Department
for Environment
Food & Rural Affairs

United Kingdom Progress Report to the Aarhus Convention Compliance Committee

July 2022 to September 2023

Date: October 2023

We are the Department for Environment, Food and Rural Affairs. We are responsible for improving and protecting the environment, growing the green economy, sustaining thriving rural communities and supporting our world-class food, farming and fishing industries.

We work closely with our 33 agencies and arm's length bodies on our ambition to make our air purer, our water cleaner, our land greener and our food more sustainable. Our mission is to restore and enhance the environment for the next generation, and to leave the environment in a better state than we found it.

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Introduction

The Aarhus Convention is an international treaty under the auspices of the United Nations Economic Commission for Europe (UNECE). The UK ratified the Convention in 2005; it is one of the Convention's 47 Parties. The Convention contains three pillars - providing the public with access to information, participation in decision making and access to justice in environmental matters.

The Aarhus Convention Compliance Committee (ACCC) was established by the Convention's decision-making body, the Meeting of the Parties (MOP), to review and monitor compliance by the Parties with their obligations under the Convention. The ACCC is composed of 9 members from different countries, who are elected by the MOP.

Alleged instances of a Party's non-compliance are normally raised by members of the public and eNGOs via the ACCC's communications process. The ACCC has the following functions in relation to such communications: reviewing these communications; communicating its findings on whether or not there has been non-compliance with the Convention; making recommendations to the MOP about the Party concerned on how to remedy the issue and monitoring the implementation of its recommendations.

There are 14 recommendations contained in Decision VII/8s recommending ways in which the UK can bring itself into compliance with the Convention. The full decision document, adopted by the Meeting of the Parties at the 7th Session in 2021, can be found via the following link: https://unece.org/sites/default/files/2022-01/Decision_VII.8s_eng.pdf

During the 7th session of its MOP in 2021, the UK was requested to provide annual interim progress reports, starting in October 2023, on how the UK is implementing the 14 recommendations. In 2022, the UK produced an Action Plan[1] setting out the steps that will be taken to address the recommendations. The action plan sets out UK Government departments and devolved administrations that have an interest in each recommendation and what steps are necessary to address the issues identified by the ACCC.

This report details the UK's recent progress in implementing the 14 recommendations referred to in paragraph 9 of the Decision VII/8s of the MOP in 2021.

[1] The UK Action Plan can be found via the following link: https://unece.org/sites/default/files/2022-07/frPartyVII.8s_01.07.2022_plan_action.pdf

Progress against the Recommendations

The full text of the recommendations can be found online at https://unece.org/sites/default/files/2022-01/Decision_VII.8s_eng.pdf

Paragraph in the Decision Document	Original Text in the Decision Document
2	Reaffirms decision VI/8k and requests the Party concerned to, as a matter of urgency, take the necessary legislative, regulatory, administrative and practical measures to:
2(a)	Ensure that the allocation of costs in all court procedures subject to article 9, including private nuisance claims, is fair and equitable and not prohibitively expensive;
2(b)	Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;
2(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;
2(d)	Establish a clear, transparent and consistent framework to implement article 9 (4) of the Convention;
2(e)	Put in place a clear requirement to ensure that: (i) When selecting the means for notifying the public under article 6 (2), public authorities are required to select such means as will ensure effective notification of the public concerned in the territory outside of the Party concerned, bearing in mind the nature of the proposed activity, and the potential for transboundary impacts; (ii) When identifying who is the public concerned by the environmental decision making on ultra-hazardous activities, such as nuclear power plants, public authorities will apply the precautionary principle and consider the potential extent of the effects if an

	accident would indeed occur, even if the risk of an accident is very small;
4	Recommends that the Party concerned take the necessary legislative, regulatory, administrative and practical measures to ensure that:
4(a)	Decisions to permit activities subject to article 6 of the Convention cannot be taken after the activity has already commenced or has been constructed, save in highly exceptional cases and subject to strict and defined criteria;
4(b)	Activities subject to article 6 of the Convention are not entitled, by law, to: (i) Become immune from enforcement under article 67B (3) of the Planning (Northern Ireland) Order 1991 or any legislation that supersedes it; (ii) (ii) Receive a certificate of lawful development under article 83A of the Planning (Northern Ireland) Order 1991 or any legislation that supersedes it;
6	Recommends that the Party concerned take the necessary legislative, regulatory, administrative and practical measures to ensure that:
6(a)	The time-frame for bringing an application for judicial review of any planning related decision within the scope of article 9 of the Convention is calculated from the date the decision became known to the public and not from the date that the contested decision was taken;
6(b)	When calculating the sum of costs to be awarded against an unsuccessful claimant in a procedure subject to article 9 of the Convention, the courts, inter alia, take into account the stage of the judicial procedure to which the costs relate;
6(c)	In judicial procedures within the scope of article 9 of the Convention, successful “litigants in person” are entitled to recover a fair and equitable hourly rate;
6(d)	In proceedings within the scope of article 9 of the Convention in which the applicant follows the Party concerned’s pre-

	action protocol, the public authority concerned is required to comply with that protocol;
8	Recommends that the Party concerned promptly take the necessary legislative, regulatory, administrative or other measures, such as establishing appropriate assistance mechanisms, to ensure that procedures to challenge acts and omissions by public authorities that contravene provisions of its law on litter are fair, equitable and not prohibitively expensive;

Access to Justice

Under the constitutional arrangements of the United Kingdom, England and Wales have a single justice system under the jurisdiction of the UK government and judiciary. Scotland and Northern Ireland have their own justice systems. The Supreme Court is the final court of appeal for civil cases for the whole of the United Kingdom.

Environmental Cost Protection

This section is relevant to Recommendations 2(a), 2(b), 2(d), 6(a), 6(b), 6(c) & 6(d).

England and Wales

The UK Government last updated its Environmental Costs Protection (ECPR) regime in 2017. Since the Meeting of the Parties in October 2021, the UK Government has considered the several recommendations made by the Aarhus Convention Compliance Committee. The primary objective of the ECPR is to enable environmental claims, within the scope of the Aarhus Convention, to be brought irrespective of a claimant's financial means. The ECPR also helps to control the cost of these claims for all parties. The default costs caps enable parties to make informed choices about the costs of litigation, while retaining sufficient flexibility, through the potential for variation, to reflect the finances of all parties.

The government will raise the issues raised in the committee's recommendations in the forthcoming Call for Evidence on the operation of the Environmental Costs Protection Regime (ECPR) to seek views on the way forward.

Litter abatement

This section is relevant to Recommendation 8.

As set out in its Litter Strategy for England, the Government remains committed to reviewing the mechanism by which councils and other land-managers can be held to account for

maintaining their land to the standards set out in the Code of Practice on Litter and Refuse. Since the last update, we have commenced work on updating the Code of Practice on Litter and Refuse, though the committee should be aware that the public can readily seek a litter abatement order under section 91 of the Environmental Protection Act 1990.

Scotland

Environmental Governance Review

Section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ('the Continuity Act') requires Scottish Ministers to review and prepare a report on environmental governance, including whether the law in Scotland on access to justice on environmental matters is effective and sufficient.

Human Rights Bill (Scotland)

The Scottish Government has recently conducted a consultation on proposals for a new Human Rights Bill. The Bill will incorporate into Scots Law, a range of economic, social and cultural rights and recognise the right to a healthy environment for the first time, within the limits of devolved competence.

Exemption of Aarhus Environmental Cases from Fees

This section is relevant to Recommendations 2(a), 2(b) & 2(d).

The Scottish Government undertook a public consultation on court fees, which closed in March 2022. Following analysis of the responses to the consultation, an exemption from court fees was introduced for environmental cases in the Court of Session. The Court of Session is Scotland's principal civil court and is where all Petitions for Judicial Review are heard.

The Order introducing an exemption from court fees for Aarhus cases in the Court of Session came into force on 1 July 2022. An Aarhus Convention case refers to a case brought by the public to make legal challenges to decisions from a public authority which may affect the environment. More specifically, such cases involve one or more members of the public, or an environmental non-governmental organisation, bringing forward litigation which is within the scope of the Aarhus Convention:

- to assert the public's right to access environmental information (under article 9(1) of the Convention);
- to assert the public's right to participate in environmental decision-making and procedure (article 9(2)); or
- to challenge the legality of any decision, act or omission by a private person or a public authority which contravenes any other environmental law (article 9(3)).

This change partially addresses the issues raised in Recommendation 2(a) with regards to Scotland.

Protective Expense Orders

This section is relevant to Recommendations 2(a), 2(b), 2(d), 6(a), 6(b), 6(c), 6(d) & 8.

The Scottish Civil Justice Council (SCJC) is responsible for advising the Lord President on the rules governing civil court procedure in Scotland, including the rules in relation to Protective Expenses Orders (PEOs). The SCJC is independent of Scottish Government. The SCJC has confirmed that a review of the PEO rules, in light of the ACCCs recommendations, is one of their priority objectives under their 2023/24 work programme. The SCJC has broad powers to conduct consultations, commission research, and make recommendations to Scottish Ministers.

As the SCJC is an independent body, the Scottish Government cannot commit to an end date for completion of a rule review and any subsequent redraft of the Court Rules which may be considered necessary or appropriate.

Northern Ireland

Court of Judicature Rules

This section is relevant to Recommendation 2(c).

Court rules in Northern Ireland currently provide that an application for leave to bring a judicial review must be brought within three months from the date when the grounds for the application first arose unless the court considers that there is good reason for extending that period. The Department of Justice (NI) continues to give consideration to the implications of taking forward a possible legislative amendment in light of the recommendation of the ACCC. The outcome of this consideration will require approval at ministerial level.

Litter abatement

This section is relevant to Recommendation 8.

The Department for Agriculture, Environment and Rural Affairs (DAERA) is responsible for litter policy and legislation in Northern Ireland. Article 11 of the Litter (Northern Ireland) Order 1994 applies. DAERA recently made new legislation (the Environmental Offences (Fixed Penalties) (Miscellaneous Provisions) (Amendment) Regulations (Northern Ireland) 2022) to deter littering, and reduce the likelihood of a person becoming aggrieved by litter, by increasing the maximum fixed penalty notice for littering offences to £200 – the highest in the UK. DAERA has also commenced preparation of Northern Ireland's first terrestrial Litter Strategy, which will include further steps.

DAERA has also agreed a fly-tipping Protocol with 7 of the 11 district councils in Northern Ireland, under which the Northern Ireland Environment Agency (an agency of the Department) has committed to taking responsibility for illegal waste deposits in excess of

20 cubic metres, and a range of hazardous waste regardless of volume. District councils will take responsibility for all other deposits under 20 cubic metres.

Public Participation in Decision Making in the United Kingdom

Department for Energy Security and Net Zero

This section is relevant to Recommendation 2(e).

The UK would recall to the Committee the updated Advice Note 12: Transboundary Impacts which reflects the UK's updated process for notifying the public, and as part of our published (7 April 2022) British Energy Security Strategy at https://www.gov.uk/government/publications/british-energy-security-strategy/british-energy-security-strategy, the UK Government has committed to developing an overall siting strategy and setting up a Great British Nuclear Vehicle, tasked with helping projects through every stage of the development process, which would include statutory requirements for consultation.

The new UK nuclear delivery vehicle - Great British Nuclear (GBN) has launched. GBN is an arms-length body responsible for driving delivery of new nuclear projects and will work with successful bidders to ensure site arrangements are in place and then the project developer will shape the proposals that inform the statutory consultation requirements (including those set out in Advice Note 12) and any application for development consent. GBN will co-fund the selected technologies through their development and work with successful bidders on ensuring the right financing and site arrangements are in place.

In addition, we are reviewing the Nuclear National Policy Statement (NPS) for new nuclear developments after 2025. The Nuclear National Policy Statement will set the criteria and requirements on developers for new nuclear and there are opportunities with a future NPS to reinforce the public notification and consultation requirements set out in Advice Note 12. There will be an extensive consultation before any policy decision on the NPS, with the first being in Autumn 2023, we will share the consultation with the Committee.

We are considering the Committee's specific recommendations on Advice Note 12 with the Planning Inspectorate as it sets out the requirements for notifying the public. This programme of work will be aligned with wider work on regulatory streamlining, GBN developments and the NPS as set out in the British Energy Security Strategy.

The UK is committed to taking a precautionary approach, as restated in the Environment Act 2021. For each proposed nuclear power plant there is a screening process to assess likely significant transboundary impacts, as required by the EIA Regulations.

The UK absolutely does not accept that, with its robust regulatory regime, there is any likelihood of such an accident. However, the UK acknowledges that there may be public

concerned in states where no likely significant environmental effect is assessed and has set up a process to inform the public concerned in such states within Advice Note 12.

Retrospective applications for planning permission, certification of lawful development and enforcement action.

This section is relevant to Recommendations 4(a) & 4(b).

The UK notes the findings and recommendations and will work with the devolved administrations to consider implementation of the recommendations as appropriate. Governments in England, Scotland, Wales and Northern Ireland continue to assess the implications of the recommendation and assess the options available. If appropriate, the United Kingdom will come forward with measures to address the issue raised.

Scotland

Having considered the recommendations, Scotland intends to consult on proposals for amending relevant legislation at the earliest opportunity.

Northern Ireland

In respect of recommendation 4(a), in December 2021 the Department for Infrastructure (DfI) (Northern Ireland) finalised and published its Development Management Practice Note (DMPN) 9A: *Unauthorised Environmental Impact Assessment (EIA) Development* which had been under development as part of DfI's Environmental Governance Work Programme. The practice note provides practical information and advice on the legal principles which apply to the management of unauthorised EIA development in the regional planning system.

A body of case law (European and UK) in recent years has established the legal principles which must be applied in order for planning authorities to determine whether to grant planning permission retrospectively for unauthorised EIA development. These legal principles set a very high bar in practice, both to ensure that the objectives of EIA are fulfilled in accordance with the statutory procedures laid down by the EIA Regulations and to avoid the developer gaining any unfair advantage from having carried out the development without having first complied with the requirements of the EIA Regulations or obtained the required planning permission.

The legal principles are that a planning authority has the power to grant retrospective planning permission only where:

- There are demonstrable exceptional circumstances that justify the grant of retrospective consent;
- It is clear the developer has neither gained, nor stands to gain, any unfair advantage from their breach of planning control;

- The public, and other stakeholders, are provided equal opportunity to express their views on the application and its Environmental Statement, as would be required of any EIA development; and
- The Environmental Statement and the EIA is rigorously scoped to ensure its assessment is based on a reasonable estimation of the baseline environment that is likely to have existed on the site prior to the unauthorised EIA development having taken place.

The practice note also emphasises the importance of timely and effective enforcement action in relation to unauthorised EIA development, to support compliance with the EIA Directive and the proper exercise of the 'precautionary principle'.

The DMPN is intended to support planning authorities in the practical application of these legal principles and regulatory procedural requirements[2]. It is also useful to developers and other stakeholders (including statutory consultees to the planning system) in understanding more about the effective management processes planning authorities will apply in relation to unauthorised EIA developments, and the requirements to be met when considering applications for the grant of retrospective planning permission. It provides clarity to those who have undertaken unauthorised EIA development of what to expect, including potential enforcement action and the challenges to gaining planning permission to retain the development. The practical application of these requirements has also been addressed as part of the EIA training programme for public sector planning officers in Northern Ireland over the last 4 years.

In respect of recommendation 4 (b) (i) & (ii), consideration is currently being given to potential legislative amendment to remove time limits on enforcement for EIA development. Such a move would mean that planning authorities would not be legally constrained in taking enforcement action against unauthorised EIA development by comparison with non-EIA development, which becomes immune from enforcement action after a period of 5 years. Should time limits on enforcement be removed in relation to EIA development, then such development could not lawfully receive a certificate of lawfulness of existing use or development (CLUD).

Any resulting amendment would involve primary legislation requiring both Ministerial agreement and the approval of the NI Assembly.

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[2] DMPN 9A is available at:

https://www.infrastructure-ni.gov.uk/sites/default/files/publications/infrastructure/dmpn9a-unauthorisedeiadev-dec2021.pdf