

Aarhus Convention secretariat
United Nations Economic Commission for Europe
Palais des Nations
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Email: aarhus.compliance@un.org

10 November 2023

Dear Aarhus Convention Secretariat,

Re: Decision VII/8s (United Kingdom) - invitation to comment on First Progress Report

Thank you for your email dated 16 October 2023 inviting our comments on the UK's First Progress Report ("**the Report**") by 13 November 2023. We welcome the opportunity to respond and our detailed comments can be found below.

England and Wales

The 12-page Report reproduces the Recommendations in paragraphs 2, 4, 6 and 8 of Decision VII/8s. In respect of Recommendations 2(a), 2(b), 2(d), 6(a), 6(b), 6(c) & 6(d) (Environmental Costs Protection Regime), the only sentence of relevance can be found on page 7, which contains a commitment to review the Aarhus costs rules at some unspecified date in the future:

"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."

The Ministry of Justice ("**MoJ**") has since confirmed (16 October 2023) that it is their intention to publish the Call for Evidence before the end of 2023.

It is difficult to know how to offer constructive comments on the Report. Essentially, there has been no substantive progress on the above Recommendations, other than those forced by litigation on our part,¹ since the adoption of Decision IV/9i by the Meeting of the Parties ("**MoP**") at its Fourth Session on 1 July 2011. During that period, there have been ongoing, systematic attacks on the process of Judicial Review (both generally and in respect of environmental cases), the openly stated purpose of which has been to make the process less accessible to those forced to rely on it as a remedy of last resort.

Despite this, we have continued to attempt to engage with civil servants in Defra and the Ministry of Justice ("**MoJ**"). We have responded constructively and comprehensively to all consultation exercises. We have undertaken research that has confirmed the prohibitively high cost of legal action continues

¹ *RSPB, Friends of the Earth, ClientEarth v Secretary of State* [2017] EWHC 2309

to represent a substantial barrier for civil society in England and Wales² and we have outlined the ways in which we believe these concerns can be addressed. We appreciate these may not be the only or best way of doing so, but our suggestions have always sought to provide a basis for constructive discussion. None of these initiatives have generated any positive response or engagement.

We have repeatedly requested meetings to discuss the substantive content of the Action Plan and the Progress Report. As late as August 2022, we gave our availability for a meeting, but on 5 October 2023 were told: *“We are finalising the UK’s 2023 Progress Report and expect to share this soon. Unfortunately, we will not be able to convene a meeting before the Report is finalised”*. The abject failure to engage with eNGOs (let alone civil society more generally) on the preparation and implementation of the Action Plan, without explanation or apology, is beyond dispiriting and calls the UK’s performance on public participation in decision-making, as well as access to justice, into serious question.

The MoP has been clear in its Recommendations. We sincerely hope the 2023 Call for Evidence is not an invitation for consultees to question the Committee’s findings, but to invite views on a range of thoughtfully considered options for reform. If not, we fear it will be taken as an opportunity to dispute that reform is neither needed nor proportionate and, once again, the issue will be kicked into the long grass.

Scotland³

Overall, ERCS remains concerned that there are no clear proposals to address Scotland’s non-compliance with the relevant provisions of the Aarhus Convention in a timely manner.

It is telling that the references to the Environmental Governance Review and the Human Rights Bill (Scotland) in the Report do not explain which of the MOP’s recommendations they are relevant to. The reason for this appears to be that neither document contains any proposals relevant to the MOP’s Recommendations.

Environmental Governance Review

The report produced by the Scottish Government as part of the Review contains no proposals which will improve compliance with the Convention. The report was narrow in its scope, contained numerous non-evidenced claims to support the *status quo* and contained no analysis of the many problems of environmental governance which exist in Scotland. It was not a review of environmental governance in any real sense. Additionally, the review was unlawful. The Scottish Government had a statutory duty to produce a report on whether and, if so, how the establishment of an environmental court could enhance environmental governance arrangements. The report failed to properly consider this matter. ERCS has published the Opinion of senior counsel John Campbell KC to the effect that the Scottish Government failed to discharge their statutory duty vis-à-vis whether to establish an environmental court. ERCS did not challenge this breach of statutory duty due to the prohibitive costs of litigation. The ERCS briefing can be found [here](#) and the Opinion of John Campbell KC can be found [here](#).

Human Rights Bill (Scotland)

ERCS supports the proposal in the Human Rights Bill (Scotland) to incorporate the right to a healthy environment into Scots law. However, the recent consultation on the Human Rights Bill contained no

² See [A Pillar of Justice](#) and [A Pillar of Justice II](#), the latter submitted to the UK Aarhus Focal Point and colleagues in Defra and the MoJ on 12 July 2023 (and the Compliance Committee on the same date)

³ Please note that Friends of the Earth Scotland [...]

proposals which will remove the barrier to accessing justice caused by the costs of litigation. A right to a healthy environment which cannot be enforced will be meaningless.

Exemption of Aarhus Environmental Cases from Fees

An exemption for court fees for Aarhus cases in the Court of Session was introduced in July 2022. ERCS welcomed this change in July 2022, subject to the qualification that the fee exemption does not extend to litigation in other courts, such as cases heard in the sheriff courts. Overall, the introduction of a court fee exemption was a minor change which did not materially alter the costs barrier to access to justice.

Protective Expenses Orders (PEOs)

The UK Action Plan published on 1 July 2022 referred to the Scottish Civil Justice Council (“SCJC”) completing its PEO rules review by March 2023. This deadline has been missed. The Report neither acknowledges nor explains the missed deadline. No new timescales have been given for the review. ERCS is concerned about the absence of any progress on this matter. ERCS has approached the SCJC for an explanation as to the lack of progress. The SCJC has not responded to several requests from ERCS for information. The Scottish Government describes the SCJC as an ‘independent body’ as an apparent excuse for its inability to provide a date for the review or the content of any new PEO rules. It was the Scottish Government’s decision to task the SCJC with carrying out the review. The Scottish Government remains responsible for any delays and the ultimate outcome.

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

ERCS welcomes the statement that “*Scotland intends to consult on proposals for amending relevant legislation at the earliest opportunity*”. However, there are no details on the content of any proposed amendment or the start date for a consultation.

Time limits for judicial review (recommendation 6(a))

There is no mention of any proposals to address this recommendation. Scots law on this matter is in clear contravention of the requirements of the Convention because the time limits for raising actions for judicial review and statutory planning appeals run from the date on which a decision was made, rather than the date the decision became known to the public.

Northern Ireland

As the Report notes, there has been no progress in relation to costs or changes to the limitation period in Northern Ireland.

Concluding remarks

It is clear from the above that the UK has made absolutely no progress to address the Recommendations in paragraphs 2, 4, 6 and 8 of Decision VII/8s in England and Wales and Northern Ireland and minimal progress in Scotland. This is regrettable and calls the UK’s commitment to the Aarhus Convention into serious question. The devolved administrations now have less than a year to run consultation exercises and secure sufficient Parliamentary time (in the midst of a likely General Election in 2024) to implement measures arising from consultation. We urge the Committee to press upon the UK the urgency and importance of this matter and the benefit of engaging with eNGOs and other stakeholders in drawing up concrete proposals to meet international obligations on participatory rights.



Please do not hesitate to contact us should the Committee have any questions arising from this submission.

Yours sincerely,

England and Wales

Carol Day and Rosie Sutherland, the RSPB

Will Rundle and Katie de Kauwe, Friends of the Earth England, Wales and Northern Ireland

Scotland

Ben Christman and Shivali Fifield, Environmental Rights Centre for Scotland