



Public Consultation: National Implementation Report 2021

Submission of the Commissioner for Environmental Information

SUBMISSION

The Office of the Commissioner for Environmental Information (OCEI) welcomes the opportunity to make a submission in response to the public consultation on the access to justice provisions of the Aarhus Convention and their implementation into Irish law. The OCEI was established under Article 12 of the European Communities (Access to Information on the Environment) Regulations 2007 to 2011 (the AIE Regulations) for the purpose of providing an external administrative review procedure in accordance with Article 6(2) of Directive 2003/4/EC on public access to environmental information and Article 9(1) of the “Aarhus Convention” (i.e. 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).

RESOURCES

OCEI is staffed by a dedicated team based within the Office of the Ombudsman. The staffing resources of OCEI are set out on our website [here](#). Our investigations team is led by a Senior Investigator.

At the time of our last submission, OCEI had two investigators working on AIE appeals. This has since been increased, bringing the number of OCEI investigators to four.

Staff movements, both within the Office of the Ombudsman and within the wider civil service, have continued to prove challenging. Following the retirement of the Senior Investigator and other staff changes, there have been times when the staffing complement was considerably under strength. A new Senior investigator is in post and all posts are due to be filled by February 2021.

CASE RESOLUTION

Since our last submission, the number of appeals to OCEI has more than doubled: In 2015 OCEI received 31 appeals. In 2019 we received 64 appeals.

Unsurprisingly, the additional staffing available to OCEI in the years leading up to 2019 led to an increase in the number of appeal cases closed. More cases were closed in 2018 than in any other year since the establishment of the OCEI. Staff turnover meant that the number remained the same for 2019. The full picture for 2020 will be presented in the OCEI's Annual Report, which will be published later this year.

It has always been the case that working on AIE appeals is often difficult and time-consuming. This is due to factors such as the volume of records involved, the complexity of the subject matter, a lack of clarity on how the law should be interpreted, delays in receipt of information from the parties, strongly contested disputes as to whether information is environmental information or not, and the frequent requirement to consult third parties.

In recent years a growing number of OCEI decisions have been appealed to the courts. For example, this number increased from 12.5% of decisions made in 2018 to 19% of decisions made in 2019. Responding to these appeals diverts resources away from our core mission. More information on this matter is set out below.

AVERAGE NUMBER OF DAYS TAKEN TO CLOSE CASES

The OCEI's 2017 Annual Report reported that the average number of days taken for a case to be closed in 2017 was reduced by 54 days from 316 days in 2016 to 262 days in 2017. As reported in our 2018 Annual Report the average number of days taken for a case to be closed in 2018 was 279 days. Our 2019 Annual Report reported that the average number of days for a case to be closed was 249 days, an improvement that this Office is committed to building upon.

Regrettably, due to significant constraints on OCEI resources, which were compounded by the challenges faced by all providers of public services in the wake of the COVID19 crisis, further improvements were not possible in 2020. The OCEI will address this with the appointment of additional investigators, and new faster procedures which come into effect in Q1 2021.

COURT PROCEEDINGS

As reported in the OCEI's Annual Reports of recent years, there has been a significant increase in the number of the Commissioner's decisions that have been appealed to the courts. This is a significant challenge for the OCEI. In our 2018 Annual Report we stated that "the high percentage of [court] appeals are likely to have a negative effect on the ability of my Office to close cases in the coming year". This remained a theme in our 2019 Annual Report.

While the number of cases closed and formal decisions made has increased since the last National Implementation Report and the average number of days taken for cases to be closed has decreased, the rise in court appeals has complicated efforts to reduce the number of cases on hand. Court appeals consume a substantial amount of resources, both in terms of legal costs and staff time. Each court appeal takes a considerable amount of time to manage and requires the diversion of resources from day-to-day casework. As a result, court appeals divert OCEI's resources from progressing appeals made to the Commissioner under article 12 of the AIE Regulations.

The majority of the court appeals concern the definitions of "public authority" and "environmental information". This Office has repeatedly flagged the issues arising from the lack of clarity over the scope of both definitions and the need for guidance on the matter. At the time of writing, the OCEI is awaiting a preliminary ruling from the Court of Justice of the European Union on the interpretation of the definition of "public authority" (Friends of the Irish Environment –v- Commissioner for Environmental Information 2017/298 MCA). A judgment from the High Court on the interpretation of the definition of public authority (Right to Know CLG -v- Commissioner for Environmental Information 2019/87 MCA) is also due in the early part of 2021, following a hearing in December 2020.

Two appeals concerning the definition of public authority are listed for hearing before the High Court in March 2021 (Right to Know CLG -v- Commissioner for Environmental Information & Ors 2019/249 MCA and Right to Know CLG -v- Commissioner for Environmental Information & Ors 2019/250 MCA). A further appeal hearing concerning the definition of environmental information is due to take place in April 2021 (Right to Know CLG -v- Commissioner for Environmental Information & Ors 2020/34 MCA).

More information about these appeals can be found in the Annual Reports of the OCEI, which are available at www.ocei.ie.

It should be noted that appeals against a decision of the Commissioner are subject to the "special costs rules" under the Environment (Miscellaneous Provisions) Act 2011, as amended. These rules serve to limit the financial risk to parties bringing appeals against a decision of the Commissioner, where costs can only be awarded against a party in limited circumstances. The OCEI notes the importance of rules limiting the costs of litigation, particularly where such rules facilitate the access to justice mechanisms envisaged by the Convention. The Commissioner would welcome a review of the current rules, which might include consideration of a system based on reciprocal cost-capping, which would facilitate access to justice while providing a safeguard against significant draws on the resources of the OCEI and other public bodies subject to the special costs rules.

DRAFT RECOMMENDATIONS AND FINDINGS OF THE ACCC

Following a complaint about Ireland's compliance with the Convention in August 2016, the Aarhus Convention Compliance Committee (the ACCC) issued its draft findings and recommendations in August 2020. Among other matters, the ACCC found a failure on Ireland's part to comply with the requirements of the Aarhus Convention by an absence of measures to ensure that OCEI appeals are resolved in a timely manner.

The OCEI takes the draft findings and recommendations of the ACCC very seriously. As detailed above and in consecutive annual reports, the OCEI is committed to improving the efficiency of its practices and procedures. This is particularly the case in circumstances where an appeal to this Office involves participation in environmental decision-making.

The OCEI continue to take steps to ensure that appeals to this Office are resolved as quickly as possible.

LEGISLATIVE CHANGE

Since the last NIR, amendments have been made to the AIE Regulations in relation to the status of the President of Ireland under the definition of a public authority. While this clarification was welcome, a number of questions of interpretation of the AIE Regulations remain outstanding, including the difference between the wording in article 8(a)(iv) of the AIE Regulations and the corresponding provision of the AIE Directive. The introduction of this amendment means that the legislation underpinning the responsibilities of the OCEI comprises four separate pieces of secondary legislation, rendering the law in this regard considerably less accessible than it ought to be.

It also remains the case that the Commissioner's powers are limited in several respects. This situation is contrasted with the powers available to the Commissioner in his role as Information Commissioner under the Freedom of Information legislation, which include comprehensive powers of enforcement and delegation. The Commissioner would welcome a full review of the current AIE Regulations in order to clarify outstanding matters of interpretation and to bring the AIE Regulations within one consolidated piece of legislation.