Friends of the Earth Statement: public participation in the UK’s withdrawal from the European Union

For Agenda item 6(b) at the Sixth Session of the Meeting of the Parties

We welcome the opportunity to provide the Sixth Session of the Meeting of the Parties to the Aarhus Convention with a Statement about public participation in the UK’s withdrawal from the European Union (‘EU’) following the referendum in the UK in June 2016, given the proposed legislative changes to achieve this. This process will affect environmental law in the UK and UK citizens’ Convention rights.

Despite overwhelming public confusion about what the UK’s withdrawal from the European Union might actually entail (and specifically for the environment), the UK Government has now proposed the “European Union (Withdrawal) Bill” ¹ (introduced in the House of Commons on 13 July 2017). Notwithstanding that lack of clear information about withdrawal and how it should best occur, the Bill now proposed gives unique and wide-ranging powers for Ministers to potentially make major legislative and policy changes, but without adequate public participation or scrutiny. This is contrary to the requirements of Article 8 of the Convention.

- The UK Government’s powers created in the Bill, to legislate by statutory instrument ² and change retained EU law, are far reaching and will allow significant changes to be made in the environmental field.

- Approval for each of those statutory instruments (of which there are likely to be many) is to be done by the ‘negative resolution’ process ³ (the default procedure for most statutory instruments made under the Bill). It provides a very low level of scrutiny and participation in this extraordinary process of subsequent law making. This approval process is opaque and undemocratic, requiring no actual vote to be passed by peoples’ representatives in Parliament, or even proper scrutiny by them. We understand that only once since 1979 has Parliament overturned a statutory instrument subject to the negative resolution process. The ‘affirmative resolution’ procedure ⁴ provides a small amount of greater scrutiny in a limited number of specified circumstances (see Schedule 7, sub paragraph (2)) in providing for a vote by both Houses of Parliament before the law is made. But, it is to be used in a limited number of instances only, and is not considered effective because it is

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¹ Please see this link for the bill: [https://www.publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf](https://www.publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf); also here for information about it: [http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html](http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html)

² See clauses 7-9 and 17 of the Bill for the executive powers to legislate by statutory instrument (including amending primary legislation) are extremely broad

³ For a description of the negative resolution process see here: [http://www.parliament.uk/site-information/glossary/negative-procedure/](http://www.parliament.uk/site-information/glossary/negative-procedure/)

⁴ For a description of the affirmative resolution process see here: [http://www.parliament.uk/site-information/glossary/affirmative-procedure/](http://www.parliament.uk/site-information/glossary/affirmative-procedure/)
compromised by being dependent on who is present to vote on the relevant day, and can be dictated by a government majority.

- In either case there has been no commitment in the Bill to public consultation when new statutory instruments are proposed to amend or remove retained EU laws (even though much of that body of law would have been consulted on when first made).
- We believe that this is detrimental to democratic public participation at this unique time of major legislative change, and in broader terms to environmental governance and the aims of the Convention. Given the highly unusual situation we are in and the very broad and far-reaching powers in the Bill that are not ordinarily given to the executive, there should be enhanced scrutiny and effective public participation, not the ineffective practice under the negative or affirmative procedures as set described above.
- We are also enormously concerned about the implications for environmental protection over the loss of monitoring, enforcement and public complaint mechanisms currently provided by EU institutions. Although the UK’s withdrawal Bill gives the UK Government the power to pass these functions to new or existing public bodies (see clause 7(5)) and to do that subject to the ‘affirmative resolution’ procedure, there is no obligation on the Government to do so. Ministers will actually have the power to remove such functions or institutions altogether without any further scrutiny or public participation in that decision.

Overall, Article 8 of the Convention requires effective public participation (either directly or via representatives), which is in an informed manner, and at an appropriate time, yet the Bill asks our representatives to give advance approval for an unprecedented amount of far-reaching executive power at a time when there is a concerning lack of information about how it might be used. As such, there is a lack of effective participation in this decision.

Neither will there be effective constraints on, or participation in the decisions for, subsequent legislation made under the Bill; for example, to prevent Ministers undermining Convention rights currently implemented in the UK via EU law. The Bill sacrifices effective and democratic participation for speed of exit, and for executive discretion. However, UK citizens’ Convention rights must be safeguarded and maintained in this process, if not improved and fully implemented. But the Bill does not commit to this.

As this highlights and we have expressed in relation to matters on Access to Justice, the outcome of the EU Referendum in June 2016 has created a climate of uncertainty and fear around the future of EU-based environmental law in the UK (from which most UK environmental law derives). We believe that this extraordinary process that the UK must now go through is likely to result in a significant lessening or under-implementation in the UK of the Aarhus Convention.

There are wide-spread and deep concerns about the public participation deficit arising from the legislative process both in relation to the Withdrawal Bill itself (given the uncertainty that surrounds the BREXIT process and what it means), the large amount of legislation that will
follow it, but specifically, the possible use of the legislative mechanisms in the Bill to change existing EU law as the UK leaves the EU.

These concerns underline the continuing importance of the Aarhus Convention and the role played by its compliance and implementation mechanisms/institutions, in providing or ensuring for UK civil society robust and effective environmental rights, especially now during the enormous and rapid legislative change that the UK must go through.

The issues summarised above are of clear importance to the aims and main objective of the Aarhus Convention, and we respectfully suggest that it should be a matter of concern for the Parties, in the achievement of full and effective implementation of the Convention in the UK. Not least regarding accountability and transparency in decision-making in all branches of government (including legislative bodies) that the Convention requires, and in strengthening public support for decisions affecting the environment.

Convention Article 3 makes clear that: “Each Party shall take the necessary legislative, regulatory and other measures ... to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.”. This is now under serious threat as the UK leaves the EU.

We call upon the Meeting of the Parties to obtain clear commitments and assurances from the UK with regards to the full implementation of Convention rights for UK citizens, and in securing full and effective public participation throughout the UK exit process.

11 August 2017