right to be heard in person at local plan Examinations in Public (EiPs). The White Paper states that planning inspectors will now have discretion over what form an objector's representations might take. Under paragraph 2.53, which is an alternative option to the proposal in paragraph 2.48, the White Paper suggests that any form of 'right to be 'heard' might be removed. The right to be heard under Section 20(6) of the 2004 Planning Act is the only clear civil right that exists in the planning process for the individual citizen. It includes the important phrase: 'Any person who makes representations seeking to change a development plan document must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination.' These changes, were they to go ahead, would take away the public's absolute right to participate and be heard in decisions and plans.

57. We appreciate the proposals are at an early stage, but the changes the Government has already made to Permitted Development Right (PDRs) have removed swathes of development from the public's right to object to site specific proposals is an indicator of how fundamentally this Government is undermining the implementation of the Aarhus Convention in England. There have been wide-ranging concerns about the implications for public participation expressed by elected members, leading NGOs and in the media. For example, the proposal to extend permission in principle is a serious undermining of the democratic process within the English planning system. Permission in principle avoids the provisions of the SEA Directive, and the public participation rights that it secures for example in Local Plans. In particular, the loss of democratic oversight and public scrutiny of actual development proposals will lead to worse outcomes for people and the environment under the new system. The Government's Planning White Paper for England seems to suggest a multitude of ways to gain consent that vary from place to place, which certainly is not 'simple' for the public to understand.

58. With regard to the statement in the White Paper that "*Local Plans should have a clear role and function, which should be, first, to identify land for development and sites that should be protected*" (paragraph 2.7), local plans already do this, but with clear environmental assessment requirements attached through SEA.

59. Under Proposal 1 of the White Paper**,** land would be placed in one of three categories: zones for growth, renewal or protection. We are concerned that by categorising land in this manner and conferring an 'automatic permission' (paragraph 1.16, bullet 1), 'permission in principle' or 'presumption in favour of development' within growth and renewal areas, together with simpler,

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[27] The White Paper was published on 6 August 2020 and consultation ran until 29 October 2020. The White Paper can be found here

shorter Local Plans, development management will be ineffective weak or absent under the proposed new system. Moreover, this approach is based on a major failure to understand that the principle and detail of the development are inextricably linked. Plans will require much more detailed site assessment processes to be robust. National datasets can speed up this process, but only detailed site investigations can ultimately reveal the suitability of a site in terms of archaeology, ecology, and flood risk, place-making, services availability, transport links and health impacts. Local information provided through the public opportunity to object to planning applications is essential in making this decision-making process more robust. Only 'protected areas' will retain the current system of planning and development control, but will still be complicated by PDR changes, brownfield registers, permission in principle, and the loss of local development management policy, creating a confusing and uncertain system for public participation and far less role for public input.

60. Paragraph 2.15 of the White paper on planning states that "*We want to move to a position where all development management policies and code requirements, at national, local and neighbourhood level, are written in a machine-readable format so that wherever feasible, they can be used by digital services to automatically screen developments and help identify where they align with policies and/or code*." We would be concerned were automated procedures to lead to schemes being approved without the scrutiny they warrant or conversely, miss opportunities for sustainable development from say a community led scheme whose proponents may be unfamiliar with the correct procedures. Automatic screening is no substitute for human judgement for many planning matters which require careful consideration and appraisal prior to a decision being reached on whether a development proposal can go ahead or not.

61. With regard to the suggestion that Sustainability Appraisals be replaced by a simplified process for assessing the environmental impact of plans (paragraph 2.19), it is essential that any replacement for SA fulfils the requirements of UK and international law and treaties. In our view, Local Plans and, where appropriate, Neighbourhood Plans must continue to be subject to Strategic Environmental Assessment (SEA). We also believe that national planning policy should undergo SEA or a similar exercise, to ensure environmental effects are appraised and alternatives considered and subject to public consultation at the national level.

62. Neighbourhood Plans - which foster community ownership of, and engagement with, planning - should continue to have a role in setting local policies tailored to the needs of their neighbourhood. Those responding to the consultation have highlighted that revised reforms should maintain many of the mechanisms for consultation that currently exist within the current English planning system, increasing transparency and participation where possible (e.g. through ease of access to information/data).

63. We would expect the final NIR to include a brief summary of all the proposals in all the English planning reform matters, including the already implemented changes to PDRs, along with any knock-on proposals for public participation in the planning process and the UK's obligations under Article 6 of the Convention, with particular regard to:
    - The right to be heard in the examination of local plans;
    - The involvement of planning committees in applications and plans;
    - Community consultation throughout each of the different ways to gain planning permission or consent in England's planning system;
    - The maintenance of SEAs as part of the Sustainability Appraisals in Local Plans;

- A tiered system of strategic planning;
- The maintenance of Neighbourhood Plans; and
- The retention and strengthening of EIA.

64. We further suggest that all the nations of the UK should consider whether under Article 6, it should introduce a Third Party Right of Appeal (TPRA) to augment public participation and the ability to challenge decisions (related to Article 9) – a point we raised in responding to the draft NIR in 2017.

65. Applicants who are refused planning permission (or are unhappy with the conditions imposed on the grant of a planning permission) have a statutory right of appeal. However, there is no such right given to objectors to appeal against a decision of a Local Planning Authority to grant planning permission. An objector might, if the project is one of more than local significance, persuade the Secretary of State, Welsh Ministers or Scottish Ministers, to "call in" the application for their own determination. And, if the application is called in, a Public Inquiry is normally held, in which the merits of the proposed development will be considered with a full opportunity usually given to the public to make written and oral representations at the Inquiry. However, where an objector fails to have an application called in and planning permission is granted by the local planning authority, their only remedy is to challenge the decision to grant permission through judicial review. Save where the decision is *Wednesbury* unreasonable, the Court will be unconcerned with the merits of the development and limit its consideration to the lawfulness of the decision-making process.

66. The creation of a statutory right for third parties to appeal and have the merits of proposed development examined at a public inquiry, at which their comments could be expressed and taken into account, could address the absence of an Article 6(7) compliant public hearing.

67. Paragraph 58 of the draft NIR describes the passage and content of the Planning (Scotland) Bill, which became the Planning (Scotland) Act 2019, saying it "*contains a number of provisions which enhance the opportunities for communities to shape the places they live, work and play*". We note that during the passage of the Bill a campaign was fought by Scottish Environment LINK, Planning Democracy and communities for a TPRA to be included in the new legislation – for the second time in little over a decade, the first being fought around the Planning etc. (Scotland) Act 2006 – on the basis that trust amongst communities in the Scottish planning system is at an all-time low, as demonstrated by a Scottish Government-commissioned independent study on Barriers to Community Engagement in Planning.[28] Opposition parties introduced amendments to that effect, but the Scottish Government voted these down. The new legislation fails to address long-standing concerns about public participation in planning.[29] The NIR should explain why the Scottish Government considers a TPRA is not necessary to meet the requirements of Article 6(1).

68. In England, the Ministry for Housing Communities and Local Government in the Planning White Paper under Proposal 3 has identified the simplification of environmental assessment as part of abolishing existing 'sustainability appraisal'. We are concerned that these proposals are too vague to gain an understanding of the implications for the SEA Directive (which derives from and implements Article 7 of the Convention), in terms of rigour and purpose. Proposal 16 identifies the simplification of environmental impact assessment. Again, we are concerned that these proposals for England mean

28 See here
29 See here

that the provisions of the Aarhus Convention may be undermined, given there is insufficient detail to understand how this 'simplification' may be implemented. If policy making is taken out of local plans, they are taken out of the consultation and assessment requirements of the SEA Directive as they become part of national planning guidance and/or design codes. There have been no assurances that legislation for planning will require this guidance in order for the guidance to clearly require environmental assessment, and remain compliant with the Convention.

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

69. This Article has not yet been incorporated into UK law, and represents a glaring omission. It is the subject of an extant complaint for breach of Articles 3 and 8 of the Convention (ACCC/C2017/150[30]) due to the way Brexit legislation was produced. The existence of this complaint and the issues it raises should be noted in the final NIR, because at the very least, until the Compliance Committee determines the complaint the UK cannot credibly say it is in compliance where there is a clear lack of any implementing legislation for Article 8 and a complaint that the Committee has declared admissible.

70. The comment that there is a general practice is not sufficient where there are examples of the practice not being adhered to and a formal complaint made on that basis. The lacuna is clear. In this regard, we refer to the hearing before the Aarhus Convention Compliance Committee, held on 5th November 2019, for the Joint Communication brought by RSPB, FoE (England, Wales and Northern Ireland), Friends of the Earth Scotland and Leigh Day regarding substantive review[31]. During the hearing, the Compliance Committee commented on the quantity of evidence needed to establish systemic non-compliance. Whilst the ACCC's final decision on this Communication is outstanding, the Committee indicated that in some instances, providing just one example of non-compliance can be enough to establish that there is a systemic issue due to its effect.

LEGISLATIVE, REGULATORY AND OTHER MEASURES IMPLEMENTING THE PROVISIONS ON ACCESS TO JUSTICE IN ARTICLE 9 and OBSTACLES ENCOUNTERED IN THE IMPLEMENTATION OF ARTICLE 9

Article 9

71. We are surprised the draft NIR does not mention the establishment of the Independent Review of Administrative Law (IRAL) panel to examine Judicial Review in England and Wales announced on 31 July 2020.[32] The Panel chaired by Lord Faulks QC will consider whether the right balance is being struck between the rights of citizens to challenge executive decisions and the need for effective and efficient government. It will examine a range of data and evidence, including relevant caselaw, on the development of JR and consider whether reform is justified. In addition to constitutionally significant questions concerning the scope of JR and the possible codification of JR grounds, it seeks to address procedural issues such as timing, standing, remedies and costs. It is therefore clearly highly pertinent to the relevant legal review mechanisms under Article 9 of the Convention and we would expect its

30 See here
31 Communication ACCC/C/2017/156
32 See here

establishment and Terms of Reference to have been highlighted in the draft NIR. We hope that this concern will be reflected in the final NIR.

Articles 9(2) and (3)

72. Article 9(2) of the Convention requires contracting 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.

73. Across all jurisdictions, *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.

74. In 2017, a Communication was submitted to the Aarhus Convention Compliance Committee alleging 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.[33] The Communication was accepted as admissible on 15th March 2018 and a hearing was held in Geneva on 5th November 2019. The Committee submitted numerous questions to the Communicant and the UK Government on 1 June 2020, following which there has been correspondence by both parties. The Committee's Findings are expected in due course. We would not necessarily expect the draft NIR to discuss the Communication in depth because the Compliance Committee has not concluded its examination. However, we would expect the draft NIR to clearly highlight that the concerns around the UK's compliance with Article 9(2) of the Convention in this respect have been raised and that the position will be clarified by the Compliance Committee's forthcoming findings.

75. We also have concerns over the UK Government's introduction of a new and broader test in relation to judicial reviews (including environmental judicial reviews) at both permission and relief stage. These concerns were recorded in the 2019 report by Friends of the Earth (England, Wales and Northern Ireland) and RSPB: *A Pillar of Justice*.[34]

76. Sections 84(1)-(3) of the Criminal Justice and Courts Act 2015 amended the Senior Courts Act 1981 to introduce a broader test at both permission and relief stage, under section 31. It requires that where the Court considers/predicts (and this may simply be due to legal submissions from a public authority and not due to clear evidence establishing the point) that it is *highly likely* that the outcome for the applicant would not have been *substantially different* if the complained of conduct had not occurred, then the Court *must* refuse to grant permission or relief, except on the limited basis of "exceptional

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33 The Communication (ACCC/C/2017/156) was submitted by the RSPB, Friends of the Earth (England, Wales and Northern Ireland), Friends of the Earth Scotland and Leigh Day and is accessible here

34 This is a joint report co-authored by FoE England Wales and Northern Ireland and RSPB. It is available here. See in particular pages 3 and 13

public interest". The pre-2015 test was narrower:[35] it was a test of whether the decision would *inevitably* have been the same.

77. The new test makes it harder for claimants to pass the permission stage. In keeping with this, the number of Aarhus Convention claims granted permission to proceed has markedly decreased since April 2016 (although despite this, environmental claims still have a better success rate when compared to judicial review claims generally).

78. It also makes it more likely that a claimant will be denied a remedy (e.g. a quashing order, or a mandatory order), even when they have established that an unlawful decision has been made by a public authority. This allows for a contradiction of Article 9 and the requirement in the Convention for effective remedies to environmental claimants where they have proven their case and illegality is identified. It squarely undermines the value of procedural rights, which are precisely the focus of the Aarhus Convention.[36] It effectively denies that breach of a procedural environmental right is in and of itself a serious illegality, regardless of the effect on the substance of the decision in question (which may be quite difficult to establish in any case, and is not something that a Court would necessarily be best placed to assess). Whilst there are authorities that the section 31 test is still a high threshold to satisfy (i.e. and so refusal of a remedy has not been considered justified)[37], there have been cases in which relief has been refused to claimants (see, for example, *R (oao Spitalfields Historic Trust Limited) v Mayor of London & Others)*.[38]

79. Moreover, as concluded in *A Pillar of Justice*, these changes appear (alongside other factors such as cost liability, see below) to be deterring environmental claimants from seeking justice through the court system, out of concerns that even if they can persuade a court that illegality has occurred, the unlawful decision may still be left to stand regardless.[39] In keeping with this, the number of environmental judicial review applications has decreased since 2015.[40]

Article 9(4)

80. In order to avoid repeating concerns made about the UK's compliance with the provisions of Article 9 of the Convention and progress towards the implementation of Decision VI/8k of the Meeting of the Parties to the Convention, we refer Defra to comments made by the Observers to Communication ACCC/C/2008/33.[41] For ease of reference we append these comments to this response and we would expect to see a brief summary of them included within the final NIR.

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35 Commonly referred to as the "Simplex test", by reference to Simplex GE (Holdings) Ltd v Secretary of State for the Environment [1988] 3 PLR 25

36 To a more limited degree, the Simplex test did too

37 See e.g. *R (oao Friends of the Earth Ltd & Othrs) v SST* [2020] EWCA Civ 214 at paras. 273-276

38 *R (oao Spitalfields Historic Trust Limited) v Mayor of London & Othrs* [2016] EWHC, in which the Court ruled that the test under section 31(2A) of the Senior Courts Act 1981 was met. This case concerned a decision by the Mayor to act as the local planning authority for a planning application and listed building consent application concerning a mixed-use development in a location near several listed buildings. The claimant argued successfully that there had been a failure to consider a material consideration (namely a letter they had sent to the Mayor urging that that they not issue a direction that they be the planning authority), but the Court refused to grant a remedy.

39 *A Pillar of Justice Report* (2019) op. cit., pp20-21

40 *Ibid*, page 21

41 Findings available here

81. We wish to make one additional point in relation to Northern Ireland on Article 9(4) of the Convention. In terms of the "not prohibitively expensive" aspect of 9(4), we submit that 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.

Conclusion

Please do not hesitate to contact us should you require any further information or clarification regarding any of the points made in this response.

Yours sincerely,

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