A submission by Community Law & Mediation to the Department of the Environment, Climate and Communications on the review of the European Communities (Access to Information on the Environment) Regulations 2007-2018

Summary of Recommendations

CLM recognises an urgent need for consolidation and amendment of the AIE Regulation 2007-2018 ("the Regulations") to ensure that they properly implement and effect the Aarhus Convention, applicable EU Directives and other relevant international law. The core priority in this exercise is to set a strong legislative basis for meaningful access to information in environmental matters. Such access is integral to enabling the two further pillars of the Aarhus Convention, specifically meaningful public participation in environmental decision-making and effective access to justice. CLM has concerns that this consultation has not operated in a manner consistent with the Aarhus principles of public participation given the provision of limited and overly complex information in the consultation paper and the short consultation period. Such deficiencies underscore the imperative for full legislative and public policy commitment to proactively disseminating environmental information to the public and ensuring effective, timely and fair processes for such access.

In summary, CLM makes the following specific recommendations:

- Design and implementation of a human rights and equality matrix to be part of the consultation process to ensure full public engagement and participation on environmental matters.
- Amendments that provide for a strong legal basis for meaningful and timely access to environmental information and that facilitate effective implementation of the participation in decision-making and access to justice pillars of the Aarhus Convention.
- Amendments to Article 6 to reduce administrative barriers to requests for environmental information to ensure accessibility of that information.
- Amendments to Article 7 to ensure timeliness of access throughout the process, including initial request and appeal stages.
- Amendments to Article 12 to ensure timeliness in the processing of appeals to the OCEI.
- Insertion of new provisions to impose more rigorous duties on public authorities to actively disseminate environmental information to the public.
- Amendment to Article 15 to extend the reduced appeal fee to non-governmental organisations.

Community Law & Mediation is grateful for the opportunity to make this submission and is available to engage further with the Department on the issues raised herein.

About Community Law & Mediation

Community Law & Mediation (CLM) is a community based, independent law centre providing services nationwide and operating in two locations: Dublin and Limerick. It was founded in 1975 and assists more than 3,000 people annually through its services, which include free legal advice and representation; information and education; and mediation and conflict coaching. CLM also campaigns for law reform, and for the safeguarding of rights already enshrined in law.

CLM's Centre for Environmental Justice

In 2020, Community Law & Mediation identified an unmet legal and educational need in relation to environmental concerns among the communities it engages with, those experiencing disadvantage or social exclusion. In recent years, CLM has seen how closely intertwined our climate and our changing environment are with the issues experienced by these communities, including energy poverty, housing, employment and health. CLM's law centres in Dublin and Limerick are already working with communities who have been affected by issues linked to environmental justice, including flooding, health concerns related to poor air quality, and poor housing conditions.

CLM's Centre for Environmental Justice was formally launched by Mary Robinson on 11 February 2021. The Centre is the first of its kind in Ireland. The objective of the Centre is to empower communities experiencing disadvantage on environmental justice issues. It provides training and information resources to advance and address environmental concerns and increase participation on environmental issues. The Centre provides legal information and advice on individual and community queries through a monthly legal advice clinic. The Centre is also engaged in law reform and policy work.

Human rights and public participation considerations

CLM welcomes the Department's consultation on the important and overdue concern of amending of the AIE Regulations. Primarily however, we raise an overarching concern in relation to the manner in which this consultation has been carried out with respect to human rights and equality considerations and a related specific concern around the obligation on the State to enable meaningful and effective public participation on this consultation.

Our concerns relate to the State's obligation to properly and meaningfully consult with communities and individuals who are likely to engage or seek to benefit from this review and the related legislative provisions. We note that the briefing paper for the consultation is extremely brief and technical and lacked explanatory detail or context in plain language, and that there has been no additional information provision or outreach activities, by way of virtual town halls or structured engagement with communities and individuals through established networks. Such engagements would have sought to ensure that those likely to be impacted by any legislative reform were aware of the consultation and enabled to participate. The short time period for consultation further compounded this difficulty: the consultation period ran to less than six weeks including the Easter break and requests for short extension of time for submissions were declined.

This review is therefore remote and disconnected from the people it is designed to connect with and empower to participate in environmental decision-making. The overall approach does not in our view appear to be in the spirit of the Aarhus Convention.

It is CLM's contention that the State should apply a human rights-based approach when acting to promote access to environmental information, both in the course of consulting on any amendments

to the Regulations themselves but also in the promotion and application of the legislation. The underlying rationale for such an approach is that decision-making on environmental matters, particularly as we enter a period of significant transition in response to the climate crisis, is likely to impact certain disadvantaged groups in a disproportionate manner. The rules around how and what information an individual can access in the course of this transition is likely to assume increasing importance and relevance. Each consultation on environmental democracy therefore presents a vital opportunity to include and promote the involvement of individuals in environmental decision making. Engagement of a wide range of individuals and communities at the consultation stage would go some way to ensuring that the Regulations will be responsive to the needs of the public within the Irish legal and policy context and would promote their engagement in a meaningful way.

The imperative to incorporate and mainstream such an inclusive and participatory approach is recognised by several international human rights bodies.

The preamble in the Paris Agreement highlights the need, when responding to climate change, to *"respect, promote and consider [the state's] respective obligations on human rights"* and makes specific reference to the rights of those disproportionately affected by climate change, such as women, children, migrants, indigenous peoples and people with disabilities.[1]

Flowing from this, the Office of the High Commissioner for Human Rights (OHCHR) sets out the obligation on states to ensure that appropriate adaptation measures protect and fulfil the rights of all persons, particularly those living in vulnerable areas.[2] The OHCHR confirms the general procedural human rights principles of good governance that apply to State, including participation, transparency and responsiveness to the needs of the people.[3] UN bodies have consistently highlighted the fact that climate change will have an unequal impact on the substantive rights of social groups already in vulnerable positions, and that state obligations exists in relation to non-discrimination and the protection of members of these vulnerable groups.

The OHCHR identifies the need for a human rights based approach in order to properly address the risk of disproportionate impact on vulnerable groups, stating: "*A human rights based approach addresses cross cutting social, cultural, political and economic problems, while empowering persons, groups and peoples, especially those in vulnerable situations. This can make considerable contributions to climate change policies, making them less myopic and more responsive, sensitive, and collaborative."*[4]

CLM notes the absence of an overarching policy framework or matrix applicable to policy and law reform consultations that ensures such measures will be implemented in a human-rights compliant manner and will promote the engagement of specific groups who are experiencing a form of disadvantage. CLM urges the State to develop and apply such a human rights framework that would essentially ensure consistency with environmental democracy principles at an early stage – including at consultation stage - and highlight a potential a role for the Irish Human Rights and Equality Commission and other human rights defenders in supporting design and implementation of such a framework.

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[1] Recital 11 to the Preamble of the Paris Agreement (2018), 2.

[2] Office of the United Nations High Commissioner for Human Rights, '*Understanding Human Rights and Climate Change'*, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (2015), 3.

[3] Office of the United Nations High Commissioner for Human Rights, '*Good Governance and Human* Rights' (24 July 2020)

[4] *Ibid*, n2, 7.

The rights of meaningful public participation are a linked and a core consideration. Environmental democracy enjoys strong protections under international law, EU law and centrally, the Aarhus Convention. A strong legal framework that provides for processes that are accessible, effective and understood broadly amongst communities is crucial as we grapple with ever increasing environmental challenges. The consultation notice itself states that the Regulations are to be updated to *"improve compliance and effectiveness"*. A key aspect of effectiveness is engagement of the public at large so that ultimately their engagement in environmental decision-making is meaningful and the State's obligations under the Aarhus Convention are realised.

The importance of informed participation on these matters is recognised and mandated in international law.

The OHCHR recognises: "*The International Covenant on Civil and Political Rights and other human rights instruments guarantee all persons the right to free, active, meaningful and informed participation in public affairs. This is critical for effective rights-based climate action and requires open and participatory institutions and processes, as well as accurate and transparent measurements of greenhouse gas emissions, climate change and its impacts."*[5]

The objective of the Aarhus Convention is set out in its Article 1, which states: *"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."* [6] The Convention specifically obliges the state to facilitate public access to environmental information as it contributes to enabling every person to live or seek to live in a healthy environment.

The Department will be aware of its duties under Section 42 of the Irish Human Rights and Equality Act 2014.[7] This provision obliges all public bodies to promote equality, prevent discrimination and protect the human rights of their customers and service users and everyone affected by their plans and policies. The duty relates to protection of human rights and this extends to the protection of the right to fair procedures and access to the courts, which are concerns in this consultation. The right to fair procedures including access to the courts are protected in various forms by the Constitution and the European Convention on Human Rights Act 2003. The public sector and equality duty therefore lends further weight to the need for a human rights based approach to legal reform and we refer the Department to the growing body of guidance available to support public bodies in meeting its statutory obligation in this regard.[8]

In summary, the consultation is a welcome and urgently needed development and a revised and strengthened legal framework in relation to access to environmental information will have broad benefits and has the potential to ensure the State will properly deliver on its international and EU legal obligations. It is precisely because of the wide-ranging impacts and the broad impact of any proposed legislative reform that any consultation of this nature must be transparent, meaningful and truly

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[5] *Ibid* n3, 4.

[6] Recital 9 to the Preamble of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), 2.

[7] Irish Human Rights and Equality Act 2014, s.42.

[8] Of particular relevance and assistance is a guidance note issued by the Irish Human Rights and Equality Commission setting out a three-step approach to implementation of the public sector and equality duty. The guidance is available here:
https://www.ihrec.ie/app/uploads/2019/03/IHREC_Public_Sector_Duty_Final_Eng_WEB.pdf

participative. CLM believes there has been an absence of wider and proactive engagement with communities and individuals likely to be impacted by this review and urges the Department to make up for this missed opportunity through a strong legislative framework in the amended Regulations that are then fully promoted and properly applied by public bodies.

Overall purpose and benefits of the Regulations

No review of the Regulations should be completed without careful attention to the International and European legal context within which these Regulations are made. The many benefits of the Regulation as derived from this legal context are detailed above.

The Aarhus Convention, or the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, is an international convention signed by the European Union and its member states in 1998, and ratified by the European Union on 17 February 2005. It was ratified by Ireland on 20 June 2012 and entered into force accordingly on 18 September 2012.

The Convention clearly addresses three pillars, as set out in its name - access to information, public participation in decision-making and access to justice in environmental matters.

The objective of the Convention is set out in its Article 1 and is set out above. It identifies the need to guarantee all three pillars of the Convention in order to protect the right of every person to live in an environment adequate to his or her health and well-being. This is worth special emphasis. The information pillar (together with the two others) is designed to contribute to *"the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being"* and is one element of broader legal protections[9]. It is imperative that any reform of the Regulations produces a strong legal framework that promotes access to environmental information but crucially that the first pillar is recognised as an integral part of meaningful and proper implementation of the remaining pillars of the Convention.

CLM wants to ensure that the review contributes to effective protection for the right to a healthy environment which CLM views as the ultimate goal of the amended legislation.

Specific considerations

CLM invites the Department to consider the following specific aspects of the Regulations:

(i) Accessibility of environmental information

CLM proposes amendments to Article 6 of the Regulations to improve the accessibility of environmental information and to reduce the barriers to accessing such information. The legislation should be drafted so as to promote ease of access for the public at large and to reduce administrative barriers and hurdles that do not serve a clear rational purpose.

Specifically, CLM proposes removing the obligation as set out in Article 6 for a request for environmental information to be made in writing, instead making provision of a request to be made in writing or orally. CLM proposes omission of the alternative requirement that the request be submitted online as this has the potential to indirectly discriminate against those who do not have access to digital resources and supports or are not computer literate. In addition, CLM proposes

[9] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), Article 1.

omitting the obligation on the requester to state that the request is being made under the Regulations, as in our view such information is overly technical, not needed and creates an unnecessary administrative hurdle.

It is noted that a request for information under the General Data Protection Regulation can be made orally and that similar principles in relation to promotion of ease of access apply in the application of those protections.

(ii) Timeliness of access to environmental information

Last year, on 9 November 2020, the Aarhus Convention Compliance Committee (ACCC) made findings of non-compliance against Ireland (ACCC/C/2016/141)[10]. The State committed to amending the Regulations in response to these findings.

There can be little quarrel with the suggestion that justice delayed is justice denied. The same holds true for access to environmental information that is key to accessing environmental justice. Many requests for environmental information are made in the context of public participation in environmental decision-making procedures such as planning/licensing decisions or public consultations. Such information requests are time sensitive and the habitual use of the two month outer time limit as the "real" deadline by public authorities results in the frustration of these public participation rights. There is no real participation without informed participation.

The findings of non-compliance against Ireland (ACCC/C/2016/141) highlight fundamental issues regarding respect for the right to access information, shown by delays in the appeal and court processes.

The solution requires more than mere tweaking to the language in the Regulations. We cannot expect real change in timeliness, merely by requiring the Commissioner for Environmental Information ("the Commissioner") to make a decision on an appeal, or a court to deliver judgment, within some short period of time, where the State has not allocated appropriate resources for that purpose.

That is not to say there is no point to such deadlines; they provide an important yardstick for measurement of good behaviour and provide a method for sorting between competing priorities. For example, in the context of applications for planning permission, An Bord Pleanála has sometimes found it difficult to comply with its statutory objective of making decisions within 18 weeks. However, for the sub-set of decisions within its strategic housing division, it has routinely been able to make decisions within the shorter prescribed period of 16 weeks.

We recommend that the response to the findings of non-compliance about timely procedures should include specific deadlines.

We anticipate that some might perceive the separation of powers doctrine would make it difficult to address the ACCC's finding about effective remedies and the role of the Superior Courts supervising the Commissioner after an order of the court has been made. Even so, there should be nothing controversial about respecting the State's international law obligations by requiring the courts to have regard to the requirement for *"adequate and effective remedies".*

More importantly, the recommendation made by the ACCC to resolve the finding is to ensure *"mandatory directions in place to ensure that, should a court rule that a public authority or an*

[10] ACCC/C/2016/141 Ireland (ECE/MP.PP/C.1/2021/8).

information request falls within the scope of the AIE Regulations, the underlying information request is thereafter resolved in an adequate and effective manner"[11].

The State can resolve this, without trespassing the separation of powers, by two means. Either the court can be required to set those directions in each individual case (but left free to determine what those directions should be); or, the State can prescribe default rules for the Commissioner that apply in all such cases (but perhaps leave the court free to adjust those, as required). We favour the latter. It makes sense for the State to indicate the default position in these circumstances, so that all stakeholders, including the ACCC can observe compliance.

There remains an issue with the time periods for action on a request for information.

The issue of expeditious review and access was considered in part by the ACCC in ACCC/C/2016/141, but no adverse finding was made. That was because the Regulations include the required one month deadline. However, the ACCC was not invited to, and did not, consider the routine reliance, by many public authorities, on the extended two month deadline. Where that becomes, in practice, the default, there is persistent disrespect for the right to information protected in the AIE Directive and the Convention.

Article 7(2)(b)(i) requires the public authority to explain why it is not possible to comply with the one month deadline.[12] We understand that explanations given are terse and uninformative. A culture of dissemination and disclosure has not yet been established. Instead, excessive time is spent drafting creative arguments to avoid disclosure, by reference to threshold issues about whether a public authority, whether environmental information and whether exempt. If that same effort was invested in a culture of dissemination and disclosure, we have no doubt that timelines would be easier to achieve and fewer resources would be wasted on review, appeal and court procedures

We therefore propose amendment to the wording in Article 7(2), so as to place an obligation on the public body to set out substantial and stated reasons for the need for an application of a two month rather than a one month time limit to make a decision on the request.

(iii) Timeliness of appeals processing

A core finding by the ACCC in Case 141 was that the OCEI has no obligation to comply with the processing time limit of one month, and unlike the Information Commissioner, and there is no upper time limit beyond which they cannot extend the deadline for considering appeals (paras. 103-110). The Committee found that there were frequently excessive delays in processing complaints to the OCEI. This has also been highlighted by academic commentary, where the deleterious effect of this upon the AIE regime is criticised. The Environmental Pillar in its submissions[13] on the issue in Case 141 highlighted that it was such as to undermine the credibility of the whole regime.

It is recommended therefore that the Regulations be amended to reflect an obligation similar to that available under the Freedom of Information legislation e.g. the requirement under section 22(3) of the FOI Act to rule on appeals *"as soon as may be and, insofar as practicable, not later than four months after the receipt by the Commissioner of the application for the review concerned."*

[11] ACCC/C/2016/141 Ireland (ECE/MP.PP/C.1/2021/8) at para. 134.
[12] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), Article 7(2)(b)(i).
[13] Observers Submissions, 18th February 2018, available at https://unece.org/DAM/env/pp/compliance/C2016-141_Ireland/Correspondence_with_Observer/frObserverC141_Irish_Environmental_Pillar_18.10.2018.pdf

(iv) Active dissemination of environmental information

Too little attention is paid to Article 1(b) of the AIE Directive. It provides that one of the two objectives is *"to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted."* [14]

The objective is elaborated at Article 7, where the State must *"take the necessary measures to ensure that public authorities organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public".*

There is a real and pressing need for wider and more active dissemination of environmental information.

The Report from the Commission to the Council and the European Parliament on the experience gained in the application of Directive 2003/4/EC on public access to environmental information (COM/2012/0774 final) identified this clearly:

> *"The emergence of an information society with an increased emphasis on wide access requires a shift from an approach dominated by information-on-request needs to an approach centred on active and wide dissemination using the latest technologies. The Directive leaves flexibility for Member States to choose the appropriate means to disseminate environmental information actively and accommodate changes in computer telecommunications and electronic technology. Some Member States have developed user-friendly websites – for example, allowing the public to see on a map the level of waste-water treatment for their city or town. In that context, the Commission calls on all Member States to make the widest possible use of the provisions on active dissemination.[15]"*

The State is free to choose appropriate means, but must still achieve the widest possible systematic availability and dissemination to the public of environmental information.

Public authorities must be alerted to their obligations and obliged to take the necessary steps and show to the public how that has been done. The "publication scheme" model under section 8 of the Freedom of Information Act 2014, as amended, has the advantage that the bodies affected must contemplate their approach to dissemination, make clear commitments in accordance with a template shaped by central government and expose themselves to comparison of their performance with those commitments.[16]

More comprehensive transposition of the obligations of the Directive in respect of dissemination, in particular the requirement on the State to publish lists of public bodies (Art 3(5)(b) Directive 2003/4/EC), would be desirable together with the full list of information required to be disseminated in the Directive ((Art 7(2)).

In our view, active dissemination of environmental information will encourage more informed and better engagement by public authorities and the public in issues relevant to the environment, with better outcomes for all stakeholders. Current dissemination falls short of the objective of the

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[14] Council Directive 2003/4/EC, Article 1(b).

[15] The Report from the Commission to the Council and the European Parliament on the experience gained in the application of Directive 2003/4/EC on public access to environmental information (COM/2012/0774) at pg. 12.

[16] Freedom of Information Act 2014, s. 8.

Convention in this regard and there is a need for firmer legal obligations on public authorities to proactively disseminate information in a structured way that is regularly reported on. It is our recommendation therefore that the Regulations should be appropriately amended to reflect strengthened and greater obligations on public authorities in this regard.

(v) Costs considerations

Article 15(4) of the AIE Regulations prescribes three categories of person that pay a reduced fee of €15 (not €50) for an appeal to the Commissioner[17]. The category should include non-governmental organisations (NGO).

The resources of the NGO sector are scarce and it is unfair to expect them to fund access to a remedy before the Commissioner. The data on the success rate for appeals does suggest that the appeal mechanism is a necessary control on poor decision-making by public authorities. During the period 2016 to 2018, the Commissioner (see page 5 of ACCC decision ACCC/C/2016/141) upheld more than half of appeals.[18]

Although disaggregated data is not available, we expect that the rate of successful appeal by the NGO sector was even greater. Their role is a necessary check and balance, so any measure having the effective of stifling their access to that remedy should be carefully and proportionately calibrated.

We therefore propose an amendment of Article 15 in order to extend the refused appeal fee to non-governmental organisations.

Key recommendations

In summary, CLM makes the following specific recommendations:

- Design and implementation of a human rights and equality matrix to be part of the consultation process to ensure full public engagement and participation on environmental matters.
- Amendments that provide for a strong legal basis for meaningful and timely access to environmental information and that facilitate effective implementation of the participation in decision-making and access to justice pillars of the Aarhus Convention.
- Amendments to Article 6 to reduce administrative barriers to requests for environmental information to ensure accessibility of that information.
- Amendments to Article 7 to ensure timeliness of access throughout the process, including initial request.
- Amendments to Article 12 to ensure timeliness in the processing of appeals to the OCEI.
- Insertion of new provisions to impose more rigorous duties on public authorities to actively disseminate environmental information to the public.
- Amendment to Article 15 to extend the reduced appeal fee to non-governmental organisations.

Conclusion

In conclusion, CLM recognises an urgent need for consolidation and amendment of the Regulations to ensure that they properly implement and effect the Aarhus Convention, applicable EU Directives and other relevant international law. The core priority in this exercise should be to set a strong legislative basis for meaningful access to information in environmental matters. Such access is integral to the enabling the two further pillars of the Aarhus Convention, specifically meaningful public participation

[17] Access to Information on the Environment Regulations 2007-2018, Article. 15(4).
[18] ACCC/C/2016/141 Ireland (ECE/MP.PP/C.1/2021/8) at pg. 5.

in environmental decision-making and effective and timely access to justice. CLM has concerns that this consultation has not operated in a manner consistent with the Aarhus principles of public participation given the provision of limited information and a short consultation period. In our view, such deficiencies must be addressed through the development of a strong legal framework in the Regulations that enable timely and meaningful access to environmental information together with public policy commitment to proactively disseminating environmental information to the public and fostering a culture of dissemination and disclosure.

Community Law & Mediation

[redacted]