FINDING COMMON GROUND

Report on Aarhus Implementation – IRELAND

ABSTRACT:

This report sets out to highlight a range of the key gaps in Aarhus Convention implementation in Ireland, which include issues with timeliness of access to information, lack of provision for public participation in many areas, and issues accessing the courts dues to delays, costs, standing rules, and problems with the standard of review. The report highlights possible solutions where possible, and makes recommendations for further research.

REPORT ON AARHUS CONVENTION IMPLEMENTATION IRELAND

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This report is produced as part of the Irish Research Council funded project "Finding Common Ground: Towards all-island implementation of the Aarhus Convention", and any comments/feedback on this report should be sent to ahough@tus.ie.

The Principal Investigator for the project is Alison Hough, Technological University of the Shannon. Co-Investigators are Dr. Peter Doran of Queens University Belfast, and Dr. Ciara Brennan of EJNI (and Newcastle University).

The project involves collaboration with Friends of the Irish Environment (FIE), an NGO dedicated to environmental protection and access to justice. The project also partnered with Environmental Justice Network Ireland (EJNI) and Friends of the Earth Northern Ireland (FOE-NI). It involved working with NGO umbrella bodies, The Environmental Pillar/IEN and NIEL (Northern Ireland Environment Link).

This project sought to carry out a preliminary assessment of all-island implementation of the Aarhus Convention through a mix of desk-based research and consultation with the NGO community. It also explored the possibility for an all-island "Aarhus Centre".

A separate report "Aarhus Implementation in Northern Ireland" has also been prepared and is available on the website www.findingcommonground.ie. There is also an overall project report, titled "Synthesis Report: All-island Implementation of the Aarhus Convention" available on the website.

Thanks to Research Officer Caitlin McIlhennon of Environmental Justice Network Ireland (EJNI), the Gathering NI, all of our webinar speakers, those who participated in the workshops, the eNGO communities Northern Ireland and Ireland, and our funder, the Irish Research Council (New Foundations) for their support in undertaking this project.

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Executive Summary

The Aarhus Convention, an international treaty, mandates environmental democracy rights – public participation in environmental decision making, access to environmental information and access to justice when these rights are denied, or the environment is harmed. The Convention has been a transformative force in EU and Irish environmental governance. Some of the key issues with the Convention's implementation in Ireland highlighted by the combination of desk-based research, consultation and surveys in this study include:

- **The need for simplification of the environmental law framework –** excessive complexity makes the law inaccessible for the public, decision makers and public bodies**.**
- **Protections for those exercising their rights** – extension of whistle-blower protection outside of the employment/volunteer context (4.6), creation of an offence of harassment of environmental defenders (4.7), tackling SLAPP litigation, guidelines for media and political discourse around environmental rights, ending "applicant shaming" (4.16).
- **Capacity building** of the public regarding their Aarhus Rights and civic responsibility is key (10.23).
- **Training for public authorities:** Many issues arise from failure of public bodies to appreciate their obligations under the Aarhus Convention (4.2, 5.8, 5.21).
- **Access to Information**:
    - Poor first-instance[1] decision making by public bodies requires improved awareness and training, and full transposition of the AIE Directive should be key priorities (5.8, 5.21).
    - Underfunding of the Office of the Commissioner for Environmental Information (OCEI) should be addressed immediately.
    - Timeframes for deciding initial applications should be reduced and timeframes for the OCEI to decide on appeals should be created to tackle delays (5.17).
- **Public Participation** procedures need re-evaluation. Inconsistent practices, and high thresholds (6.11 – 6.13), (e.g. forestry, aquaculture), and a lack of consideration of diversity and inclusion issues in public participation is evident. Public participation rights are also adversely impacted by AIE failures.
- **Access to Justice:**
    - lack of proper legal aid (7.3) is problematic, and own costs are still a problem.
    - Reforms to improve access to justice like multi-party litigation (4.18) and third-party funding (4.17) should be considered.
    - Judicial Review- the standard of review (7.20) and standing rules need review (7.8).
    - Dedicated, streamlined environmental courts system could increase efficiency.
- **Funding should be provided for Aarhus Centres.** Appropriately supported, Aarhus Centres or Environmental Rights Centres could play an important role in NGO and public capacity building, and in monitoring State compliance from an objective point of view.
- **Cross-border exercise of Aarhus Rights** is threatened by Brexit and mechanisms are needed to enhance coherence.

[1] First-instance refers to the first time a decision is made on an application, as opposed to the appeal or review stages. For planning decisions, this is frequently the County Council decision to accept or reject a planning application.

- **Key Recommendations to support Aarhus Rights:**
    - Research into the areas identified above, in particular protection of environmental defenders, and costs measures, and the standard of review.
    - Measures to encourage pro-bono legal assistance such as tax write offs & CPD.
    - Media balance policies and Oireachtas Guidelines to be updated to discourage "applicant shaming".
    - Establishment of an Aarhus Centre on an all-island basis to focus on research, capacity building and NGO support.
    - Increased awareness and training for public bodies.
    - Environmental Courts should be considered.
    - Mechanisms to promote regulatory coherence with Northern Ireland are needed.

1. This Report

1.1 This project is an NGO-Academic collaboration, which is reflected in the co-design/co-production of the project collaboratively with the NGO Friends of the Irish Environment, and in partnership with Environmental Justice Network Ireland (EJNI) and Friends of the Earth Northern Ireland (FOE-NI). It is also reflected in the consultation on the draft reports with the communities in both jurisdictions interested in environmental governance (eNGOs, activists and lawyers). This co-design and co-production approach to research ensures that those with on-the-ground experience of the issues the report seeks to address have input into the research design and outputs, and that the research outputs have on-the-ground applicability for those who are working to tackle the problems discussed. This increases the likelihood of the relevance of the research and the validity of its recommendations.

1.2 This report was produced based on the desk-based research of the author which utilized transnational, comparative and doctrinal legal research methodologies, as well as data gathered by the research team from stakeholders through a targeted online stakeholder consultation and survey conducted by the research team. The stakeholders identified for the purpose of this project consisted of environmental NGOs, lawyers and activists engaged in environmental protection activities and interested in environmental governance in Ireland and cross-border. It aimed to gather knowledge about Aarhus Convention implementation that would not be available from the State version of the National Implementation Report submitted to the UN. The research team consisted of the author, Alison Hough BL, Senior Lecturer, TUS, Dr. Ciara Brennan, Director of the EJNI and Visting Fellow of Newcastle University and Dr. Peter Doran of QUB.

1.3 The purpose of this project is to carry out a preliminary assessment to identify key implementation issues in relation to Aarhus Convention rights. The data gathered is intended to be used to identify research priorities to form the foundation of a future, more comprehensive research project on Aarhus implementation. As such this report does not claim to be a comprehensive or systematic analysis of the areas covered.

1.4 The author would like to thank all the eNGOs, activists and lawyers who took the time to participate in the activities that contributed to both the design of this project and the formulation of this report.

2. Introduction

2.1 The Aarhus Convention (UNECE, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998) arose out of Principle 10 (UNEP) of the Rio Declaration 1992 (UN, Rio Declaration 1992, 1992), ("the Convention" or "the Aarhus Convention" hereafter) which embodies a key principle of international environmental law, that environmental decisions are best handled with the participation of those concerned. The Convention was unusual in that it was negotiated with NGOs at the table (Wates, 2004), and

NGOs remain important actors at the Meeting of the Parties, with speaking rights. The Convention placed a large degree of importance on including the public in decision-making about the environment. Public participation in environmental decision-making was framed as a fundamental international law right, and increasingly it has come to be framed as a human right (Ebbesson, 2018). The Aarhus Convention included two other categories of rights to support the right of public participation. These were the right to access information about the environment (so that the public would be well informed enough to participate in environmental decision-making), and the right to a remedy in the courts when rights of public participation and information were not fully protected. "Access to Justice", as it is known, is a very important plank of the tripartite rights that make up the Aarhus Convention rights in broad terms. The Convention also provides for other related rights and obligations, like the right to protection from persecution for environmental defenders[2], the obligation to provide support for environmental NGOs[3], or the obligation to take all necessary steps to implement the Convention[4].

2.2 The Convention also provides for environmental impact assessment (EIA) of projects that have a significant effect on the environment, and high-level plans and programs affecting the environment (Strategic Environmental Assessment (SEA)) (like Government Policies and Strategies, or County or Local Development Plans). It provides for public participation as an integral part of the environmental impact assessment process of these types of projects.

3. Ratification & Implementation

3.1 The Aarhus Convention has been ratified (made fully legally binding) by 47 State Parties (UNECE, 2017) worldwide. The EU ratified it in 2005 (EU, 2019). The European Union was specifically envisaged as a signatory during the drafting of the Convention, and is circumspectly referred to as a Regional Economic Integration Organization or REIO in the Convention (UN, 2019).

3.2 The EU implemented the Convention through a series of Directives and Regulations. Directive 2003/4/EC provided for Access to Information, and 2003/35/EC provided for Public Participation, which brought about amendments to the EIA Directive 85/337/EEC facilitating public participation in Environmental Impact Assessment. Attempts to introduce an Access to Justice Directive were controversial and ultimately failed. The EU also introduced public participation in plans and programs relating to the environment (Directive 2001/42/EC) and in the management of water bodies and river basins (Directive 2000/60/EC "Water Framework Directive"). The Aarhus Regulation 1367/2006 applied the provisions regarding access to justice to the EU institutions, although its implementation is widely regarded as unsatisfactory (Kramer, 2017) in many respects. Finally, Regulation (EC) No 1049/2001 provided for access to environmental information from the EU institutions and bodies.

3.3 Ireland was one of the last countries to ratify the Aarhus Convention in 2012. Ireland has implemented the EU law implementing measures, which carry into Irish law the Aarhus

[2] Art 3(8) Aarhus Convention
[3] Art 3(4) Aarhus Convention
[4] Art 3(1) Aarhus Convention

obligations through a complex piecemeal set of amendments to various pieces of legislation, which has been the subject of infringement actions[5] brought by the Commission against Ireland. Implementation is widely regarded as unsatisfactory.

3.4 As this report will explain, Ireland has not fully implemented the provisions of the Convention. The individual instances of implementation failures are dealt with in the sections below. For example, no measures to implement Article 9(4) were introduced to ensure that access to justice was fair, equitable, timely and not prohibitively expensive, and the obligation to put in place a system of financial supports for those wishing to access environmental justice under Art 9(5). Access to substantive review is only available in exceptional cases in judicial review of environmental decisions. A court ruling shows that NGOs will never (under current legislation) for State financial supports for those accessing justice[6]

4. Implementation of Art 3(2)(3)(4)(7) & (8)

4.1 Funding of the eNGO sector in general is dismally low when compared to the UK/NI (Harvey, 2015). Even taking into account recent announcements of increases in funding of the IEN to €1.7 million[7], this still falls below the level funding available in Northern Ireland or the UK, and it should be borne in mind that this funding has to be distributed across all of the member organisations of the IEN which consists of around 28 members. This chronic underfunding of the eNGO sector represents a basic failing in relation to Article 3(4). There is also a difficulty with a lack of clear data on environmental funding being made publicly available. For example, CSO statistics for environmental issues do not include details of eNGO funding. This is basic environmental information which should be made available. The only clear comparable data, from 2015 came directly from the sector itself.

4.2 There is no legislative implementation in place of the obligation in Art 3(2) of the Convention for public bodies to provide assistance to the public in exercising their rights under the Convention. For example, the Irish Access to Information on the Environment Regulations 2007 – 2018, Regulation 5(1), create a general obligation to provide advice and guidance on the exercise of their rights but does not create sufficiently specific obligation to provide assistance for example in how to make a request for environmental information, or assistance in facilitating such requests when made.

4.3 There is no system in place to ensure capacity building of the public specifically in the area of Aarhus Rights, and the State has recently refused[8] a request for funding of an Aarhus Centre from the eNGO sector which would play an important role in capacity building for individuals. This is required by Art 3(3) of the Convention which requires specifically capacity building around the Convention's rights.

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[5] E.g. see https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1581 and https://ec.europa.eu/commission/presscorner/detail/en/IP_02_1950

[6] FIE v The Legal Aid Board (2020) IEHC 454 https://www.courts.ie/acc/alfresco/fe3f46ca-1aab-4a57-9c49-0aeeb6ad6d3c/2020_IEHC_454.pdf/pdf#view=fitH

[7] gov.ie - Minister Ryan announces significant increase in funding for environmental NGOs (www.gov.ie)

[8] https://www.friendsoftheirishenvironment.org/aarhus

4.4 Environmental law is a notoriously voluminous, fragmented, and obscure, and particularly in Ireland the judicial decisions which form the web of what is known as "precedent" (binding law principles developed by judges in multiple court judgments) are highly complex and difficult to navigate (Ryall A. , 2018) (Scannell, Environmental and Planning Law in Ireland, 2004) (Scannell, 2011). Knowledge about the law is hard to find and generally contained in expensive legal textbooks and subscription-based journal articles not available to those outside of third level/the legal profession. Government funded advice services like Citizens Information lack the capacity to assist in such a specialist and complex area. Initiatives to clarify and simplify environmental law and legal processes have been proposed, including statute law revision, and the development of dedicated environmental law courts, but to date no initiative that has made any impact on this problem has been launched successfully.

4.5 There are no government provided services building the capacity of citizens and NGOs to access information, participation or justice specifically in relation to the environment.

4.6 There is no system in place to implement Art 3(8) of the Convention, creating specific protections against harassment for environmental defenders. There is whistle-blower legislation (the Protected Disclosures Act 2014), which only covers information uncovered regarding organizational wrongdoing by a worker (s.5 of the Protected Disclosures Act) in the course of their job. This excludes volunteers. The only redress mechanisms are employment law ones. This law is set to be amended on foot of an EU Directive 2019/1937[9]. The draft legislation published in February 2022 will extend the protections to volunteers, shareholders, board members and job applicants for the first time[10]. Even if this amendment passes, the legislation would still not protect those who have no link to the organization being reported on (the majority of those reporting on environmental harms/wrongdoing), or those who take environmental judicial reviews or other court proceedings to prevent environmental harm, or make complaints in a personal capacity to State Agencies. It will not protect concerned citizens and NGOs who report on private or public sector wrongdoing for example.

4.7 Harassment of environmental defenders could be actionable by way of Section 10 of the Non-Fatal Offences Against the Person Act 1997, if the criminal burden of proof can be met, which can be challenging. It can be difficult to satisfy the constituent elements of the offence such as proving fear of harm or injury, and the repeated nature of the harassment (particularly an issue where different people are involved in the harassment). Also, difficulties arise where environmental defenders are harassed anonymously or online, and in these cases, it is difficult even to formulate a criminal complaint against persons unknown.

4.8 There is no civil wrong or tort of "harassment", and in the sense that it falls below the criminal threshold of putting a person in fear of actual harm, it is not illegal to bully someone. It may become a civil wrong should they suffer an injury, such as a mental injury like depression or anxiety, or a physical injury incurred as a result of the harassing behaviour where this is a foreseeable consequence of the behaviour. But distressing behaviour towards an environmental

[9] See the draft transposing legislation here https://www.gov.ie/en/publication/e20b61-protected-disclosures-act-guidance-for-public-bodies/#eu-whistleblowing-directive

[10] Protected Disclosures (Amendment) Bill 2022 – No. 17 of 2022 – Houses of the Oireachtas https://www.oireachtas.ie/en/bills/bill/2022/17/

defender to discourage them from engaging in environmental protection work is not as such against any law.

4.9 It is therefore recommended that consideration be given to the development of a statutory offence of intimidation of those involved in environmental protection activities, for the purpose of preventing those activities, in order to implement Art 3(8).

4.10 It is notable in Ireland that environmental NGOs frequently come under attack for their activities (O'Neill, et al., 2022). In 2021 Friends of the Irish Environment received threats of violence and intimidation in relation to a judicial review they were involved in regarding local authority own development in Roscommon[11]. Environmental NGOs have also been targeted by politicians and public figures for their environmental protection activities. This is unacceptable and potentially a breach of Art 3(8). Political interference in the activities of environmental NGOs and in particular threats to funding should not be tolerated.

4.11 This was highlighted in the judgement on the leave application of the Kilkenny Cheese Plant case[12] by Mr. Justice Humphries who called out the high-profile attacks on the Plaintiff, An Taisce, who was the subject of vitriolic attacks by farming bodies[13], a range of cross-party TDs and Senators[14], (including some members of Cabinet), and ultimately the Taoiseach himself urging them from the Dáil to drop the appeal of the High Court case[15]. At para 35 the learned judge goes on to pinpoint some of the real causes of the delays in the planning system, such as lack of judges. The issue of "applicant shaming" has been raised by the court in multiple subsequent litigations[16].

4.12 Issue has also been raised with the media coverage of environmental issues. For example, the State broadcaster[17], RTE, have been criticised for their lack of coverage of environmental issues like climate change[18] (and their policy in relation to this has been the subject of a High Court case on environmental information[19]), as a result of which they have signed up to a climate

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[11] Environmental activist threatened by figures linked to IRA, court told – The Irish Times 25th August 2021 https://www.irishtimes.com/news/crime-and-law/courts/high-court/environmental-activist-threatened-by-figures-linked-to-ira-court-told-1.4655905

[12] An Taisce v An Bord Pleanála, [2021] IEHC 422, Humphreys J., 2nd July 2021 https://www.courts.ie/acc/alfresco/6182043c-443a-49b4-bde9-bb6e3b184689/2021_IEHC_422.pdf/pdf#view=fitH , para 34 & 35.

[13] "The Questions An Taisce Must Answer" IFA, 11TH May 2021, https://www.ifa.ie/farm-sectors/the-questions-an-taisce-must-answer/

[14] "This is an attack on rural Ireland: Fine Gael TD's call out An Taisce planning appeal" https://www.wlrfm.com/news/this-is-an-attack-on-rural-ireland-fine-gael-call-out-an-an-taisce-planning-appeal-186401

[15] "Taoiseach calls on An Taisce to reverse High Court appeal" Farmer's Journal 11th May 2021 https://www.farmersjournal.ie/taoiseach-calls-on-an-taisce-to-reverse-high-court-appeal-on-glanbia-plant-621287

[16] Enniskerry Alliance and Enniskerry Demesne Management Company CLG v An Bord Pleanála [2022] IEHC 6 (High Court (General), Humphreys J, 14 January 2022), An Taisce V. An Bord Pleanála (No. 2) [2021] IEHC 422, [2021] 7 JIC 0205 (Unreported, High Court, 2nd July, 2021), Save Cork City Community Association CLG V. An Bord Pleanála (No. 1) [2021] IEHC 509, [2021] 7 JIC 2802 (Unreported, High Court, 28th July, 2021); Cork County Council V. Minister for Housing, Local Government and Heritage [2021] IEHC 683, [2021] 11 JIC 0502 (Unreported, High Court, 5th November, 2021))

[17] John Gibbons: We cannot fall prey to lobbyists as they set about picking the IPCC report apart (thejournal.ie) August 2021, https://www.thejournal.ie/readme/climate-report-5519240-Aug2021/

[18] How RTÉ News is covering climate change (rte.ie) 27th July 2021, https://www.rte.ie/news/analysis-and-comment/2021/0726/1237408-climate-change/

[19] Right to Know CLG v OCEI & RTE [2021] IEHC 353 on 20 April 2021, https://www.courts.ie/viewer/pdf/7b38915d-f3b3-40dd-8a41-16231fa92608/2021_IEHC_353.pdf/pdf#view=fitH

reporting pledge[20]. Major news outlets regularly carry articles that paint the exercise of environmental rights in a negative light, and it is commonplace for politicians to criticize "objectors", characterising those who exercise their Aarhus rights as "NIMBYs" ("Not In My Back Yard"), a term intended to shame those who exercise their rights under the Convention as merely selfish, rather than having genuine environmental concerns. The common theme is that the exercise of environmental democracy rights delays development of everything from vital infrastructure to housing, with environmental defenders even being blamed for the housing crisis[21].

4.13 Extensive research already demonstrates that delays in the planning system are due to a combination of a high rate of poor quality first instance decision making, legislative amendments aimed at speeding up the process but actually making it less effective (such as the now repealed Strategic Housing Development provisions) and dysfunction in the Courts system[22]. Recent revelations regarding An Bord Pleanála[23] have called into question the integrity[24] and efficacy[25] of that planning appeals and decision-making body, which already has a history of massive delays and backlogs[26]. Also, misattribution of the housing crisis in general to "objectors" is common[27]. In reality, the true causes are much more complex, and detailed analysis of this is outside the scope of this report, but in broad brushstrokes it can be traced to

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[20] Rté Joins Broadcasters Pledging to Help Audiences Navigate Climate Change – https://about.rte.ie/2021/11/03/rte-joins-broadcasters-pledging-to-help-audiences-navigate-climate-change/

[21] E.g. David McWilliams: Serial objectors are colonising future through Nimbyism (irishtimes.com) 1st May 2021, https://www.irishtimes.com/opinion/david-mcwilliams-serial-objectors-are-colonising-future-through-nimbyism-1.4551548?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fopinion%2Fdavid-mcwilliams-serial-objectors-are-colonising-future-through-nimbyism-1.4551548 . "Want to find the cause of the housing crisis: Look in the mirror" 13th November 2018, David McWilliams https://davidmcwilliams.ie/want-to-find-the-cause-of-the-housing-crisis-look-in-the-mirror/ . Ian Guider: Serial objectors don't help in trying to solve the housing crisis | Business Post 5th Dec 2021 https://www.businesspost.ie/analysis-opinion/ian-guider-serial-objectors-dont-help-in-trying-to-solve-the-housing-crisis/ . Call for Government to deal with 'serial objectors' to planning permission | Newstalk 29th May 2019 https://www.newstalk.com/news/call-government-deal-serial-objectors-planning-permission-864833 . County Council to weed out 'serial objectors' - Friends of the Irish Environment. 'I hate them with every vein in my body' – Danny Healy-Rae hits out at 'serial objectors' to tree felling - Independent.ie 29th September 2020 https://www.independent.ie/irish-news/politics/i-hate-them-with-every-vein-in-my-body-danny-healy-rae-hits-out-at-serial-objectors-to-tree-felling-39572726.html. Aughnacliffe's Cllr Garry Murtagh calls for serial objectors to submit deposit - Longford Leader 1st April 2021 https://www.longfordleader.ie/news/home/621500/aughnacliffe-s-cllr-garry-murtagh-calls-for-serial-objectors-to-submit-deposit.html

[22] 'It's the small person who bears the brunt' – High Court president launches attack on government over court backlogs - Independent.ie, July 2021, https://www.independent.ie/irish-news/courts/its-the-small-person-who-bears-the-brunt-high-court-president-launches-attack-on-government-over-court-backlogs-40641431.html

[23] "An Bord Pleanála Official Steps Aside Amid Claims of Impropriety" 9th May 2022, Irish Examiner, available at https://www.irishtimes.com/news/ireland/irish-news/an-bord-pleanala-official-steps-aside-amid-claims-of-impropriety-1.4874051. See also Concerns over 'system failure' at An Bord Pleanála (rte.ie) and "Paul Murphy – What about the 22 other scandals in An Bord Pleanála" 20th May 2022, available at https://www.facebook.com/watch/?v=498587805388080 . Also "Concerns over systems failures at An Bord Pleanála", RTE, 2nd June 2022 https://www.rte.ie/news/primetime/2022/0526/1301450-key-procedure-an-bord-pleanala/

[24] "An Bord Pleanála inspectors raise concerns about being asked to change reports", Irish Examiner, 2nd June 2022, https://www.irishexaminer.com/news/arid-40886393.html

[25] "An Bord Pleanála criticised for delay in online planning system", Irish Times, 19th February 2021 https://www.irishtimes.com/news/politics/an-bord-plean%C3%A1la-criticised-for-delay-in-online-planning-system-1.4490024

[26] "O'Cuiv condemns delays in An Bord Pleanála Appeals Mechanism" 15th July 2018 https://www.fiannafail.ie/news/o-cuiv-condemns-delays-in-an-bord-pleanala-appeals-mechanism

[27] E.g. See Fn 21 Above.

government policy such as the promotion of the Irish property market as an investment opportunity to foreign investment funds[28] with tax breaks (Lima, Hearne , & Murphy, 2022) (Birchall, 2021), over reliance on private market HAP housing[29] (Hearne & Murphy, 2022), and inadequate measures to tackle tenant security (Birchall, 2021), dereliction (Joint Oireachtas Committee on Housing, Local Government and Heritage, 2022)[30] and pursuing a policy of dropping housing standards to increase development[31]. However, this false narrative has already manifested in several unfortunate legislative attempts to restrict Aarhus rights in an attempt to appease industry lobbyists keen to reduce regulation in various sectors. This includes the General Heads of the Housing, Planning and Development Bill 2019[32] which sought to heavily restrict both NGO and individuals' rights to review planning decisions, and similarly restrictive proposals in the area of forestry originally contained in the Agriculture Appeals (Amendment) Bill 2020[33]. As pointed out by Ryall (2019), the introduction of such measures has a tendency to backfire, resulting in more legal challenges not less, because such restrictive measures inevitably conflict with EU laws and international law norms surrounding access to environmental justice.

4.14 It was notable that in the public consultation and survey on Aarhus Implementation many participants raised the issue of dominant narratives from government that were anti-environmental democracy and that were incorrect or misleading, and many participants expressed a desire to see this narrative challenged or addressed. This issue was rated as a serious issue for Aarhus Implementation in Ireland. Workshop participants also expressed concern about attacks on environmental defenders in Ireland.

4.15 A range of measures should be considered, including media monitoring for industry influenced narratives that run counter to environmental protection objectives, the adoption of a BAI policy on environmental and climate reporting, to include monitoring for balance in environmental discourse. The introduction of a statutory offence of intimidation of those engaged in environmental protection activities with the objective or intent of preventing them from engaging in those activities should be considered, with penalties and both EPA and citizen enforcement powers. Whistle-blower protections designed to protect those with no connection

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[28] Hundreds of luxury apartments controlled by US fund lie vacant in capital | Business Post 17th January 2021, https://www.businesspost.ie/news/hundreds-of-luxury-apartments-controlled-by-us-fund-lie-vacant-in-capital/

[29] Ires Reit made €8.7 million from state rent subsidies in 2021 | Business Post 6th Feb 2022 https://www.businesspost.ie/news/ires-reit-made-e8-7-million-from-state-rent-subsidies-in-2021/

[30] E.g. see "Why fixing Ireland's housing crisis requires a change of policy" Dr. Rory Hearne, https://www.maynoothuniversity.ie/research/spotlight-research/why-fixing-irelands-housing-crisis-requires-change-policy.

[31] https://www.irishtimes.com/news/social-affairs/owen-keegan-questions-suitability-of-build-to-rent-for-social-housing-1.4867665

[32] The draft legislation can be seen here https://www.gov.ie/en/consultation/c20fbc-public-consultation-on-general-scheme-of-the-housing-and-planning-an/ . The public consultation attracted 294 submissions, the overwhelming majority of which were critical. See Overwhelming majority of submissions on government's controversial planning law proposals object to restrictions on access to justice for citizens, NGOs, and others – TheStory.ie at https://www.thestory.ie/2021/07/28/overwhelming-majority-of-submissions-on-governments-controversial-planning-law-proposals-object-to-restrictions-on-access-to-justice-for-citizens-ngos-and-others/ However, despite this, the Government has indicated an intention to revive the proposals to restrict judicial review contained in the bill e.g. https://verde.ie/blog-post/planning-process-set-for-major-review-by-attorney-general/ .

[33] https://www.gov.ie/en/consultation/290a0-submissions-received-in-response-to-the-public-consultation-on-the-draft-agriculture-appeals-amendment-bill-2020-now-entitled-the-forestry-miscellaneous-provisions-bill-2020/

to the organisation committing the wrongdoing should be considered, in line with Art 33 of the UN Convention Against Corruption (UNCAC)[34] to which Ireland is a party. Guidelines for political representatives and members of Government in public statements regarding environmental defenders could also be considered, particularly in the Oireachtas, to ensure parliamentary privilege is not abused. This could be in the form of a broader definition of whistle-blower in line with the UNCAC, or the introduction of a new criminal offence of targeting of environmental defenders, or both.

4.16 Another issue faced by those who seek to exercise their environmental democracy rights is targeting of those who engage in public participation or access to justice with defamation or other kinds of intimidatory lawsuit. This practice is known as SLAPP (Strategic Law Suits Against Public Participation), whereby the courts are used as a tool to threaten those involved in environmental protection activities (for more see CASE Report (CASE, 2022)). Donson (Donson, 2010) points to the looser description of Anthony (Anthony, 2009) "SLAPPs can be seen as meritless suits designed to intimidate and harass political critics into silence and not to achieve the purposes of the action, such as compensation for the wrong", which seems to be closer than the narrower definition of Pring and Canan[35] (Pring & Canan, 1996) to modern conceptions of SLAPP, for better or worse. In 2020 Ireland was notified to the Council of Europe regarding use of a SLAPP against journalists. There are concerns that Ireland's defamation processes which are costly and lengthy, present the ideal forum in which to run SLAPP litigation, where the objective is not to win but to tie up the target's time, energy and money. Some commentators suggest the removal of juries would ease the burden. In 2022 Ballyboden Tidy Towns committee were threatened with a defamation suit for opposing Strategic Housing Developments (SHDs) in their area which was raised in the Dail[36]. It is such as serious issue across Europe (Borg-Barthet, Lobina, & Zabrocka, 2021) that the EU have brought forward a proposal for a directive[37] to tackle it which covers some core areas such as swift dismissal, costs, penalties, and compensation. Reforms have also been proposed[38] domestically in Ireland as a result of a review of the Defamation Act 2009.

4.17 Another group of local residents were targeted with three separate law suits in response to their judicial review of an SHD development decision by An Bord Pleanála (see the judgment in Kelly v An Bord Pleanála [2022] IEHC 238, Holland J., 28th April 2022 on the developers motion to dismiss). The developer, Atlas, accused them of champerty and maintenance (as well as defamation, nuisance and breach of a restrictive covenant in other cases filed). Champerty and maintenance are ancient crimes/torts that are committed when a third party with no interest in the case before the court provide funding to the litigants to take the case. It is based on statutes created between the 14th -17th century, making third party funding of litigation a crime and a

[34] UN Convention Against Corruption available at https://www.unodc.org/unodc/en/treaties/CAC/

[35] "A civil claim brought against non-governmental individuals or organisations on an issue of public interest, objecting to their communications made to influence a governmental action or outcome." (Hilson, 2016).

[36] Houses of the Oireachtas Commission: Motion – Dáil Éireann (33rd Dáil) – Tuesday, 1 Feb 2022 – Houses of the Oireachtas https://www.oireachtas.ie/en/debates/debate/dail/2022-02-01/10/

[37] Commission tackles abusive lawsuits against journalists (europa.eu) https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2652

[38] Speech by Minister McEntee on the Report of Review of Defamation Act 2009 - The Department of Justice 11th May 2022, https://www.justice.ie/en/JELR/Pages/SP22000085

tort (Maintenance and Embracery Act 1634, and some older laws). Ancient laws on champerty and maintenance also potentially inhibit crowdfunding of litigation in Ireland, which is permitted in the UK. In a 2017 Irish case, "Persona"[39] the Supreme Court confirmed that the ancient statutes are still effective and third party funding is still against the law. The decision also states (obiter) that "After the event" insurance is not illegal however. This is one way that those who seek to access justice sought to overcome costs barriers (discussed below) but unfortunately this is prohibited. For many years crowdfunding was common in Ireland for legal cases, but the recent ruling discussed above makes it clear that those who take this approach to costs barriers can be penalised.

4.18 Another related matter is the lack of formal "class actions" or multiparty litigation in Ireland (Kelly, 2020). The Chief Justice Mr. Frank Clarke commissioned a report "The Report of the EU Bar Association and the Irish Society of European Law relating to Litigation Funding and Class Actions" (EU Bar Association & ISEL, 2020) which recommended the introduction of both third party funding, and class actions, recommending implementation of the Law Reform Commission recommendations from 1995 that formal class action mechanisms be introduced, and reviewing the non-binding EU European Commission Recommendation 2013/396/EU encouraging Member States to establish collective redress mechanisms, with limited success.

4.19 It is noted that at the time of writing, the Meeting of the Parties to the Aarhus Convention have established a Rapid Response Mechanism [40]for Environmental Defenders[41] which will appoint a Special Rapporteur on Environmental Defenders. This is designed to address concerns regarding attacks on environmental NGOs and activists in the State Parties[42] to the Convention. This mechanism can issue orders to State Parties in relation to their treatment of environmental defenders. This is a very welcome development. It is to be hoped that the Special Rapporteur will be adequately resourced to deal with what is likely to be a very considerable volume of complaints from the 47 State Parties to the Convention.

Conclusion

4.20 In conclusion it can be seen that there is poor governmental support for the environmental NGO sector and despite some recent increases, most remain drastically under resourced. A poor understanding of the importance of environmental democracy rights, combined with misleading narratives around environmental democratic rights and their exercise from prominent figures in public life and the media create a toxic atmosphere for environmental defenders who are then subject to attack for attempting to combat environmental harms in the midst of a climate and

[39] Persona Digital Telephony Limited and Another v The Minister for Public Enterprise, Ireland and Others [2017] IESC 27, https://www.courts.ie/search/judgments/%22Persona%20type%3AJudgment%22%20AND%20%22filter%3Aalfresco_radio.title%22%20AND%20%22filter%3Aalfresco_fromdate.01%20Jan%202017%22%20AND%20%22filter%3Aalfresco_todate.31%20Dec%202017%22

[40] "Ireland to lead Rapid Response Mechanism to Safeguard Environmental Defenders" 21st Oct 2021, https://www.gov.ie/en/press-release/d2c3e-ireland-to-lead-on-un-rapid-response-mechanism-to-safeguard-environmental-defenders/

[41] Rapid response mechanism to protect environmental defenders established under the Aarhus Convention | UNECE https://unece.org/media/environment/Aarhus-Convention/press/361413

[42] Inf.16_Situation_of_environmental_defenders_in_Parties_to_the_Convention.pdf (unece.org) https://unece.org/fileadmin/DAM/env/pp/wgp/WGP_24/Inf.16_Situation_of_environmental_defenders_in_Parties_to_the_Convention.pdf

biodiversity crisis. Financial precarity of environmental NGOs and lack of any effective legal protections for environmental defenders magnify the effect of these factors, whether they are NGOs or individuals. Neither the criminal law of harassment nor the legislation on whistle-blowers provide adequate protection to them. Recent increases in the use of SLAPP litigation act as a disincentive for exercise of civic rights. This undermines environmental protection, the rule of law and democracy/civil life. It is to be hoped that existing international law obligations to tackle these issues will be fully implemented. It is also to be hoped that some willingness to tackle these fundamental challenges and find creative, balanced solutions will be evident domestically without need to for civil society to resort to compelling action on same through the Courts or other mechanisms.

5. Access to Information

Legal Framework

5.1 The Access to Information Regulations 2014- 2018[43] as amended (AIE Regulations) create a comprehensive regime implementing Directive 2003/4/EC on Access to Information, and Article 4 & 5 of the Aarhus Convention. Information relating to the environment is very broad including "state of the environment" information like water quality levels, chemical use levels, plans or programs affecting the environment), environmental legislation reports, cost-benefit analyses, matters affecting human health and the food chain.

5.2 This regime is complemented by Freedom of Information[44] laws which mandate access to all information held by public bodies unless that information is somehow sensitive (for example for State Security or Commercial Sensitivity reasons).

5.3 The legislative process is not subject to these laws, and Cabinet discussions on these issues benefit from the legal principle of Cabinet Confidentiality.

5.4 However, the exceptions must be applied on a case-by-case basis according to the proportionality test (the restriction seeks to achieve a legitimate objective, and goes no further than is necessary to achieve that objective) and so some documents circulated by Cabinet are amenable to disclosure (see Right to Know CLG v An Taoiseach [2018] IEHC 372 below at para 5.20).

5.5 Time limits are longer in Ireland (one month extendable to two months for complex requests) than in many EU countries, and should be reduced to between 10 – 14 days (Institute of European Environmental Policy, 2019, p. 38) (EU Commission, 2012).

5.6 There is no timeframe set out in the Access to Information Regulations 2014 for the Commissioner for Environmental Information to make a decision. This can be adversely compared to the Freedom of Information Act 2014 as amended which sets down a four month[45]

[43] European Communities (Access to Information on the Environment Regulations) 2007 to 2018. (S.I No. 133 of 2007, S.I. No. 662 of 2011, S.I. No. 615 of 2014, S.I. 309 of 2018). Unofficial Consolidation available here: https://www.dccae.gov.ie/documents/Unofficial%20Consolidation%20AIE%20Regs%202011-2018.pdf

[44] Freedom of Information Act 2014 as amended (Number 30 of 2014). http://revisedacts.lawreform.ie/eli/2014/act/30/revised/en/html .

[45] Section 22 of the Freedom of Information Act 2014 as amended http://www.irishstatutebook.ie/eli/2014/act/30/section/22/enacted/en/html#sec22

timeframe for determination. The Aarhus Convention Compliance Committee recently found this lack of clear timeframe to be a breach of the Convention[46].

The effectiveness of the Legal Framework

5.7 Despite a comprehensive legislative regime, there appears to be a low level of awareness of access to information rights among the general public (Ryall A. , Access to Information on the Environment: The Evolving EU and National Jurisprudence, 2016), (Ewing, Hough, & Amajirionwu, 2011).

5.8 Also, NGOs report difficulties with public bodies/local authorities demonstrating lack of awareness of the obligations of the regime. Lengthy disputes frequently arise over whether information is "environmental information" or whether the body concerned is a "public" body (see below). Many survey respondents indicated that local authorities and public bodies seemed to lack either awareness or regard for access to information rights, and a desire to see both a greater level of training and actual penalties imposed on such bodies that flout their access to information obligations.

5.9 More research is needed to establish the level of awareness of access to environmental information rights of the public and public bodies.

Timeliness of Response

5.10 Delays in processing complaints by the Office of Commissioner for Environmental Information (the "Ombudsman" for Environmental Information, hereinafter the OCEI) have been repeatedly highlighted by NGOs.

5.11 Delays in processing access to environmental information requests were also highlighted by survey respondents and public consultation participants, with many finding delays arising at first instance as well as at OCEI level, where the lack of a fixed time frame for making a decision was experienced as problematic.

5.12 This has been the subject of a complaint by the NGO campaign group Right to Know CLG[47] (R2K) who lodged a complaint before the Aarhus Convention Compliance Committee (hereinafter the ACCC) in 2016[48] regarding access to environmental information in Ireland. In this case the complaint stated that when decisions to refuse information are referred to administrative review, they are not dealt with until long after the related decisions have been made, frustrating the public participation and access to justice rights of the requesting parties.

5.13 The extensive delays have been stated by the OCEI to be due to lack of resources[49]. The Irish State has indicated to the UN in 2017 that additional funding was allocated to the OCEI in 2015, but that this did not have the effect of reducing backlogs due to the increase in volume and complexity of the complaints being dealt with in that time (DCCAE, 2017). Therefore, one can

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[46] Para 110, ACCC/C/2016/141 C141_Ireland_findings_advance_version.pdf (unece.org)

[47] www.righttoknow.ie

[48] ACCC/C/2016/141 C141_Ireland_findings_advance_version.pdf (unece.org)

[49] Mr. Pat Swords and the Department of Environment, Community and Local Government (20 September 2013). http://www.ocei.gov.ie/en/Decisions/Decisions-List/Mr-Pat-Swords-andthe-Department-of-Environment-Community-and-Local-Government-.html

conclude that although funding was increased, it was not increased sufficiently to enable the authority to function as required by EU law.

5.14 The delays at this stage are compounded when the matter has to be judicially reviewed in the Courts, which stretches the timeframe by up to 6 - 7 years as was the case in NAMA -v- Commissioner for Environmental Information[50] [2013] IEHC 16612. In that case the complaint was initiated in 2010 and the refusal by NAMA of the information was the subject of final determination by the Supreme Court in 2015, determining that NAMA was a public body and therefore subject to the legislation, and so the request could finally begin to be dealt with by NAMA after the conclusion of the Court case. NAMA still did not supply the requested information in the aftermath of the Supreme court proceedings in that case[51].

5.15 The Aarhus Convention Compliance Committee has found that these excessive delays constitute a breach of the Convention[52].

5.16 Also, the situation reported by NGOs that public authorities often treat the outer limit of two months as the actual deadline should be addressed through amendments to the legislation that make it clear that extension is only to be availed of in exceptional circumstances. This should also be addressed through training provided regularly by the Department of Environment to public authorities/training provided as part of the PMDS system.

5.17 It is difficult to address this issue when no statistics are available, and instead reliance is placed on the anecdotal reports of NGOs and timelines in cases which come before the Court. There are statistics available for Government Department response times[53] to AIE requests and these do indicate good practice in terms of keeping to the time limit of one month by Government departments. However, it is impossible to assess the situation in the absence of more comprehensive data regarding the processing timeframes across the wider public service and in particular local authorities.

5.18 Records should be kept in a central database containing annual reports on the requests, the response times, and the reasons for any exceedances of time limits in order to monitor and assess compliance in this area.

Treatment of Requests

5.19 Another undesirable aspect of the framework is the treatment by public authorities of requests for information. The tendency by public authorities is to treat the AIE and FOI frameworks as competing separate frameworks instead of overlapping complementary frameworks, so refusing to deal with requests unless they list the "correct" legislation at the top of the request, and processing the requests under different legislation in different ways. This acts as a barrier to access that is not what was envisaged. This can be evidenced by cases such as Áine Ryall v An Taoiseach, a determination of the OCEI of the 13th December 2018, in which the Department of

[50] 4. NAMA -v- Commissioner for Environmental Information [2013] IEHC 16612, http://www.bailii.org/ie/cases/IEHC/2013/H166.html.

[51] See pg. 10 of the Communication in ACCC/C/2016/141 https://unece.org/DAM/env/pp/compliance/C2016-141_Ireland/Communication_19.08.2016_Ireland_R2K.pdf

[52] Para 117 ACCC/C/2016/141 C141_Ireland_findings_advance_version.pdf (unece.org)

[53] Supplied to this author on request to the Department of Environment.

An Taoiseach claimed not to be a public body, and that a memorandum of a proposal to alter standing rights in environmental and planning judicial review was not "environmental information". This was overturned by the OCEI and access was granted.

5.20 Similarly, in Right to Know CLG v An Taoiseach [2018] IEHC 372 access was refused to cabinet documents on emissions, many of which were ultimately found to be within the scope of the legislation, with the material being wrongfully classified as out of scope, and no balancing test used to determine access.

5.21 A final matter of note is that the Aarhus Convention represents a radical alteration in the governance and transparency obligations of Governments. This new era of transparency stands in opposition to a sometimes-dysfunctional organizational culture that prevails in the Irish Public Service. A generic example of how this might interfere with access to information is where, for example, employees in some sectors may be in fact subtly rewarded for finding creative ways to deny access requests. The account of treatment of "threshold jurisdictional issues" by Right2Know in ACCC/C/2016/141 and in commentary by the OCEI on these same issues[54], as well as the OCEI commentary on difficulties it has in engaging with public bodies on AIE issues[55], is suggestive of a culture problem around AIE. Procuring cultural change in an organization is a difficult task and there is a body of research on organizational change and performance management that suggests that culture trumps rules every time (O'Riordan, 2017).

5.22 Many survey and public consultation respondents highlighted experiencing a public service culture that lacked an understanding of the principles of transparency that underpin the access to information regime, finding that the rules on access to information were often not known or were flouted/not respected. Part of this may be lack of knowledge by local authority staff (despite annual training being offered by the Department of Environment). But it seems likely that at least some of these experiences may be attributable to organizational culture.

5.23 More needs to be done to address the "soft" or invisible cultural/organizational barriers to access to information that arise from a tradition of not affording access to information and participation in decision-making. This could be tackled through training. While it is acknowledged that the Department of Environment (now Communications, Climate Action and Environment) has provided several trainings to Local Authorities on Access to Environmental Information on the new AIE Regulations, addressing cultural barriers and organizational values takes a more workplace integrated, ongoing and consistent approach, and this could be an important contribution to producing real access to information. The PMDS professional development system used throughout the public service is supposed to highlight training needs. However, the evidence suggests uneven application of this system across the public service (O'Riordan, 2017, p. 21). (Ewing, Hough, & Amajirionwu, 2011).

5.24 Article 11 of the AIE Regulations does not create an obligation on the public authority, on first-instance refusal, to inform the applicant of their right to appeal.

5.25 The issue of threshold jurisdictional refusals highlighted by the applicant in Case 141 (but not subject to positive determination by the ACCC) should be investigated and if substantiated,

[54] E.g. see comments of the OCEI on pgs. 3&4 of its submission to the public consultation on review of the AIE Regulations from 16th April 2021, available here https://www.gov.ie/pdf/?file=https://assets.gov.ie/136947/04d180fc-809c-47bd-a590-c2b355bc5f0d.pdf#page=null.

[55] See pg. 6 of the above footnote.

should be dealt with by guidance, training, and possibly penalties for repeat offenders. The grounds for refusal need to be clarified to prevent this in the future.

5.26 It is important that public bodies give reasons for their decision. The OCEI has highlighted deficiencies[56] in the reason giving approach of public bodies, such in "threshold jurisdictional" cases where the request is refused because it is not deemed to be environmental information, or the body asserts they are not a public body. In such cases the AIE regulations are not clear that a reason giving obligation arises. This creates problems in accessing justice where environmental information is refused.

Dissemination

5.27 Another issue arising is the extent to which public bodies and local authorities are complying with their Article 5 Aarhus Convention obligations to engage in active dissemination in public forums of the environmental information they hold.

5.28 This provision is visible in Article 7 of the EU AIE Directive. This Directive requires that public authorities engage in "active and systematic dissemination". Nowhere in the AIE Regulations is this obligation transposed.

5.29 The Aarhus Convention requires that public bodies gather environmental information and disseminate it. In Irish Law, this provision is partly implied in the Access to Environmental Information Regulations, Section 5, but there does not appear to be any actual clear implementing provision for the Article 5 (Aarhus Convention) obligation on public authorities to "possess and update environmental information which is relevant to their functions", and as consequence this provision is not well implemented.

5.30 This means that most ordinary environmental information relating to a public body's activities should be routinely available as a matter of course without the need to make an access request. Given the frequency of disputes surrounding environmental information, it is clear this is not the case. There are some examples of good practice such as the provision of Planning information online by local authorities, the Pollution Register (ePRTR)[57]. However, there are many instances where information is not routinely provided, and other examples of provision of information that is inadequate. In the land use planning system, while there is quite a lot of information available online, frequently there are issues with the accessibility and searchability of both the local authority and An Bord Pleanála level information. Complex and clunky displays of the information which is held online is also an issue. (e.g. many instances of poor quality or inaccessible planning files on Local Authority websites, and An Bord Pleanála[58]). An Bord Pleanála's website[59] is very difficult to use, lists decisions in weekly batches with no categorization and not in searchable format. The new Forestry License Viewer provides very effective online access to Forestry License applications but according to eNGOs, there are issues with delays in license applications being uploaded which impact the tools usefulness in public participation.

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[56] See pgs. 4 & 5 of the OCEI's submission to the public consultation on review of the AIE Regulations, 16th April 2021 https://www.gov.ie/pdf/?file=https://assets.gov.ie/136947/04d180fc-809c-47bd-a590-c2b355bc5f0d.pdf#page=null

[57] http://www.epa.ie/enforcement/prtr/map/

[58] http://www.pleanala.ie/lists/2019/decided/index.htm

[59] http://www.pleanala.ie/lists/2019/decided/index.htm

5.31 A 2019 EU level study by the IEEP indicated that Ireland performs weakly when assessed on access to environmental information and transparency. It highlighted deficiencies in many respects in the dissemination of environmental information, for example chemicals information (Institute of European Environmental Policy, 2019, p. 33). It also highlighted that Ireland was one of the few countries that did not provide online EIA information in a manner that complied with best practice on accessibility for those with disabilities for example allowing customisation of text (Institute of European Environmental Policy, 2019, p. 55), or allowing text to be read aloud, as well as comprehensive alt-text description of images[60].

5.32 The IEEP report also criticised Irelands provision of EIA information as not meeting best practice (pg. 34) because data was incomplete or hard to access. It highlighted the need for greater digitisation of environmental information in general, and a complementary need for enhanced broadband access because of the reliance on internet-based dissemination (pg. 120).

5.33 One area where there is no implementation of the AIE Directive is that of lists of bodies that are classed as public authorities for the purposes of the regime, as required by Art 3(5)(b). This would enhance the clarity and efficiency of the regime if it was clear what bodies were subject to the regulations. This could be done by way of a register of public bodies.

5.34 It would also be preferable that the full list of categories of information required to be disseminated be transposed into the AIE Regulations in order to ensure the consistency with the Directive and clarity of the obligations. Particularly the AIE Regulations do not refer to the categories listed in Art 7(2)(d)-(g) and Art 7(3) of the Directive (State of the Environment Reports). It is acknowledged that many of these obligations are implemented elsewhere, but it would enhance clarity and accessibility of implementation information if these categories were to be added to Regulation 5 of the AIE Regulations.

5.35 Awareness training was carried out for Local Authorities by the Department of Communications, Climate Action and the Environment on the introduction of the updated 2014 AIE Regulations, and on occasions since then, but this training appears to have been insufficient to achieve the kind of access envisaged by the Regulations, if the contentions raised in the Case 141 are taken on board.

5.36 Public awareness of the regulations appears to be low (Ryall A. , Access to Information on the Environment: The Evolving EU and National Jurisprudence, 2016) and capacity building with the public is urgently needed. Obligations in this regard should be transposed into the AIE Regulations from Art 3(5) (obligation on public authorities to inform the public of the rights they enjoy).

5.37 Linking the training in to the PMDS system (Ewing, Hough, & Amajirionwu, Assessing Access To Information, Participation, and Justice in Environmental Decision Making in Ireland, 2011), or other more comprehensive/intensive approaches may be required, up and including collaboration with educational institutions to develop certified short courses credited on the National Qualifications Framework to ensure that those dealing with requests are fully aware of how to process them correctly.

[60] See the EIA Portal at https://www.housing.gov.ie/planning/environmental-assessment/environmental-impact-assessment-eia/eia-portal

Mandatory Exceptions

5.38 The AIE Regulations provide for mandatory exceptions. The Directive does not provide for any mandatory exceptions, and the default presumption should be access (Ryall A. , 2016). Refusal should be subject to a balancing test. Where refusal is presumed there is no balancing test applied. This should be remedied.

Conclusions on Access to Information

5.39 The implementing measures for Access to Information can be described as a framework that looks comprehensive on paper but lacks adequate provision for capacity building and doesn't in practice provide ready access to information. Better training for both the public and State bodies on the legislation is required, full transposition of all of the provisions of the AIE Directive is needed[61], as well as better practice guidelines for public bodies, with a view to producing a culture change in attitudes to transparency. Proper implementation of the obligation on public bodies to generate environmental information by engaging in monitoring, make the environmental information they have available to the public as a matter of course, and to regularly disseminate same, is necessary to truly fulfil this obligation. The underfunding in the OCEI should be addressed, and the dysfunction in the Courts system should also be examined (although it is recognized this is a broader cross-societal issue). Legislative timeframes for administrative review of decisions by the OCEI and Courts should be put in place. An argument frequently advanced by environmental academics is that a dedicated Environmental Court would provide faster and better-quality decisions in this area. Finally, more training needs to be provided to local authorities and public bodies to gather and disseminate on a regular basis information relating to the environmental impacts of their normal program of activities.

6. Public Participation

"If the developer has already poured the concrete, it's too late [to participate]"[62]

EU Law

6.1 The legal framework around public participation in environmental decision making required by Article 6 is uneven across different areas of environmental decision-making. The EU has implemented this provision by way of the Public Participation Directive 2003/35/EU, which has been the driver of Ireland's implementation in this area, together with the provisions of the EIA Directive (Directive 85/337/EEC, since repealed and replaced by 2011/52/EU, as amended by 2014/92/EU) inserted by the Public Participation Directive.

[61] It is to be hoped that this will be addressed by the ongoing review of the AIE Regulations https://www.gov.ie/en/consultation/53b81-public-consultation-on-the-review-of-the-access-to-information-on-the-environment-aie-regulations-2007-2018/

[62] Workshop Participant at the online event "Stakeholder Consultation on Aarhus Implementation in Ireland" 17th June 2021.

6.2 Public participation in plans and programs relating to the environment is required by Directive 2001/42/EC (Strategic Environmental Assessment) and in the management of water bodies and river basins (required by Directive 2000/60/EC "Water Framework Directive").

6.3 The requirement of Public Participation has been implemented in a variety of different ways in the legislative framework, with an unevenness across different areas of environmental decision-making in the depth and ease of participation.

Planning Law

General

6.4 Planning permission has traditionally had a strong public participation element (despite recent attempts to roll this back) that predates the Aarhus Convention and membership of the EU. The practice of requiring site notices and newspaper notices to be displayed in local papers to notify people of their right to participate, and the right of any person to make submissions and observations on a development are some of the strong points of public participation in the Irish planning and development framework.

6.5 Some matters of concern include the Strategic Housing Developments[63] and Strategic Infrastructure Developments[64] which by-pass the local authority stage and go straight to An Bord Pleanála, and have shortened timeframes for submissions and observations.

6.6 Strategic infrastructure development[65] can generally be described as development which is of strategic economic or social importance to the State or a region. It also includes development which will contribute significantly to the fulfilment of any of the objectives of the National Planning Framework or any regional spatial and economic strategy for an area, or which would have significant effects on the area of more than one planning authority.

6.7 Public participation periods are restricted to 6 weeks[66], which is much shorter than the period available on a normal residential or commercial development. This is controversial given these projects will, by their nature be large complex developments. Drafting such submissions or observations takes time.

6.8 Recent draft heads of Bill were proposed by Government which would seek to drastically restrict public participation and access to justice rights in this area.[67] These are discussed in detail under Access to Justice, below.

Planning participation and Covid-19

6.9 The emergency legislation provided for the extension of planning deadlines, including deadlines for public participation, during the pandemic, in order to ensure no one was prejudiced in the

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[63] Planning and Development (Housing) and Residential Tenancies Act 2016, No. 17 of 2016 http://www.irishstatutebook.ie/eli/2016/act/17/enacted/en/print#sec11
Planning and Development (Strategic Housing Development) Regulations 2017, SI 271 of 2017 http://www.irishstatutebook.ie/eli/2017/si/271/made/en/print

[64] ss.37A and 37B of the Planning and Development Act 2000.

[65] http://www.pleanala.ie/sid/sidpp.htm

[66] Section 37E, Planning and Development Act 2000.

[67] "New Bill a 'retrograde' step in access to justice" rightshttps://www.google.ie/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjf4sKFp4vmAhUUThUIHbmJAPQQFjAAegQIBBAB&url=https%3A%2F%2Fgreennews.ie%2Fbill-retrograde-step-a2j%2F&usg=AOvVaw3DXYUPQC4Oyw46BPc-hyc6

planning process as a result of Covid-19 disruptions[68]. Legislation was also introduced which allowed certain types of Covid-19 related infrastructure to be built without planning permission[69] at all (new categories of exempted development), and without environmental impact assessment or public participation. This has resulted in the construction of a six storey extension to the Mater Hospital, Dublin, without any approval process[70].

6.10 Given that the ACCC had issued a statement[71] that participation rights should not be impacted by Covid-19, this blanket exemption of what could potentially be very large infrastructure projects from any development control or public participation is concerning.

Environmental Impact Assessment (EIA)

6.11 Any project subject to Environmental Impact Assessment (which means certain types of projects meeting certain thresholds, and also any project that meets the criteria of having a significant effect on the environment) generally have a requirement for public participation thanks to implementation of the EIA Directive 2011/92/EC[72] as amended by 2014/52/EC[73].

6.12 Ireland was one year late in implementing new amendments that improve public participation under the new EIA Directive (European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018) and it is open to question the extent to which the regime introduced fully implements the Directive. The amendments that were introduced to implement the new Directive have been described as taking "legal complexity and legislative fragmentation to a whole new level, even by Irish standards" (Ryall A. , 2018).

6.13 There are some areas such as Forestry[74], Aquaculture[75] and Peat extraction[76] where thresholds for when a project requires EIA are set so high that they take almost all projects out of the purview of the public participation/environmental impact assessment process. Ireland was criticised for high threshold setting in the case C-392/96 Commission v. Ireland. Additionally, NGOs have raised concerns regarding project splitting[77], to keep projects within these thresholds and avoid triggering the EIA/participation obligations. This is the subject of a (second

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[68] E.g. see Section 9 of the Emergency Measures in the Public Interest (Covid-19) Act 2020 http://www.irishstatutebook.ie/eli/2020/act/2/section/9/enacted/en/html#sec9

[69] S.I. No. 93/2020 - Planning and Development Act 2000 (Section 181) Regulations 2020 http://www.irishstatutebook.ie/eli/2020/si/93/made/en/print

[70] "Mater Hospital is building a new wing using Covid planning exemptions" 6th June 2021 https://www.thetimes.co.uk/article/mater-hospital-is-building-a-new-wing-using-covid-planning-exemptions-29fhmtnfj

[71] Statement on the application of the Aarhus Convention during the COVID-19 pandemic and the economic recovery phase ECE/MP.PP/C.1/2020/5/Add.1 (unece.org)

[72] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p. 1–21, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0092

[73] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ L 124, 25.4.2014, p. 1–18 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0052

[74] Removal of 70 hectares of coniferous forest.

[75] Freshwater fish breeding of over 1 million smolts. Above 100 tonnes per annum fish production in sea water (Planning and Development Regulations 2001 – 2019, Schedule 5)

[76] Above 30 hectares (Planning and Development Regulations 2001 – 2019, Schedule 5).

[77] https://www.thejournal.ie/climate-change-ireland-1186621-Nov2013/

run) High Court decision in EPA v Harte Peat ltd [2014] IEHC 308[78], where the Court found that multiple separate projects by different owners in the same area should be assessed cumulatively (not currently the case). This was appealed to the Court of Appeal but remitted to the High Court for a second trial (which ran in the High Court[79] in March 2022).

Aquaculture & Foreshore

6.14 The legal framework for offshore development and resource exploitation has been described as "opaque" (Moylan, Ó'Cinnéide, & Whelehan, 2017)

6.15 Aquaculture Licenses are granted by the Minister for Agriculture, Food and the Marine. Foreshore leases and consents are considered 'companion' licenses to aquaculture licenses, and are also granted by application to the Minister for Agriculture, Fisheries and the Marine.

6.16 A new Marine Planning and Development Management Bill[80], in progress since 2013 which has not yet progressed to legislation, would attempt to improve this and bring certain offshore developments within the purview of An Bord Pleanála. However, this legislation is still draft.

6.17 Fees are substantial for third party appeals, costing €152.37[81]. Issues arise when multiple licenses are granted/renewed for a single area[82], and therefore individuals would be forced to pay multiples of this in order to participate in all of the decisions that affect them.

Forestry

6.18 Like Aquaculture licensing, recent legislation introduced many charges in this area. Under the Forestry (Miscellaneous Provisions) Act 2020, and the regulations made thereunder, a fee is charged for participation (€20 per observation), access to information (€20 per man-hour required to retrieve and produce the information) and a large fee for appeals of €200[83].

6.19 The stated intention of the introduction of the €200 fee for appeals appears to be to act as a barrier to appeals, which is contrary to the provisions and purpose of the Aarhus Convention. This appears to have had the effect also of reducing appeals[84].

6.20 NGO respondents to the consultation and survey highlighted fees in this area as a considerable burden, particularly as multiple projects are often submitted together in one area at the same time. Large volumes of applications for a single site by different providers, which must be addressed separately are common. An environmental NGO seeking to protect a single SAC could

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[78] EPA v Harte Peat ltd [2014] IEHC 308 https://www.courts.ie/viewer/pdf/e82383b0-6e9f-4582-8c1a-c9b89e7c8509/2014_IEHC_308_1.pdf/pdf#view=fitH

[79] https://www.courts.ie/acc/alfresco/fa01261d-d4af-4adc-b23f-e1f4e9374e1a/2022_IEHC_148.pdf/pdf#view=fitH

[80] General Scheme of the Marine Planning and Development Management Bill 2019 https://www.gov.ie/en/publication/25a96-marine-planning-and-development-management-bill-general-scheme/

[81] From Appeal Form available at http://alab.ie/appeals/appealsprocess/

[82] E.g. the 17 unnumbered applications by different operators in relation to Kenmare Bay under one NIS. Available at: https://www.agriculture.gov.ie/seafood/aquaculture foreshoremanagement/aquaculturelicensing/aquaculture foreshorelicence applications/cork/

[83] SI 418 of 2020, Forestry Appeal Committee Regulations 2020, http://www.irishstatutebook.ie/eli/2020/si/418/made/en/print?q=Forestry

[84] Forestry Sector Dáil Éireann Debate, Tuesday - 27 July 2021, Question 3408 https://www.oireachtas.ie/en/debates/question/2021-07-27/3408/

face paying multiples of the above €20 fee for submissions on all of the piecemeal applications in a single site, and multiples of the €200 fee for appeals.

Effectiveness of this framework

6.21 As this is a process designed primarily to be used by developers, it is likely that the public are less aware of the obligation to prepare an EIAR (Environmental Impact Assessment Report) or NIS (Natura Impact Statement, required under the Habitats Directive to ascertain risks to protected species) for certain projects, and the implications this has for bringing projects within the public participation provisions in the EIA Directive

6.22 The public are also likely to be less aware of the more complex process under the EPA Licensing process and the Strategic Infrastructure process.

6.23 The area of public participation is one where there is an unfulfilled need for capacity building in general regarding people's understanding of the fundamental nature of the right to public participation and the specific processes through which this right can be exercised.

6.24 Public participation in plans and programs (SEA) appears to be problematic. Government departments don't seem to be aware of the obligation to utilize the central electronic portal established for carrying out public consultations, and still restrict to publishing on their own websites[85].

6.25 Public participation in plans and programs often offer very short consultation periods, sometimes over holiday periods, asking for feedback on hugely complex issues, and accompanied by a failure to notify the appropriate stakeholders (e.g. the Open Government Partnership Action Plan Consultation[86] which opened from 15th January 2019 to the 31st January 2019, was not notified to the Environmental Pillar). Concerns arise in relation to "selective" consultation in these types of cases – is the Government seeking to confirm a particular viewpoint by only consulting with those bodies from which agreement has already been secured? The Environmental Pillar have provided at least three examples in the month of January 2019[87],[88],[89] alone, where they challenged public consultations because of short timeframes. This is an excessive drain on the time and energy of civic society volunteers that takes from time that could actually be spent contributing to the public consultations.

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[85] E.g. Consultation on Draft Integrated Implementation Plan 2019-2024 & associated Strategic Environmental Assessment (SEA) & Appropriate Assessment (AA) running from 28th November 2018 t0 1st February 2019 https://www.nationaltransport.ie/consultations/consultation-on-draft-integrated-implementation-plan-2019-2024-associated-strategic-environmental-assessment-sea-appropriate-assessment-aa/

[86] Open Government Partnership National Action Plan 2016-2018 Draft End-Term Self-Assessment Report, open 15th January 2019 – 31st January 2019, https://www.gov.ie/en/consultation/e5ba38-open-government-partnership-national-action-plan-2016-2018-draft-end/

[87] Transboundary Public Consultation on the Wylfa B Nuclear Power Station https://www.housing.gov.ie/planning/other/transboundary-environmental-public-consultation-wylfa-newydd-nuclear-power-plant

[88] Consultation on Draft Integrated Implementation Plan 2019-2024 & associated Strategic Environmental Assessment (SEA) & Appropriate Assessment (AA) https://www.nationaltransport.ie/consultations/consultation-on-draft-integrated-implementation-plan-2019-2024-associated-strategic-environmental-assessment-sea-appropriate-assessment-aa/

[89] Open Government Partnership National Action Plan 2016-2018 Draft End-Term Self-Assessment Report, open 15th January 2019 – 31st January 2019, https://www.gov.ie/en/consultation/e5ba38-open-government-partnership-national-action-plan-2016-2018-draft-end/

6.26 Another issue highlighted by NGOs is inconsistent practice when it comes to "taking into account" contributions to public consultations (O'Neill, et al., 2022). The extent to which written feedback is provided on the submissions varies widely, with some public bodies providing a written response to each comment, and some public bodies providing no responses whatsoever, and often not publishing submissions or only publishing them after long periods of time have elapsed[9091].

6.27 The Government have produced Guidelines on Public Consultation (Department of Public Expenditure and Reform, 2016), which are adhered to by some but not all bodies, as evidenced by the practice examples above. Consistency would be desirable in this area.

6.28 Additionally, these guidelines and indeed many of the public participation systems described above (planning, EIA, licensing) treat the public as a homogenous mass and make no attempt to provide nuanced public participation mechanisms that recognize the demographic or other diversity of the population being consulted with, resulting in indirect exclusion of groups from consultations (O'Neill, et al., 2022). For example, the over-reliance on online means of mass consultation with the general public may exclude those who do not have access to the internet[92] or appropriate device to type a submission on.

6.29 The establishment of the Public Participation Networks[93] countrywide in 2014 was a welcome development providing formalized channels of engagement with a variety of civic society actors to input into Local Authority policy making and decision making (Department of Rural and Community Development, 2020). These consist of the placing of representatives of various community groups and NGOs onto the Local Authority Committees in various areas such as Planning and Housing. However, teething issues are ongoing, including inconsistent application of the model from area to area, and many examples of practices that effectively exclude the Civil Society representatives from the meetings (e.g. by scheduling the meetings during working hours only, with no facility for conference calling/web participation, so that any reps of working age cannot attend). Some examples of good practice exist also, including the paying of travel expenses to reps (Department of Rural and Community Development, 2020). However, review of implementation is needed as well as some mechanism for calling Local Authorities to account if they do not follow the National Guidelines on the issue (Mazars, 2022). One outstanding issue with the PPN as a whole is the lack of public awareness in many areas of the Network and its function. It also fails to account for the fact that consultation with organizations/NGOs is not a substitute for true community engagement. Nevertheless, the introduction of the PPN system marks the opening up of local authority decision making to community input in a manner that had not occurred before.

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[90] E.g. the public consultation on the General Heads of the Housing and Planning Development Bill 2019 closed 27th March 2020 and submissions have still not been published, no written feedback has been provided to participants, but the Bill is still in development. https://www.gov.ie/en/consultation/c20fbc-public-consultation-on-general-scheme-of-the-housing-and-planning-an/

[91] When an AIE request was made for these submissions it was refused on grounds they were not "environmental information". The OECI ruled that they were on 21st May 2021, (see https://www.ocei.ie/decisions/ms.-l-and-department-of-h/index.xml), but they have yet to be made public.

[92] Household Connectivity, CSO 2019 https://www.cso.ie/en/releasesandpublications/ep/p-isshh/informationsocietystatistics-households2019/householdinternetconnectivity/

[93] https://www.gov.ie/en/policy-information/b59ee9-community-network-groups/

Effectiveness of the legal frameworks

6.30 Public Participation in development consent and licensing applications is affected by issues like time restraints, access to experts and lack of capacity in terms of know-how. This is exacerbated by the ever-increasing amount of applications that now by-pass the County Council stage and go straight to An Bord Pleanála[94]. There are considerable challenges for ordinary members of the public attempting to participate in these decision-making processes. The requirement of fees for submissions and appeals remains a massive block to public participation in licensing and planning decision making. Additionally, public participation is eliminated or drastically reduced in areas like forestry or aquaculture by injudicious use of thresholds. The procedures for public participation in applications like aquaculture are arcane and difficult to utilize for ordinary members of the public. Appeal fees are high in forestry and aquaculture appeals.

Conclusions on Public Participation

6.31 Current public participation provision varies widely across the decision-making processes and is inconsistent. It is unlikely that it meets the requirements of the Aarhus Convention. Consideration could be given to the following:

- Public participation processes could be streamlined and updated to fulfil the obligations under the Aarhus Convention.
- The establishment of a central point or portal for public participation in the various types of decision making (like all local authority and An Bord Pleanála applications, IED Licensing and Aquaculture, Felling and Peat licensing), and a similar procedure in each case would be beneficial as the public would only have to be educated in one method, and promotion efforts would be maximized (like the Public Consultation Portal[95] for Strategic Environmental Plans and Policies currently in place).
- The removal of fees would be desirable.
- There is a need to revise the legal frameworks across areas like forestry, aquaculture, peat extraction and strategic infrastructure.
- There is a huge unmet need for capacity building and education to inform the public of the various ways in which they can participate in environmental decision-making. The public lack knowledge of their rights, the expertise to navigate the diverse systems, and resources like time and access to technical expertise. The establishment of an independent technical panel of experts, funded by the State, who provide assistance to the public making submissions and observations, could address this issue.
- There are concerns regarding the inclusiveness of participation and the extent to which the systems described facilitate participation by more marginalized groups.

6.32 Another matter for consideration is that the Aarhus Convention mandates early participation[96] when all options are on the table, including what is known as the "zero option" or the possibility

[94] E.g. Applications under the Strategic Housing Development framework: https://www.pleanala.ie/en-ie/strategic-housing-development , and the Strategic Infrastructure Development framework: https://www.pleanala.ie/en-ie/strategic-infrastructure-development-guide/sid-types-of-strategic-infrastructure-development

[95] https://www.gov.ie/en/consultations/

[96] Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, UNECE 2015 https://www.unece.org/fileadmin/DAM/env/pp/Publications/2015/1514364_E_web.pdf

of not going ahead with the project at all. This is not really given proper effect to under EU law, and as a consequence is not really part of the Irish Legal framework. There is no obstacle to Ireland offering a higher level of legislative provision for Aarhus rights than the EU legal framework mandates, and some consideration should be given to mandating much earlier public participation to ensure genuine discussion takes place.

6.33 In some jurisdictions public participation takes place on screening and scoping applications (Milieu Ltd., 2017) (early stage decisions made by the public authority as to whether EIA is required (screening) and what the contents of the EIAR should be (scoping)). These approaches should be reviewed for compatibility with the various different Irish environmental decision-making frameworks.

7. Access to Justice

Legal Framework

7.1 There is no specific EU law covering access to justice at Member State level (all attempts to create an access to justice directive have been blocked by the Member States (Cenevska, 2015)). There is a provision in the EIA Directive which implements some of the access to justice provisions of the Aarhus Convention. There is no single specific piece of legislation addressing the right of access to justice in environmental matters in Ireland. EU studies indicate huge problems with access to justice in all Member States (Milieu, 2019) but Ireland is often singled out for particular criticism[97].

7.2 There is a framework for judicial review of environmental decisions[98] which is the main way that the right of access to justice is vindicated. This is a questionable regime that has been the subject of multiple legislative reforms aimed at bringing Irish Law into compliance with EU law that have generally been regarded as unsatisfactory.

7.3 Court costs are a huge barrier to access to justice (Kelly, 2020) (O'Neill, et al., 2022), and in the context of a drastically underfunded and dysfunctional Civil Legal Aid Scheme[99], there is no assistance for Plaintiffs seeking to challenge environmental decisions, as legal aid is mostly restricted to family law cases by funding restrictions. NGOs cannot avail of legal aid for environmental (or any) cases due to statutory restriction of legal aid to "natural persons"[100].

7.4 Current rules regarding costs are contained in 50B(2)-(4) of the Planning and Development Act of 2000, and provide "each party to the proceedings, including the notice party, shall bear its own costs", but with provision in s.50B(2A) for the successful party to recoup their costs. This provision sought to strike a balance of removing the risk of being exposed to the costs of the other side in the event that the Plaintiff is unsuccessful, while preserving "no-foal, no-fee" litigation by retaining the possibility of recouping of costs if successful.

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[97] EU official castigates Government over environmental court costs – The Irish Times 21st January 2022 https://www.irishtimes.com/news/environment/eu-official-castigates-government-over-environmental-court-costs-1.4782718

[98] A combination of judicial review under Order 84 of the Rules of the Superior Courts and Section 50, 50A and 50B of the Planning and Development Act 2000.

[99] https://www.breakingnews.ie/ireland/calls-for-root-and-branch-review-of-out-of-date-legal-aid-system-966889.html

[100] FIE Clg v the Legal Aid Board [2020] IEHC 454, Hyland J. 15th September 2020 https://www.courts.ie/ga/acc/alfresco/fe3f46ca-1aab-4a57-9c49-0aeeb6ad6d3c/2020_IEHC_454.pdf/pdf

7.5 This arrangement works well for well-established environmental NGOs who have access to legal professionals willing to run public interest court cases pro-bono (for free) or no-foal-no fee (getting paid if they win)[101]. However, newer grassroots organisations formed in response to challenges arising in local areas would have no idea how to get access to such legal professional advice, and the courts system is almost impossible to use effectively without it. Also, individuals who become aware of breaches of environmental law or who wish to challenge the outcome of public participation or access to information procedures would be in a similar position. Those who cannot afford to risk hundreds of thousands of euros on litigation are therefore still excluded from meaningful access to justice in Ireland. Own costs are still a very serious barrier to access to justice in Ireland and a real deterrent to taking action on environmental harms.

7.6 The fact remains also that the extent of the coverage of the costs rules is uncertain in its practical application (Kelleher, 2022) (O'Neill, et al., 2022), and is the subject of considerable litigation. Applicants must go through the leave stage of judicial review to litigate the costs issue, with no guarantee that their costs will be covered. Even the leave stage application can amount to tens of thousands of euros, particularly if unsuccessful. This uncertainty is unacceptable.

7.7 The lack of meaningful civil legal aid in environmental cases and for environmental NGOs is therefore particularly significant in this context.

7.8 In order to ensure court proceedings in Ireland truly comply with the requirement of being "not prohibitively expensive" more needs to be done to support access to justice financially.

Standing

7.9 Standing for the purposes of judicial review is the right to take a case. Order 84, rule 20(5) of the Rules of the Superior Courts 1986, and s.50A of the Planning Act 2000 as amended stipulate that an applicant shall not be granted leave to take judicial review unless they have sufficient interest in the matter the subject of the application. The position has moved from the restrictive "substantial interest" test, which was intended to restrict access to justice[102], back to the more common "sufficient interest" test in s.20 of the Environment (Miscellaneous Provisions) Act 2011. This was likely to have been motivated by pressure to improve access to justice[103]. Similarly prior participation requirement was removed by the Planning and Development (Strategic Infrastructure) Act 2006 because of concerns about conflict with EU law (Browne, 2021, p. 920).

7.10 Standing tests like sufficient and substantial interest are ways to restrict the number of people eligible to take cases in order to preserve the administration of justice by preventing the courts being flooded with applicants, while trying to strike a balance with the need to have court oversight over the decision making of public bodies (Biehler, 2021). Sufficient interest is a broad concept developed through the case law to be flexible so that it can offer a more relaxed approach when there is greater public interest at stake (Cahill v Sutton [1980] IR 269), although to a certain extent this flexibility accords the court a large degree of discretion to make value judgments about what is important. This is evident from Kelleher's analysis of "Climate Case

[101] Consultation participant, 17th June 2021.

[102] Comments of Macken J. in Harrington v An Bord Pleanála No. 1 [2005] IEHC 344 at para 33.

[103] Kelly v An Bord Pleanála [2022] IEHC 238, Holland J., 28th April 2022, para 59.

Ireland" which highlights the comparison made by the Court between a case about the climate emergency and global warming and the cases where exceptions were made in the past to relax the rules, which concerned the SPUC v Coogan case representing the unborn, and the Irish Penal Reform Trust case representing prisoners recognised as marginalised and vulnerable. Kelleher points out that those affected by climate change are to a large extent vulnerable and marginalised, and therefore the courts analysis is unconvincing. This demonstrates the role of the courts' moral viewpoint in determining the application of standing rules. Biehler states about the objective of having standing rules:

> "The danger of individuals bringing judicial review proceedings in circumstances in which they have no legitimate interest in the outcome of these proceedings is arguably of a lesser order than the risk of invalid or unlawful decisions remaining unchallenged if the test of standing is set at too high a level." (Biehler, 2021)

7.11 Several recent legislative proposals have threatened to change the current position regarding Standing Rights[104]. Standing rights (or locus standi) are the entitlement to bring a court case. Currently NGOs enjoy broad standing rights under Irish Law to bring environmental challenges, and all members of the public who participate in the decision-making process also generally enjoy the right to challenge decisions.

7.12 Under the proposed General Heads of the Housing, Planning and Development Bill 2019, many individuals and NGOs would lose standing rights. The proposals would have required NGOs to be in existence for 3 years and to have a minimum of 100 members[105], eliminating many grassroots community groups. This would not seem to be compatible with the Aarhus Convention requirement to foster broad access to justice.

7.13 The proposals sought to impose additional requirements that individuals show substantial interest in the matters at hand (i.e. that they are particularly or specially affected by the proposals, usually only satisfied by owning land adjacent or near to the proposed development). Previous case law shows this phrase denotes a very high standard to reach[106]. This phrase was previously introduced under the Planning & Development (Amendment) Act 2006, but had to be removed as it was incompatible with EU law, and it was replaced by the original test, sufficient interest[107]. NGOs currently must be in existence for one year before taking the review action, and must have environmental objectives.

7.14 This would seem to be incompatible with Aarhus Convention requirements on access to justice and previous CJEU case law requiring broad standing rights for NGOs[108].

7.15 The proposals also required leave for judicial review to be taken "on notice" to the other side, rather than "ex-parte" (with only one side present). This might not seem significant but it adds a minimum of an extra four days to the timeframe for bringing the leave application. The leave

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[104] gov.ie - Public Consultation on General Scheme of the Housing and Planning and Development Bill 2019 (www.gov.ie) https://www.gov.ie/en/consultation/c20fbc-public-consultation-on-general-scheme-of-the-housing-and-planning-an/

[105] https://environmentalpillar.ie/environmental-groups-outline-shock-at-proposed-planning-bill/

[106] Harding v Cork County Council [2008] IESC 27.
[2008] I.E.S.C. 27

[107] Environment (Miscellaneous Provisions) Act 2011, s.20.

[108] "LZ No. 1" Case 240/09, "Djurgården" Case C-263/08, "Trianel" Case C-115/09.

application must take place within eight weeks[109] of the decision in most planning judicial review scenarios. Taken together with the new practice direction issued last year for Strategic Infrastructure cases, which requires early filing of documents, this puts significant pressure on the legal teams for Plaintiffs seeking to challenge these types of decisions[110].

7.16 The public consultation on the General Heads of the Housing, Planning and Development Bill 2019 attracted 294 submissions, the overwhelming majority of which were critical[111]. However, despite this, the Government has indicated an intention to revive the proposals to restrict judicial review contained in the bill[112].

7.17 Similar proposals seeking to undermine access to justice made an appearance under the Agriculture Appeals (Amendment) Bill 2020, put out for consultation in August 2020.

7.18 These attempts to place barriers in the way of access to justice, when so many barriers already exist, represents a retrograde step in terms of fulfilment of the obligations of the Aarhus Convention. As mentioned above under the discussion on Art 3(8), these attacks on access rights are motivated by misconceptions about environmental democratic rights, such as that they prevent development, and cause delays in the planning system. The reality is such rights are very difficult to exercise (due to factors like costs barriers and lack of capacity to use the legal system), and where such cases are taken, they are usually taken by NGOs in cooperation with pro bono lawyers, who vet cases very carefully on merit. They must satisfy a judge in a leave application that the application has substance, and is not vexatious. Their cost, time and thresholds for leave are so onerous that vexatious claims are unlikely.

7.19 The real causes of delay in the planning system, (as discussed above at section 4) have been shown to be in the main attributable to poor quality first instance decision-making, poorly designed legislative procedures (Scannell, 2011) (e.g. the now repealed Strategic Housing Development legislation[113]) and dysfunction in the courts (such as lack of judges and underfunding).

7.20 The misattribution of the causes of delay to those exercising their environmental democratic rights, is likely generated by industry lobbyists in an effort to lower regulation of various types of projects. The lowering of environmental checks and balances on development consent processes is obviously undesirable, particularly as such checks and balances have not yet reached a level where they fully comply with international environmental law norms. The reality is that there is much under-regulation rather than over-regulation, and deregulation is not an appropriate response in the context of a climate and biodiversity emergency.

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[109] Section 50, Planning & Development Act 2000.

[110] HC74 - Judicial Review Applications in respect of Strategic Infrastructure Developments
http://courts.ie/Courts.ie/Library3.nsf/pagecurrent/797211DDCD63BD008025822800555D4D?opendocument

[111] Overwhelming majority of submissions on government's controversial planning law proposals object to restrictions on access to justice for citizens, NGOs, and others – TheStory.ie at https://www.thestory.ie/2021/07/28/overwhelming-majority-of-submissions-on-governments-controversial-planning-law-proposals-object-to-restrictions-on-access-to-justice-for-citizens-ngos-and-others/

[112] e.g. https://verde.ie/blog-post/planning-process-set-for-major-review-by-attorney-general/

[113] Planning and Development (Housing) and Residential Tenancies Act 2016
Planning and Development (Strategic Housing Development) Regulations 2017

Standard of Review

7.21 Most environmental decisions are challenged using judicial review, and generally there is no appeal from An Bord Pleanála decision making. Judicial Review is not an appeal but is rather a review of the decision, how it was made and the process followed, the reasons for same. Simons states "It is well settled law that the courts have no power to entertain merits-based arguments in judicial review of planning cases" (Browne, 2021, pp. para 13-20). The seminal case on this point was O'Keefe v An Bord Pleanála [1993] 1 IR 39 at 72, where the court held the threshold of irrationality (and therefore the threshold for review of the substance of the decision) was only reached when the decision maker had no information before them upon which they could base the decision. In Balz v An Bord Pleanála [2016]IEHC 134[114] at para 53 the Court stated "The accepted view of the law on the case authorities in relation to judicial review in planning matters is that the court is not entitled to identify or concern itself with the correctness of the decision reached by the planning authority or the Board, rather the court is concerned only with the lawfulness of that decision" and went on to cite O'Keefe at para 53. Simons offers the reason for this judicial deference to the planning authorities as when legislation has accorded discretion to a decision maker the courts should only intervene where the decision maker has disregarded fundamental common sense, because the specialist expertise of these bodies that the court lacks (Browne, 2021).

7.22 The position with standard of review in planning cases Ireland is very similar to that of the UK and Northern Ireland (in those jurisdictions the grounds are Wednesbury irrationality, illegality and procedural impropriety). The standard of review applied by the High Court in an environmental judicial review in Northern Ireland was the subject of criticism by the ACCC in ACCC/C/2013/90, but the ACCC were careful not to draw conclusions about the Wednesbury standard itself, but merely highlighted that the standard of review in this case did not meet the threshold of what is required by the Aarhus Convention because the insufficient engagement by the Court with the substance of the decision, and factual conflicts between the evidence. This was in part at least because the Wednesbury standard of review itself is under consideration in the case of ACCC/2017/156. It remains to be seen whether they will consider the Wednesbury standard as providing sufficient access to substantive review as required by Art 9 of the Aarhus Convention or not. If it does not, this may prompt a re-evaluation of the O'Keefe standard of review, as this is very similar in terms to the Wednesbury principles, drastically restricting the class of cases in which substantive review was available.

Capacity Building

7.23 There is no coherent framework for educating the public about how to exercise their rights to access justice in relation to the environment. Initiatives like Citizen's Information provide general information about the legal system and FLAC can give people legal advice but neither of these organisations specialise in the complexities of environmental litigation. A new initiative, the Centre for Environmental Justice[115], is run by Community Law Mediation, and provides

[114] https://www.courts.ie/viewer/pdf/849e37ef-a503-48a1-8de2-d3af86a1ebdc/2016_IEHC_134_1.pdf/pdf#view=fitH

[115] https://communitylawandmediation.ie/centre-for-environmental-justice/

specific clinics on environmental issues to the public. Court procedure is arcane, with large portions of it consisting of unwritten conventions of behaviour that remain inaccessible to those outside the legal profession. Procedures that are written are excessively complex and difficult to navigate. There is little to no use of electronic/digital technology to create efficiencies/user friendliness. The evolving jurisprudence of the court on environmental access to justice has grown excessively complex and difficult to comprehend[116] (Ryall A. , 2018). There is no consistent education & outreach for the public on their legal rights in general (other than the Citizens Information initiative). There has historically been great difficulty in accessing documents from comparable previous court cases, meaning that important facts and context are often missing from final written judgements and that lay litigants cannot easily model the patterns of previous successful cases[117]. As a consequence, it is probable that most citizens are unaware of their environmental and participatory rights, unable to use the Courts system without expensive legal assistance, and also unaware of their access to justice rights consequent on this. Indeed, the State itself seems to lack an awareness of the public's right to access justice in relation to the environment, as demonstrated by recent legislative proposals seeking to restrict access to justice in planning decisions.

7.24 The issue of capacity building for NGOs was mentioned by many participants in the Stakeholder Consultation and there seems to be a great unmet need in that regard. This was one role that many participants felt an Aarhus Centre could fulfil.

Effectiveness of the Legal Framework

7.25 The extent to which there is real access to justice in Ireland, in general, as well as in relation to the environment has frequently been called into question by many stakeholders including FLAC (Free Legal Aid Clinics), PILA (Public Interest Law Alliance) and the former Chief Justice Mr. Frank Clarke[118],[119], as well as participants in the consultation with NGOs conducted as part of this project. NGOs have been found by the High Court to be ineligible for the State funded Civil Legal Aid Scheme[120].

7.26 It is apparent that the barriers to access are many, and increasing. Court costs, delays and dysfunction in the courts system due to decades of chronic underfunding, obscure and arcane

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[116] E.g. see criticisms of this by an EU Commission DG Environment official in EU official castigates Government over environmental court costs – The Irish Times 21st Jan 22 https://www.irishtimes.com/news/environment/eu-official-castigates-government-over-environmental-court-costs-1.4782718

[117] While the High Court Practice Directions now provide for limited access to litigation submissions (https://www.courts.ie/content/access-written-submissions), this does not include "pleadings" which ground the case, and the CJEU has ruled in case C-470/19 that the Courts Service is a judicial authority and therefore exempt from FOI/AIE requirements, jeopardising the continuance of such arrangements. https://curia.europa.eu/juris/document/document.jsf?text=&docid=239890&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=130971 .

[118] https://www.pila.ie/resources/bulletin/2017/10/11/chief-justice-frank-clarke-identifies-access-to-justice-as-a-key-priority-in-speech-at-opening-of-the-new-legal-term

[119] https://www.irishtimes.com/news/crime-and-law/rules-must-be-changed-to-widen-access-to-justice-chief-justice-1.3234950

[120] FIE v The Legal Aid Board (2020) 15th September 2020. https://www.friendsoftheirishenvironment.org/images/Access/FIE_judgment_14_Sept_2020_final_approved.pdf

legal rules for running cases which are impossible for the lay person to understand (or even lawyers!) and which must be exercised under ever tightening timeframes mean that access to environmental justice in Ireland remains an aspiration rather than a reality. In the absence of strong EU law measures, this area is fairly underdeveloped compared to the other two pillars of information and participation. Many commentators, lawyers[121] and academics[122] have called for the simplification of environmental law and the establishment of dedicated environmental courts as possible solutions to the issues of court delays and disfunction. Dedicated environmental courts with specialist judges may improve the quality of decision making.

8. Cross-border issues and Aarhus

8.1 The Aarhus Convention has cross-border influence because it accords rights without any distinction as to residency or nationality. This gives it huge cross-border potential in all areas of Aarhus rights.

8.2 It also influences cross-border issues because it continues to apply in Northern Ireland (and Scotland, and England). In this sense it has the potential to maintain some regulatory alignment and vestiges of the "level playing field" (Gravey, et al., 2018).

8.3 However, there were already existing divergences pre-Brexit which are likely to continue post-Brexit, and worsen (Hough, 2019) (Moore, 2021). There are also extensive environmental governance issues in both jurisdictions (Brennan, 2016), and as can be seen from this report, considerable issues with implementation of the Aarhus Convention.

8.4 Access to justice in cross-border cases involves difficulties for everyday people and NGOs, such as navigating unfamiliar systems, laws and procedural requirements. Lack of knowledge of how to use the system in the other jurisdiction may hamper making complaints and bringing cases in a timely manner, resulting in exclusion.

8.5 Much of EU law was "retained" after Brexit (through the EU (Withdrawal) Agreement Act 2018 as amended ("Withdrawal Acts")), and some legislation was covered by the Protocol on Ireland and Northern Ireland for retention and continued application of EU rules/CJEU jurisdiction. These do not include many key pieces of environmental legislation the Habitats, Waste Framework Directive, Water Framework Directive and the "Aarhus Directives" (e.g. Public Participation 2003/35/EC and Access to Information 2003/4/EC), and therefore these can be amended. They currently continue to be part of UK and Northern Irish law (as part of "retained EU law" created by the EU Withdrawal Acts), but are vulnerable to being altered by UK Ministers under powers in that Act. The Office of Environmental Protection (OEP) was created under the Environment Act 2021. This new regulatory body was intended to replace the oversight of the EU Commission, but it is not an effective mechanism to combat environmental damage by private bodies or regulatory divergence. The Northern Ireland Environment Agency is charged with oversight of private actors, but is situated within the relevant Government Department,

[121] Urgent need for dedicated environment court in Ireland, symposium told – The Irish Times 21st January 2021 https://www.irishtimes.com/news/environment/urgent-need-for-dedicated-environment-court-in-ireland-symposium-told-1.4782633

[122] Bulletin | PILA https://www.pila.ie/resources/bulletin/2016/01/13/guest-piece-by-dr-ine-ryall-an-environmental-court-for-ireland

and its lack of independent status has been criticized as undermining effective and consistent enforcement in Northern Ireland ineffective (Gravey, et al., 2018) (Brennan, 2016) (Brennan, Purdy, & Hjerp, 2017).

8.6 Before Brexit, the UK (and NI) was a member of the Brussels Convention I recast. This international treaty covered what laws were applicable in what disputes (choice of laws), and a streamlined process for enforcing foreign judgements. Regulation (EU) 1215/2012 (Brussels Convention I recast) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("the Recast Regulation") came into effect in Ireland on 10 January 2015. This no longer applies to the UK/NI post-Brexit. This leaves the appropriate jurisdiction in civil matters a matter to be determined on a case-by-case basis, the law applicable to civil cases open to challenge, and generates problems enforcing civil judgements across the Northern Ireland-Ireland border. The absence of any such agreement adds extra procedural complexity and costs to enforcing judgements. The UK was expected to join the Lugano Convention which would have provided a comparable framework, but this has not yet happened[123].

8.7 The Cross-Border Legal Aid Directive[124] is no longer applicable to Northern Ireland, so people can no longer seek legal aid for cross-border cases. This EU Directive allowed the person suing to avail of legal aid under the rules applicable in the jurisdiction the case was taking place in. For someone seeking to take a cross-border case who is from Ireland, they formerly would have had the potential to avail of the slightly more favourable legal aid provisions in Northern Ireland (particularly NGOs who were eligible for legal aid under NI law but not Irish law). An Irish person or NGO would not now be able to avail of Northern Ireland legal aid due to the Directive no longer being applicable. Similarly, the Directive would have entitled a person from NI to apply for Irish legal aid should they have taken a case before the Irish Courts. However, legal aid is never granted for environmental cases as a matter of policy, and NGOs are not eligible to apply, so the right was of limited utility in the NI-Ireland direction of travel. It is now no longer available as a result of Brexit.

8.8 As can be seen from the above, there are now more obstacles added to the already difficult and onerous process of a resident of one country taking a court case in another country when it comes to cross-border litigation between Ireland and Northern Ireland.

9. Conclusions on Access to Justice:

9.1 Deficiencies in the Legal Aid system need to be addressed, such as the lack of legal aid for environmental cases, and the underfunding of the legal aid system (in order to ensure

[123] Brexit: UK assesses implications after failing to accede to Lugano Convention on recognition of judgments | International Bar Association (ibanet.org) https://www.ibanet.org/Brexit-UK-assesses-implications

[124] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0008

compliance with Art 9(5) of the Arhus Convention), the lack of provision for class actions, and the existing legal ban on third party funding.

9.2 Underfunding/understaffing in the Courts Service should be urgently addressed.

9.3 Modernization of the Courts system and the adoption of digital technologies has great potential to increase access to justice.

9.4 Court costs in general need to be addressed. These include filing costs, stamp duty on court filings and lawyers' fees. Also, the issue of own costs and the lack of legal aid in environmental cases and for NGOs is in need of discussion.

9.5 Consideration should be given to setting up a specialist environmental court.

9.6 Consideration needs to be given to a fully funded civil legal aid scheme which encompasses environmental and public interest cases, including those taken by NGOs.

9.7 The use of multi-party litigation/class actions and third-party funding have the potential to assist access to justice.

9.8 Public interest case mechanisms for litigation could be introduced.

9.9 Incentivisation of pro-bono legal assistance through tax breaks and write offs, as well as CPD points, should be considered.

9.10 An Aarhus Centre could provide a focal point for people to obtain information about their access to justice rights.

10. Conclusions & Recommendations:

10.1 As can be seen from the above, there are issues in all areas of implementation of the Aarhus Convention that need to be addressed.

10.2 The Convention has potential to provide assistance in maintaining regulatory alignment in the area of environmental governance post-Brexit, and as such improving implementation will help this agenda. Cross-border mechanisms to monitor and improve coherent all-island implementation could buffer some of the worst effects of environmental regulatory divergence.

10.3 The most pressing of these is the issue of capacity building and awareness raising, of both the public, and of State Bodies. Poor first-instance[125] decision making in relation to information requests, and poor practice in public participation design and implementation generally arise from lack of training/knowledge in the public bodies concerned, or a lack of clear guidelines, as well as cultures of management that do not encourage open participation and transparency. Ongoing awareness raising among the staff of public authorities is urgently needed on a scale that would match that of efforts to promote data protection on the implementation of GDPR.

10.4 Underfunding/understaffing of the Commissioner for Environmental Information, if this is indeed the root cause of the delays in processing decisions by this office, should be addressed immediately. Legislative reform of the implementation of the AIE Directive is important to ensure the right of access to information is fully vindicated, including in the areas of time-limits for decisions and the obligation of active dissemination of environmental information.

[125] First-instance refers to the first time a decision is made on an application, as opposed to the appeal or review stages. For planning decisions, this is frequently the County Council decision to accept or reject a planning application.

10.5 A re-evaluation of public participation procedures among public bodies is also essential, with data on the demographics of participation urgently needed, and a diversity and inclusion analysis needs to be brought to bear on both the legislative frameworks and how these consultations are carried out in practice (O'Neill, et al., 2022).

10.6 Capacity Building exercises for the public (including individuals and NGOs) on Aarhus rights are badly needed, as well as for State Authorities. A consistent program of public education, introduction of education on information, participation and environmental justice rights in secondary schools, and training programs that consistently target disadvantaged groups in society, would go a long way towards making the public aware of their rights under the Aarhus Convention. An Aarhus Centre or Centres could play an important role in capacity building and awareness raising, but the State should also be conscious that the obligation[126] remains on them to provide such capacity building, and charities cannot be expected to fill the gaps in State responsibility.

10.7 In relation to capacity building the following are relevant:

- Funding a dedicated, independent, NGO-led Aarhus Centre on an all-island basis[127] to enhance capacity building of NGOs and individuals and disseminate information on Aarhus Rights in accordance with Art 3 of the Convention.
- The importance of specific approaches to specific communities with a history of low participation in state institutions cannot be overstated. With a view to tackling this, engagement should be made with Traveller and Roma rights organizations (e.g. the Irish Traveller Movement, Pavee Point, Involve), disability organisations such as Inclusion Ireland, the Disability Federation Ireland, the National Disability Authority, as well as immigration rights organizations like MASI and the Irish Refugee Council. The assistance of these organisations should be sought in equality proofing public consultation guidelines and public participation processes in Ireland.

10.8 Barriers to public participation should be the subject of further research and study and decisions regarding alterations to standing rights should not be made in absence of good data/full legislative impact assessments which include the impact on compliance with the Aarhus Convention.

10.9 If better access to information provision and public participation is achieved, and public bodies are better trained, this should lead to better quality first-instance decision making, lowering the number of appeals required of decisions. This in turn would reduce the extent to which access to justice issues such as delays, costs and difficulty using the Courts impact on people attempting to participate in environmental decision making.

10.10 Consideration should be given to implementation of Art 3(8) protection of environmental defenders. A range of measures should be considered, including media monitoring for industry influenced narratives that run counter to environmental protection objectives, the expansion of the BAI's role to include monitoring for balance in environmental discourse. The introduction of a statutory offence of intimidation of those engaged in environmental protection activities with the objective or intent of preventing them from engaging in those activities should be

[126] Arts 3(2) and 3(3) of the Aarhus Convention https://unece.org/DAM/env/pp/documents/cep43e.pdf

[127] EJNI Briefing No. 3: Aarhus Centres on the Island of Ireland https://ejni.net/wp-content/uploads/2020/10/EJNI-Briefing-3-Aarhus-Centres.pdf

considered, with penalties and both EPA and citizen enforcement powers. Expansion of whistle-blower protections should be considered. Legislative action on the use of SLAPP litigation should also be explored. Guidelines for political representatives and members of Government in public statements regarding environmental defenders could also be considered, particularly in the Oireachtas, to ensure parliamentary privilege is not abused. "Applicant shaming" as identified by the courts in a range of judgements should not be tolerated at any level of public discourse, whether in the media or politics.

10.11 Finally, access to justice could be improved by improving efficiencies through measures like class actions and environmental courts, as well as simplification of legislation. Tackling problems in the areas of costs, legal aid provision, dysfunction and underfunding in the Courts service are likely to have the biggest impact in this area, followed closely by education on how to use the Courts system for the general public. An Aarhus Centre could play an important role in the area of capacity building.

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