Aarhus Convention secretariat
United Nations Economic Commission for Europe
Palais des Nations
8-14 avenue de la Paix
CH - 1211 Geneva 10, Switzerland
Email: aarhus.compliance@un.org

28 July 2022

Dear Aarhus Convention Secretariat,

Re: UK Action Plan submitted pursuant to Paragraph 9(a) of Decision VII/8s of the Meeting of the Parties to the Convention concerning the compliance of the UK regarding the implementation of the Recommendations in paragraphs 2 and 6(a) and (b)

Thank you for your email dated 4 July 2022 inviting our comments on the UK Action Plan. We are grateful for this opportunity to respond. We set out below our observations in relation to Section A (Plan preparation) and Sections B and C (content) of the Plan for England/Wales, Scotland and Northern Ireland.

A. Description of the process by which the plan of action has been prepared

England and Wales

Further to the Open Session of the Compliance Committee on 14 December 2021, the RSPB wrote to Defra to provide contact details for potential UK stakeholders in relation to the development of the draft Action Plan (email dated 16 December 2021). In that email, we requested details of the proposed consultation process and suggested that a meeting involving representatives of Wildlife and Countryside Link, Defra and the Ministry of Justice ('**MoJ**') might be helpful in developing the UK Action Plan. Defra confirmed that it was in the process of engaging with relevant policy teams to prepare the Action Plan and stakeholder consultation.

Following the circulation of a sample template to assist in the preparation of the Plan by the Secretariat in February 2022, the RSPB met Defra in March. Defra officials referred to the complexity of addressing seven Decisions and the challenges posed by ongoing political processes in the devolved administrations. At that point, they indicated they were unable to say anything substantive about the content of the Plan or the consultation process.

Following the Open Session of the 74th Compliance Committee later in March, we wrote to Defra (together with the Environmental Rights Centre for Scotland ('**ERCS**') and the Communicants ClientEarth) setting out our concerns about the issue of "prohibitive expense" in the UK and some thoughts on how the Recommendations in paras 2 and 6(a) and (b) of Decision VII/8S could be addressed in the Plan. This letter (dated 24 March 2022) was copied to the Aarhus Convention Secretariat on 30 March 2022 (attached for ease).

The RSPB met Defra again in April, noting in advance that it would be helpful to know when officials were planning to consult stakeholders about the draft Plan and if there was anything else we could do

to assist in its development. At this meeting, Defra explained that it was expecting content from other Departments and the Devolved Administrations imminently, but reference was again made to various challenges (e.g. elections in Northern Ireland and the need for Ministerial approval for certain measures). Again, no details of the measures in the Plan were provided, but officials indicated that it might be possible for us to comment on a draft of the Plan in advance of submission (but that it wouldn't be a full consultation).

During this meeting, Defra indicated that it might be helpful for us to meet with officials from the MoJ as the body with the primary responsibility for addressing Recommendations regarding costs. We duly contacted the MoJ on 2 June 2022 to request a meeting, enclosing the above letter dated 24 March 2022. We expressed concern that at that point there had been no consultation with any stakeholders in England or Wales on the content of the draft Plan. We contrasted the position in England with engagement between colleagues and civil servants in the Directorate for Justice in Scotland.

We met again with Defra officials on 16 June 2022 and with the MoJ on 17 June 2022. During those meetings, officials explained that it was still not possible to share any information about the Action Plan other than it would contain, amongst other things, a review of the ECPR. By this point, it was clear there would be no opportunity for stakeholders in England and Wales to comment on the draft Plan before submission to the Secretariat on 1 July 2022.

We include this somewhat lengthy summary of events to highlight just how hard we tried to engage with the substantive development of the Plan and to provide relevant context for the comment in the UK Action Plan that "*Where possible we have engaged with stakeholders*" (section A). Given the lack of engagement with us, despite repeated, proactive enquiries on our part to make this happen, we consider that this statement by the UK sits oddly with the reality of what happened, and it is in our view inaccurate. It is unclear why it was *not* possible for the Government to engage with stakeholders in England and Wales and we don't accept that explanation. We identified relevant contacts at an early stage in the process and set out in correspondence, in some detail, the measures we felt worthy of consideration in the Plan. This failure to engage is particularly disappointing in light of the decision to consult the ERCS in Scotland, despite the limitations of this process (see below).

Scotland

ERCS was given the opportunity by the Scottish Government to comment on an early draft action plan as it related to Scotland. It is understood that there was no wider stakeholder engagement with other eNGOs or the public.

While the position in Scotland compares favourably relative to the rest of the UK, it is important to point out that overall the opportunities for public engagement with the process of drafting the plan were still very limited insofar as the plan relates to Scotland. There was however, at least some engagement.

The Action Plan refers to receiving further engagement from stakeholders, "including through forthcoming planned engagement as outlined in the plan of action". There is no outline of further engagement in the Action Plan.

Northern Ireland

As far as we are aware, there has been no consultation or engagement with stakeholders in Northern Ireland.

B. General character of the measures that will be needed to implement the recommendations in the MOP decision

At this stage, we are unable to comment on the general character of any measures that may subsequently be proposed to implement the Recommendations in paragraphs 2 and 6(a) and (b) of Decision VII/8S concerning prohibitive expense and timing in relation to JRs of decisions taken under the Planning Acts. The Action Plan contains no tangible proposals in relation to England, Wales and Northern Ireland. It simply states: "*The UK Government will consider whether it is appropriate to amend the Environmental Cost Protection Regime (ECPR) in the Civil Procedure Rules (CPR) or make other changes following the conclusion of the Call for Evidence*" (own emphasis added). As will be apparent, this does not even commit the UK to accepting reform in a particular way as needed or appropriate despite the very clear and careful findings of the ACCC establishing breaches of the Convention.

As regards Scotland, the Action Plan notes in paragraph 2(a) that the Scottish Civil Justice Council ('**SCJC**') is "*actively considering the rules governing PEOs*" and in relation to paragraph 2(b) that a Legal Aid Reform Bill will be introduced this parliamentary term through which "*broadening the scope of legal aid to 'legal persons' and public interest litigation may also be considered*". In relation to paragraph 2(d), it notes "*the Scottish Government has committed to introducing a Human Rights Bill over the course of this parliamentary session*", and that under the Withdrawal Act it has a duty to consult on the law in relation to access to justice for the environment. While this gives some general indication as to roughly when are where reforms may be undertaken, it gives no commitment to actual proposals to improve compliance.

Somewhat more concretely in relation to 2(b) the Action Plan notes that the Scottish Government is consulting on exempting Aarhus cases from court fees. We note that on 16 June 2022 the Scottish Government announced its intention to exempt Aarhus cases from fees in the Court of Session.[1]

In relation to recommendations at para 6 of Decision VII/8S there are no Scotland specific processes identified, let alone actual proposals for compliance.

C. Detailed plan of action

England and Wales

As above, we are unable to comment on the detailed plan of action regarding paragraphs 2 and 6(a) and (b) of Decision VII/8S because all that is proposed is a review of the ECPR "*in the coming months*". The UK Government will respond to this Call for Evidence "*in due course*" with the aim of meeting the deadline of 1 October 2024. It is regrettable that no detail is provided on any proposed measures that the UK itself at this stage considers would bring it into compliance, and on which it would seek views from stakeholders.

Please note the Action Plan states: "*The costs protection regime in Northern Ireland does not cover private law claims".* In fact, the ECPR does not cover private law claims in any jurisdiction of the UK. Please also note that Section B of the Action Plan refers only to measures which would affect England and Wales (there is nothing in there which would change the law in Scotland and/or Northern Ireland).

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1 https://www.gov.scot/publications/scottish-court-fees-2022-2025-analysis-consultation-scottish-government-response/pages/3/

The Action Plan also confirms there are no current plans to extend costs protection to private law claims "*but it will be kept under review*". The Committee will, of course, be aware of the UK's continuing non-compliance with Article 9(3) of the Convention in this respect, in accordance with the Committee's Findings in ACCC/C/2013/85 and ACCC/C/2013/86. It is disappointing that the UK Government has, on the one hand, publicly repeated its commitment to the Aarhus Convention[2], but then on the other, is apparently content to remain in continuing breach of the Convention.

While we suggested that it would be helpful for the MoJ to consult the public on discrete (identified) issues of concern, it is disappointing that the Action Plan fails to provide a single tangible measure to address the issue of prohibitive expense in England and Wales or, at the very least, to set out a clear timetable for a review of the ECPR in order to meet the 1 October 2024 deadline. The Committee may also wish to note that a future review of the ECPR is something the MoJ has been saying it will do since October 2018.[3] It is now nearly five years later, and, yet the MoJ's line remains the same. We consider that the vague language used by the UK (e.g. "*intend to publish a Call for Evidence*"; "*in the coming months*"; "*in due course*"), whereby it avoids committing itself to any specific timeframes or measures (beyond the overall deadline of 1 October 2024), is especially disappointing given its long history of non-compliance on the issue of prohibitive expense, and which has resulted in the rather unusual situation of the Committee setting out this deadline of 1 October 2024 in the first place.

We are extremely concerned about the UK's ongoing failure to address the pressing difficulties faced by civil society in bringing environmental claims to court and that, despite the Committee's Findings dating back to September 2010, the MoJ would appear to be once again simply kicking this issue into the long grass. This would be disappointing at any time, but in the context of the escalating climate and nature crises (there were record breaking temperatures of over 40 ° C in parts of the UK on 19th July 2022) bringing the importance of the Aarhus Convention – and access to justice in particular - into such sharp relief, this conduct by the UK is very serious. Nevertheless, we will continue to contribute constructively to the implementation of the Recommendations in paragraphs 2 and 6(a) and (b) of the Action Plan and, in particular, to contribute to the forthcoming review of the ECPR.

Scotland

While the Action Plan gives some general indication as to processes and legislation through which reforms may theoretically be undertaken, it is hugely disappointing that after a decade of findings of

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2 See statement made by Victoria Prentis (then Parliamentary Under Secretary of State at Defra; now Minister of State at Defra) on 6 September 2021: "*The Government is committed to the continued effective implementation of our international obligations under the Aarhus Convention on access to information, public participation in decision making and access to justice in environmental matters. The Government strongly supports the contribution the Convention makes to enhancing environmental protection and remains committed to its objectives*." At https://questions-statements.parliament.uk/written-questions/detail/2021-08-18/40934 Also, on 3 November 2020, Rebecca Pow (then Parliamentary Under Secretary of State at Defra) said: "*I thank the hon. Gentleman for drawing the Committee's attention to the Aarhus convention, which is of course an international agreement. I do not deny its importance, so he and I agree on that. The UK ratified the convention in 2005, and we remain a party to it in our own right. Our exit from the EU does not change our commitment to respect, protect and fulfil the rights contained in this important international agreement*." See: https://hansard.parliament.uk/Commons/2020-11-03/debates/c1ef941e-1c11-4e5e-8d66-dd276f6d70e1/EnvironmentBill(NinthSitting)?highlight=aarhus#contribution-A8A4897C-4135-409C-B9B5-1112EFE66C52

3 See paragraph 13 of the UK's 1st Progress Report on Decision VI/8k concerning compliance by the UK with its obligations under the Aarhus Convention dated 1 October 2018 here

non-compliance there are no commitments to actual proposals in response to the recommendations of Decision VII/8S. Therefore (and as above) our ability to comment on the detailed plan of action is restricted by the lack of any detailed proposals.

The Scottish Government has delegated the task of implementing the Action Plan to the SCJC, which is to carry out a review of the relevant court rules. We are concerned that the SCJC's process for reviewing the rules will not include any form of public participation. Civil society was previously excluded from the Protected Expenses Order ('**PEO**') regime review undertaken by the SCJC in 2018, which resulted in changes to the rules that created additional barriers for litigants seeking redress for environmental harms. ERCS has written directly to the SCJC on several occasions requesting the SCJC to confirm whether there will be any public participation in the process. ERCS has not received any assurances on this issue. It is imperative that the SCJC's review process is transparent and that the public is given the opportunity to participate in the process. Article 8 of the Convention contains minimum requirements for public participation in such matters. We are concerned that there may be further non-compliance arising from the SCJC's review process vis-à-vis Article 8.

We make the following comments in response to the contents of the Action Plan as it relates to the specific recommendations of decision VII/8s:

- **Paragraph 2(a)** – we welcome the intention for the SCJC to review the court rules by the end of March 2023. However, this does not equate to a commitment to meet this recommendation within the necessary time period.
- **Paragraph 2(b)** – we welcome the recent introduction of an exemption for liability for court fees for Aarhus cases heard in the Court of Session. However, we are disappointed that cases raised in other Scottish courts – such as the sheriff courts – are ineligible for an exemption from court fees. The reference in the Action Plan to the introduction of a legal aid bill within the parliamentary session gives no certainty that the necessary reforms to the Scottish legal aid system will be carried out within the necessary time period given the current parliamentary session extends into 2026, well beyond the timeframe set out by Decision VII/8s of an Action Plan to achieve compliance by October 2024.
- **Paragraph 2(d)** – the commitment to introducing a human rights bill within the parliamentary session and a consultation on the establishment of an environmental court are both welcome. However, there is no commitment to any substantive legal reform to further compliance through either. As per the previous point, there is no certainty that this recommendation will be met within the necessary time period given the current parliamentary session runs to 2026.
- **Paragraph 4(a)** – the response to this recommendation indicates that there will be an analysis of its implications and an assessment of the available options. We are concerned that no commitment has been made to implementing any legal changes. We note that Scottish planning law allows for the grant of retrospective planning permission (i.e. for development already carried out).[4] The procedure to apply for planning permission in such circumstances is broadly the same as making an ordinary planning application. The only exception is where an enforcement notice has been served in respect of the development. This provision of Scottish planning law does not appear to be consistent with the recommendation and we await the necessary actions to review and address this by 1 October 2024.
- **Paragraph 6(a)** – the response to this recommendation contains no proposals or details of relevance to Scotland. We note this is of particular concern given that the timeframe for bringing a statutory review of a planning case in Scotland is only 6 weeks. The time limits for raising actions

[4] Town and Country Planning (Scotland) Act 1997, Section 33.

for judicial review and statutory planning appeals in Scotland run from the date on which a contested decision was made and not from the date on which the date the decision became known to the public.[5] Said time limits are inconsistent with this recommendation. We note the reference to proposals in Northern Ireland in this respect (see below) and await the necessary actions to review and address this by 1 October 2024.

- **Paragraph 8** – we welcome that the SCJC is considering this recommendation, and is considering extending the scope of PEOs to cover legal actions raised in sheriff courts. However, we note that the Action Plan contains no commitment to carrying out any specific reforms. We note with some concern the reference made to the SCJC's independence from the Scottish Government, and the Scottish Government being unable to commit to a timeframe on behalf of a third party. The SCJC's independence was known by the Scottish Government when it was delegated the task of reviewing the relevant court rules, and such delegation should only have been carried out if the Scottish Government had first received assurances that the SCJC's work would be completed within the necessary time period. Legal expenses from legal actions arising in the sheriff courts can be prohibitively expensive. This was demonstrated in the case of George Niblock, whose attempt to obtain a litter abatement order against a local authority was unsuccessful. The local authority was awarded £9,000 in legal expenses, which led to the closure of Mr Niblock's environmental charity the Aberdeenshire Environmental Forum.[6]

Northern Ireland

In response to Paragraph 2(a) of decision VII/8s, requesting the UK to ensure private nuisance claims comply with Article 9, it is stated by the UK Action Plan that there are currently no plans to extend the costs protection regime to cover private law claims in Northern Ireland, but this will be kept under review. This is a statement of inaction and effectively indicates an intention to decline to comply with this recommendation.

Paragraph 2(c) of decision VII/8s requests the UK to, as a matter of urgency, take the necessary legislative, regulatory, administrative and practical measures to: "*(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*".

The Action Plan states that the Government in Northern Ireland has held preliminary discussions on the issue of judicial time limits within Aarhus judicial reviews. Furthermore, the Department of Justice in Northern Ireland will engage with the Court of Judicature Rules Committee to consider possible amendments to Court Rules to provide for the time limit to bring judicial review proceedings in Aarhus cases starting to run from the date on which the claimant knew, or ought to have known of the act, or omission, at stake.

So far as we are aware there has been no public consultation in relation to this and no detail has been given as to how this issue might be addressed or within what timescale.

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5 Court of Session Act 1988, Section 27A. Town and Country Planning (Scotland) Act 1997, Sections 238 and 239.

66 See Mr Niblock's observer statement dated 9 November 2020 and submitted to the ACCC in relation to communication ACCC/C/2016/142 United Kingdom.

Paragraph 2(d) of decision VII/8s requests the UK to, as a matter of urgency, take the necessary legislative, regulatory, administrative and practical measures to: (d) Establish a clear, transparent and consistent framework to implement article 9 (4) of the Convention.

The Action Plan contains no overarching response to this for Northern Ireland. It clarifies that applications for injunctions in Aarhus claims are not currently recorded in Northern Ireland. The Plan states that the Government is exploring the practicalities of Northern Ireland Courts & Tribunals Service staff recording this information in the future. Compiling adequate data is important but hardly, of itself advances the request to transparently implement Article 9(4). What can't be recorded is the cases not brought due the cost of same being prohibitively expensive.

Paragraph 4(a), (b)(i) and (b)(ii) of Decision VII/8s – the concerns about the continued scope of planning law to permit the grant of retrospective planning permission (i.e. for development already carried out), immunity from enforcement action and certificates of lawful development, even for environmentally sensitive applications, all apply within Northern Ireland as well. Little appears to have been done or proposed to address these issues.

Concluding remarks

In summary, we would emphasise our disappointment over the lack of engagement by the UK Government with stakeholders over the draft Action Plan to date (in particular, in relation to England and Wales and Northern Ireland), and the concerning lack of detail in the draft Action Plan itself beyond non-committal language. We would have hoped and expected, for more progress to have been made by the UK Government by this stage, given the unusual situation we find ourselves in, where the Committee has deemed it necessary to actually set a deadline for the UK Government given the persistent nature of its non-compliance with issues surrounding prohibitive expense.

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
Mary Church, Friends of the Earth Scotland
Ben Christman and Shivali Fifield, Environmental Rights Centre for Scotland

Northern Ireland
Roger Black, C & J Black Solicitors, Northern Ireland