

Meeting:	NuLeAF Steering Group, 14 July 2010
Agenda Item:	6
Subject:	The Aarhus Convention and Nuclear Legacy Management
Author:	Fred Barker
Purpose:	To provide an overview of the provisions in the Convention and associated legislation and indicate potential relevance to current issues

Introduction

This report covers:

- an introduction to the Aarhus Convention;
- applicability to nuclear legacy management in the UK; and
- potential relevance to implementation of NDA Strategy 2.

Recommendation

That the Steering Group agree to write to the NDA asking that it take account of the implications of the Aarhus Convention and associated EC or UK legislative requirements in the way it develops its thinking on implementation of key aspects of strategy for managing radioactive wastes.

Contribution to Achieving Strategic Objectives

Aarhus Convention provisions for openness, transparency and participation are relevant to a range of NuLeAF objectives.

1 Introduction

Officially, the Convention is known as the ‘Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters’ and, as the title suggests, contains three broad themes, referred to as ‘pillars’. These are:

- access to information
- public participation in decision-making
- access to justice in environmental matters

At its last meeting, the SG received a report on international projects, including the outcome of a European Roundtable on ‘Application of the Aarhus Convention to the Field of Radioactive Waste Management’. The European Roundtable took place in Luxembourg on 8-9 April. Attendees included Councillor Knowles from Cumbria CC and Kerry Rickards from Sedgemoor DC.

The preliminary conclusions of the Roundtable are that:

- The practical implementation of the Convention in the radioactive waste management sector necessitates deep cultural changes both from institutions and society
- There are institutional resistances to societal access to information in several contexts
- Institutional goodwill is welcome but not enough for a sustainable implementation of the Convention
- A long term driver for achieving practical implementation is the emergence of a sustainable civil society.

The organisers of the Roundtable are preparing a proposal for how the EC’s potential Directive on radioactive waste management might provide a vehicle for more thorough-going requirements to implement the provisions of the Aarhus Convention. NuLeAF’s comments on the potential Directive are on the website at [Comments on EC proposals](#).

Although the Roundtable follow-up proposal is not available at the time of writing, the current report does provide some preliminary comments on the Aarhus Convention and nuclear legacy management in the UK. The annex to this report also provides an overview of the provisions of the Convention, its translation into EC and UK law, and compliance and right of appeal issues.

2 Applicability to Nuclear Legacy Management in the UK

The secretariat is not aware of any comprehensive assessment of the implications of the Aarhus Convention and associated EC or UK legislative requirements for nuclear legacy management in the UK.

However, NuLeAF has itself published a Policy Statement entitled, ‘Taking Account of Public and Stakeholder Views in Decisions about Managing Radioactive Wastes’ (PS6, May 2009). This considers:

- the different levels and types of decision processes in the UK
- the nature of the decision processes and the role of public and stakeholder confidence or acceptability
- how to address public and stakeholder confidence or acceptability in decision making.

The Policy Statement is available on the NuLeAF website at [PS6 May 2009](#).

When asked about the way Aarhus Convention provisions impact on nuclear legacy management in the UK, the NDA's response focused on the Environmental Information Regulations 2004 (EIR), which set out duties on public authorities to progressively disseminate and make available environmental information. NDA point out that they must comply, not just in respect of waste management activities, but in everything that they do. This would be evidenced partly by the NDA Publication Scheme and by their response to requests for environmental information from time to time. NDA also point out that the Aarhus Convention has been considered as part of the plans and programmes within their Strategic Environmental Assessment (SEA) document (and therefore assessments) for Strategy 2.

3 Potential Relevance to Implementation of NDA Strategy 2

One specific area where more attention may need to be paid to the implications of the Aarhus Convention and associated EC or UK legislative requirements is in how NDA develops its thinking on implementation of key aspects of its strategy for managing radioactive wastes.

Following discussion with NDA representatives at the afternoon session of the April SG, the Executive Director (ED) attended a 'stakeholder peer review' workshop on the draft Strategy on 20 May. The workshop provided feedback that NDA will use to "shape the final editing" of the proposed Strategy.

The main concern raised by the ED was that potential initiatives described by NDA as 'strategic opportunities' are unlikely to move beyond the aspirational level if NDA does not properly address how they might be implemented. Following the workshop, the ED wrote to the NDA to suggest that:

... strategic opportunities' – for example alternative disposal routes for VLLW/LLW, consolidation of storage/treatment, near surface disposal of short-lived ILW/graphite - would remain at the aspirational level if NDA does not explicitly develop appropriate implementation strategies. Furthermore, without such strategies there is a considerable risk that attempts at implementation will degenerate into a campaign of attrition fought through the development control process – characterised by applications, refusals and appeals, leaving bad feelings and costly bills, and sitting uncomfortably with the NDA's mission statement about delivering publicly acceptable solutions, and its long-standing commitment to maintain the confidence of stakeholders.

I would welcome the opportunity to discuss what the components of appropriate implementation strategies might look like. Indeed, NuLeAF has made various contributions and suggestions over the past 18 months, including:

- That NDA encourage a focus on 'on or adjacent to site' disposal options for VLLW/LLW (see responses to Qs 6, 11 and 12 in [comments on proposed LLW](#))

[strategy](#)). This approach is likely to be more applicable to locations with some form of nuclear future.

- That NDA/LLWR encourage good practice in communication and stakeholder engagement in the implementation of LLW strategy. This has been taken up through publication of a paper that we prepared under the auspices of the LLW Strategy Group (see [Pointers to Good Practice](#) on the LLWR website).
- That Government develop a national framework for community funds associated with the development of radioactive waste management facilities. NuLeAF's March 08 proposals were rejected by Government officials (see [Community Funds and Radwaste Facilities](#)).
- Most recently, that the Scottish Government consider whether any of the concepts from the GDF siting process – voluntarism, partnership and community benefits – should be applied to any of its siting options for storage or near-surface disposal facilities. We suggested that the case for application of these concepts could be argued to increase as we go from decentralised to centralised options, and from storage to disposal (see [Comments on Scottish HAW policy](#)).

So, I would suggest that the terrain to cover in discussion of potential components of implementation strategies include types of location, effectiveness of communication and engagement, scope for community benefits, and applicability of the concepts of voluntarism and partnership.

The NDA have acknowledged that implementation issues need to be addressed, but indicate that there is unlikely to be anything concrete about this in the new Strategy. Nonetheless, they add that “making it real is very much at the front of our mind and we will be taking steps to facilitate”.

Formal consultation on the NDA's proposed Strategy is anticipated to start in early September and end towards the end of November. This can be considered in detail at the October SG meeting.

It is suggested that the SG agree to write to the NDA asking that it take account of the implications of the Aarhus Convention and associated EC or UK legislative requirements – particularly regarding public participation - in the way it develops its thinking on implementation of key aspects of strategy for managing radioactive wastes.

Annex: Overview of the Aarhus Convention and its Application

1 Introduction

The Aarhus Convention was adopted by 39 of the United Nations Economic Commission for Europe's (UNECE) 55 member countries and the European Community in 1998. The Convention:

- “Links environmental rights and human rights
- Acknowledges that we owe an obligation to future generations
- Establishes that sustainable development can be achieved only through the involvement of all stakeholders
- Links government accountability and environmental protection
- Focuses on interactions between the public and public authorities in a democratic context.

The subject of the Convention goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement, it is also a Convention about government accountability, transparency and responsiveness.”

The Convention was ratified by the UK in February 2005. Officially, the Convention is known as the ‘Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters’ and, as the title suggests, contains three broad themes, referred to as ‘pillars’.

Access to information

Pillar 1 gives citizens the right to access environmental information held by public authorities (at national, regional and other levels), private companies providing public services, and institutions of the EU. It thereby aims to make the work and services of governments and public authorities more accountable and to increase transparency.

The definition of ‘environmental information’ is intentionally kept broad. It includes information about elements of the environment (such as air, water, land, genetically modified organisms (GMOs) and biological diversity), as well as factors (noise, radiation), activities and measures that might affect them. The state and condition of human life, health and safety have also been classed as environmental information, insofar as they may be affected by any of the above specifications.

Public participation in decision-making

Pillar 2 gives citizens and NGOs promoting environmental protection the right to participate in decision-making processes. To ensure their adequate involvement in these procedures, it provides for the early release and circulation of all ‘relevant information’ before decisions are made. It also obliges governments and public authorities to take ‘due account’ of the outcome of the public participation.

The main areas affected by provisions of the second pillar are proposed activities in the energy, industry, transport, waste and water management sectors. Plans, programmes, the preparation of legal instruments and policies relating to the environment are also included.

Access to justice in environmental matters

Pillar 3 aims to guarantee citizens and environmental NGOs the right of access to justice and enhance their involvement in environmental law enforcement. It seeks to achieve this by guaranteeing them access to review procedures when their rights to information, participation or environmental laws in general have been breached.

Being the first environmental agreement that links environmental and human rights, the Aarhus Convention also addresses the question of what constitutes environmental justice. As outlined in Article 1 of the Convention, its objective is “to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing.”¹

2 The Aarhus Convention in EC Law.

An overview of how the Convention has been addressed by the EC is available at [European Commission - Environment - Working together - Aarhus](#).

The main EC provisions are:

Access to environmental information

Directive 2003/4/EC was transposed into UK law by the Environmental Information Regulations 2004 (EIR). Government produced detailed guidance on the Regulations, together with a Code of Practice to help authorities carry out their duties under the EIR.

Public participation in decision making

Directive 2003/35/EC is predominantly a technical measure. It amends public participation rights in the Environmental Impact Assessment (EIA) Directive and the Integrated Pollution Prevention and Control (IPCC) Directive. It also lays down rules for public participation in plans and programmes drawn up within other existing Directives. The Directive has been implemented by means of several statutory instruments covering the particular policy areas affected by it.²

Access to justice in environmental matters

Both EC Directives named above also contain provisions on access to justice.

Subsequent to the Directives, the EC passed Regulation (EC) No 1367/2006 ‘the Aarhus Regulation’. This covers not only the institutions, but also bodies, offices or agencies established by, or on the basis of the EC Treaty and requires them to adapt their internal procedures and practice to the provisions of the Regulation. The Aarhus Regulation addresses the “three pillars” of the Aarhus Convention - access to information, public participation and access to justice in environmental matters - where those are of relevance to Community institutions and bodies and lays down related requirements. Regarding access to environmental information, the Aarhus Regulation extends [Regulation \(EC\) No 1049/2001](#) of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents to all Community institutions and bodies. The Aarhus Regulation furthermore requires those institutions and bodies to provide for public participation in the preparation, modification

¹ Postnote from the Parliamentary Office of Science and Technology, January 2006.

² [Defra website \(pre-election\)](#)

or review of "plans and programmes relating to the environment". The Aarhus Regulation also enables environmental NGOs meeting certain criteria to request an internal review under environmental law of acts adopted, or omissions, by Community institutions and bodies.

Two decisions have also been adopted to implement further the Regulation:

- Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts. This Decision specifies the evidence to be provided by NGOs, the calculation of time-limits for reply to applications and cooperation between Community institutions and bodies. This Decision applies to all the Community institutions and bodies covered by Title IV of the Regulation.
- Commission Decision 2008/401/EC, Euratom of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institution and bodies. This Decision ensures that the General principles and minimum standards for consultation of interested parties by the Commission [COM(2002) 704] apply to public participation concerning plans and programme relating to the environment. It assigns also clear responsibilities and decision-making powers to the appropriate bodies or persons within the Commission with respect to the provisions of the Regulation concerning requests for internal review.

3 Application in the UK

An overview of how the UK Government has implemented the Aarhus Convention and associated EC requirements is available in a detailed implementation report (at [Aarhus Implementation Report 2008](#)). This provides an article by article account of how the Convention has been implemented, including UK-based legislation, codes of practice and guidance, and provision of associated web-links.

The approach of the previous UK Government is summarised on the DEFRA website:

“The government believes that improved access to information and wider participation of the public in decision-making processes are essential for building trust within communities, increasing public authority accountability and making better environmental policy. Backed by access to justice, this will create greater transparency and openness in environmental matters, and will contribute towards society’s goals of more sustainable and environmentally sound development.”

4 Compliance with the Convention and Rights of Appeal

In order to obtain a comprehensive overview of the different measures adopted or in place in the Member States to implement Article 9(3) of the Aarhus Convention and related provisions, the Commission contracted a consultant to prepare a study focusing on the

measures allowing members of the public to contest actions or omissions by public authorities. The UK report (accessible via the zipped file of country reports at [Appeal routes](#)) states that there are “over 50 different appeal routes under specialised environmental legislation. These ‘regulatory’ or ‘administrative’ appeals are only open to the person or business affected by the decision that is being appealed against. The general public do not have a right of appeal in such cases. Members of the public may appeal against an act or omission of a public authority through a procedure known as judicial review.

In general the jurisdiction of the court covers:

- Applications to prevent a public authority acting unlawfully
- Applications to require a public authority to act lawfully
- Applications to quash an invalid act
- Applications for declarations as to what is the proper legal regime and rules applying to a particular case
- Where appropriate, applications for injunctions
- Where appropriate, applications for damages associated with a substantive claim.

Generally an application for judicial review follows a two stage process. The first stage involves an application for permission to apply for the relief sought by judicial review and acts as a filter against obviously un-meritorious applications. It is also the stage where challenges such as whether the applicant has “sufficient interest” in making the application. The substantive legal and factual merits of the case are considered in the second stage. However, courts are now prepared to consider judicial review proceedings in a combined hearing especially in complicated cases.”

Compliance with the Convention is also reviewed by the UNECE’s Compliance Committee. The compliance mechanism may be triggered in four ways:

1. a Party may make a submission about compliance by another Party;
2. a Party may make a submission concerning its own compliance;
3. the secretariat may make a referral to the Committee;
4. members of the public may make communications concerning a Party's compliance with the convention.

In addition, the Committee may examine compliance issues on its own initiative and make recommendations; prepare reports on compliance with or implementation of the provisions of the Convention (see [Compliance Committee website](#)) .

Environmental Law Foundation (ELF)

ELF is a national UK charity which helps people use the law to protect and improve their local environment and quality of life. In their ‘Access to Environmental Justice’ Report (2010), ELF concluded that over half of cases in receipt of advice from them do not progress to judicial review because costs were prohibitive.