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Truth | Justice | Sustainability



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20th January 2021

Public Consultation on the Implementation of the UNECE Aarhus Convention and PRTR Protocol in Ireland

Deadline: The consultation will close at 5pm on Wednesday, 21st January 2021.

URL: <https://www.gov.ie/en/consultation/16a9e-public-consultation-on-the-implementation-of-the-unece-aarhus-convention-and-prtr-protocol-in-ireland/>

Dear Sir/ Madam

We refer to the above and make the following submissions.

Note that there are **8 pages** in total to this submission inclusive of the cover page.

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CONSULTATION - Aarhus Convention and PRTR Protocol

THE AARHUS CONVENTION

1. There are three principle facets to the Aarhus Convention. These are: -
 - a. ACCESS TO INFORMATION ON THE ENVIRONMENT
 - b. PUBLIC PARTICIPATION
 - c. ACCESS TO JUSTICE

ACCESS TO INFORMATION ON THE ENVIRONMENT

2. We have experienced significant issues accessing information. This is best illustrated by example.
 - a. **Court Documents:** on numerous occasions we have been denied access to court documents in circumstances where we clearly should have been furnished with same. This is best illustrated by example.
 - i. In January 2011, the *National Monuments Service [NMS]* issued an order for protection of a site of significant archaeological importance (2 large early medieval burial grounds). This was on lands over which a large quarry operator had sought to quarry.
 - ii. The operator (Keegan Quarries Ltd) then challenged this order by way of judicial review proceedings.
 - iii. The *National Monuments Service* ultimately decided not to defend their order and consented to an order of *certiorari* on 16th October 2012 revoking its earlier order.
 - iv. We understand that as part of this order of *certiorari*, that the site was to be examined by a 3rd party to see if it was worthy of protection (in itself a rather strange abrogation of its responsibilities by the state).
 - v. We further understand that the quarry operator was permitted to plough and till the land.
 - vi. Finally we were given to understand that the site was to be protected for two years pending the preparation of a report by the 3rd party. We were told in 2018 that this report was never done.
 - vii. Both the *National Monuments Service* and the *Court Service* has repeatedly declined to furnish us with a copy of this order as late as 2018.
 - viii. **It is clear that the NMS have abandoned this file. They have now adopted a *dog in the manger* type approach to availability of documents. There has been zero transparency and or public oversight.**
 - b. **Local Authority Documents; correspondence, legal advice:** in one instance recently; in circumstances where a County Council had deemed a significant enforcement file to be closed (regarding a very problematic unauthorised quarry development); when we sought copy documents (including a copy of correspondence from the operator); they were declined.
3. **We would recommend that these deficiencies are dealt with to reflect the aspirations of the Aarhus Convention.**

PUBLIC PARTICIPATION

4. Following the ratification and implementation of the Aarhus convention, *Mr. Kieran Cummins* made a complaint to the ***Aarhus Convention Compliance Committee [ACCC]*** against Ireland re a lack of public participation; ref. **ACCC/C/2013/107**.
5. **ACCC/C/2013/107**: in summary, planning law typically allows a person 5 years within which to complete a project following planning consent. Following the banking collapse and subsequent financial crisis of 2008, many people found themselves in a position of not being able to complete their projects due to lack of cash flow. The Irish government addressed this situation by enacting legislation in 2011, which provided people with valid planning permissions a facility to apply for an extension of duration.
6. A standard planning term of 5 years applies to all residential planning consents. The government then legislated to provide for an extension of duration of another 5 years to facilitate people in financial duress. This could be applied for on foot of a simple application and a nominal fee of €62. No public notice or consultation was required [*section 42 of the Planning and Development Act 2000*].
7. What happened was that quarry developments which ran out of their permitted time frame (typically 10, 15 or 20 years) began applying for these extension of duration consents. No Environmental Impacts Assessment [EIA] or Appropriate Assessment [AA/NIA] was carried out and therefore no up to date information was gathered or furnished. Some quarries were very problematic and concerned neighbors wished to contribute to a future planning application to extend their life. The extension of duration facility was never intended to be used in this manor by the quarry sector.
8. *Mr. Cummins* was aware that planning consents were about to expire at a particular quarry on the 5th August 2013. He had been duly watching the entrances for planning notices; none appeared. Quite by accident, he stumbled on extension of duration applications some months later. He was denied a right of participation in the process by the authorities. He then pursued the matter through the *United Nations ACCC*, which sits in Geneva and he lodged a formal complaint against Ireland on the **11th November 2013**. After numerous deliberations and a hearing in March 2016, at which both parties presented their cases in Geneva, the ACCC published its findings in July and August 2019.
9. The ACCC found that (par. 94): -

'The Committee finds that, by failing to provide opportunities for the public to participate in the decision-making on the 2013 permits to extend the duration of Trammon quarry, the Party concerned has failed to comply with article 6 (10) of the Convention. Moreover, the Committee finds that, by providing mechanisms through which permits for activities subject to article 6 of the Convention may be extended for a period of up to five years without any opportunity for the public to participate in the decision to grant the extension, section 42 (1) (a) (i) and (ii) of the Planning and Development Act 2000 do not meet the requirements of article 6 (10) and thus the Party concerned fails to comply with article 6 (10) of the Convention'

10. The ACCC went on to recommend that (par. 95): -

'The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that, with regard to section 42 (1) (a) (i) and (ii) of the Planning and Development Act 2000, the Party concerned:
(a) Take the necessary legislative measures to ensure that permits for activities subject to article 6 of the Convention cannot be extended, except for a minimal duration, without ensuring opportunities for the public to participate in the decision to grant that extension in accordance with article 6 (2)–(9) of the Convention;
(b) Take the necessary steps to ensure the prompt enactment of the measures to fulfil the recommendation in paragraph (a) above.'

11. Ireland published amending legislation in October 2020. This is limited to deal with section 42.

12. The Aarhus Conventions lays down a set of principles and provides a limited adjudication process by a committee [ACCC] who sits 3 or 4 times a year in Geneva. It is intended that these serve to act as precedents. In other words, it was envisaged that if public participation was found to be inadequate in a given set of circumstances, that national legislatures would take note and follow suit by amending other offending pieces of legislation with similar facets. It is certainly not the intention that concerned citizens would have to refer each and every matter to Geneva for adjudication.

13. Why else would Mr. Cummins have spent 6 years of his time pursuing a case if at the end of it all the state were prepared to do was amend that tiny piece of legislation? This was of course pursued with the bigger picture in mind and for the common good and to set a precedent for others. Perversely, I (Kieran Cummins) now find myself having to fight the same battles all over again.

14. The fact is that there are a number of other pieces of legislation in Ireland, which similarly excludes the public from participating in the earlier part of the planning process. These too should have been amended following the decision in **ACCC/C/2013/107**. These are: -

- a. Section 177(c) of the planning act
- b. The Strategic Infrastructure Act [SID]
- c. The Strategic Housing Development Act [SHD]

SECTION 177(c)

15. In a judgment delivered on the 3rd July 2020, by the Irish Supreme Court in *AN TAISCE, PETER SWEETMAN & Others v. AN BORD PLEANÁLA and Others* [9/19, 42/19 and 43/19], Mr. Justice William M. McKechnie stated that the public should have an input at the earlier s.177 (c) stage and specifically cited the Aarhus Convention. He also stated that 'exceptional circumstances' should not be used to avoid EU law. In fact case **ACCC/C/2013/107** (above) was pleaded in this case and likely influenced this judgment.

16. Indeed *Mr. Cummins* encored practically the same issues all over again with s.177(c). Knowing that the very same quarry was out of planning consent on the 5th August 2018, he was again monitoring site entrances and also websites. Nothing appeared until in May 2019, he discovered a permission from *An Bord Pleanála* permitting the applicant to apply for a type of retention permission. There had been no published notice on the website of *An Bord Pleanála* nor had there been a site notice.

17. *Mr. Cummins* was then obliged to pursue the matter through the courts by way of Judicial Review. This is an onerous task, which should not be constantly falling to a citizen to deal with.

STRATEGIC HOUSING DEVELOPMENT ACT [SHD]

18. This legislation facilitates a developer to go straight to the *An Bord Pleanála*, bypassing the usual requirement to first go to the local planning authority. This means that the public have no right of appeal.
19. Furthermore, a developer is given access to *An Bord Pleanála* prior to any public consultation. A Pre-Application Consultation between the developer and *An Bord Pleanála* is in fact a mandatory requirement of the legislation before any application is lodged. The public has no access until an application is lodged.
20. *Mr Cummins* again witnessed a similar set of circumstances regarding the same applicant (same group of companies) which had applied to construct some 320 housing units on a site which had 3 times been turned down for a far less number of housing units. The applicant lodged a planning application on the **8th July 2020**. A mere 3 months later *An Bord Pleanála* granted permission for the proposal by order dated **27th October 2020**. The fact that the application sailed straight through without any questions or further information of any kind being raised (on foot of submissions made by 3rd parties) is astounding.

21. The applicant had been in discussions with the planning authorities for the best part of a year before the applications were lodged.
- a. There are minutes of a meeting at the offices of *Meath County Council* on the **3rd September 2009** between interested parties (the public were excluded and completely unaware of this pending application).
 - b. There are minutes of a meeting at the offices of *An Bord Pleanála* on the **13th February 2020**; again between all the parties, but with the public excluded.
 - c. **Indeed it is noted that the Board subsequently issued an opinion and inspectors report prior to the applicant lodging their plans. ALL WITH THE PUBLIC EXCLUDED!**
 - d. The applicants together with *An Bord Pleanála* essentially designed the development during pre-planning consultations prior to a planning application and without public participation.
 - e. There were major issues of compliance and unauthorised development issues with the applicant together with specific environmental and heritage issues, which *Mr. Cummins* wished to have included in the mix. While *Mr. Cummins* did present these issues in August 2020, it is considered that the decision by the Board appeared to be a *fait accompli* with acceptance of submissions from the public at the latter stage more of a box ticking exercise rather than of any meaningful engagement.
 - f. Apart from the track record of the promoters, there were major capacity and heritage issues, which should of course have been dealt with in the earlier stages. A developer was unlikely to raise issues, which might negatively compromise their chances of obtaining planning consent for a given proposal.
 - i. Indeed in January 2021, the pressure in the water supply to the town had to be reduced as it was unable to cope with the current demand.
 - ii. Likewise there were major issues with regard to capacity of both schools and doctors, which could and should have been addressed in the earlier pre-planning stage
22. The public were essentially excluded from the process for one whole year before the applicant ultimately lodged their application after which the authorities granted permission in a mere 3 months with no further issues raised of the applicant despite important issues having been outlined in comprehensive submissions from *Mr. Cummins* and *Eco Advocacy*.

23. The STRATEGIC INFRASTRUCTURE ACT is in clear contravention of the Aarhus convention and indeed elementary justice and fairness. It is considered that the statutory authorities are merely box ticking and paying only lip service to the public participation element of the Aarhus Convention.

STRATEGIC INFRASTRUCTURE ACT [SID]

24. Likewise the same issues arise in respect of the STRATEGIC INFRASTRUCTURE DEVELOPMENT ACT where developers are given exclusive access to *An Bord Pleanála* with the public excluded. This often arises where wind turbine developers are given exclusive access to *An Bord Pleanála* while the public has no right to participate in this integral part of the process.
25. Both the SHD and SID are quiet similar to the authorities previously outlined; i.e. **ACCC/C/2013/107** and the Supreme Court judgment in *AN TAISCE, PETER SWEETMAN & Others v. AN BORD PLEANÁLA and Others* [9/19, 42/19 and 43/19].

26. As it is, public participation is very limited by comparative standards with some other jurisdictions such as Switzerland; where the community are much more involved in making decisions on what to permit in their bailiwick. Here in Ireland we are essentially trying to adopt an existing system to fit with the dictates of EU and International law (Aarhus Convention). In practice this approach has essentially proliferated box ticking or of paying lip service rather than any real meaningful public participation in decision-making.

COSTS

27. There is currently no facility for a successfully complainant (communicant) to recover costs from the offending state. Significant amounts of work and time are typically invested by a complainant in any given case and it is considered fair and reasonable that they be at a minimum compensated in some small way for their part in bringing a public interest issue to the attention of the UN, as its for the common good.
 28. Moreover given that we still have a number of other peaces of legislation on the statute books, which similarly exclude the public, it is considered that the lack of a penalty on the state is unhelpful. All similar peaces of offending legislation should of course have also been amended to bring them into line with the decision in **ACCC/C/2013/107**.
 29. Furthermore, in addition to the issues of costs, it is considered that an actual penalty by way of fine against the state would be helpful in incentivising a state to fulfill its obligations under international conventions such as Aarhus.
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ACCESS TO JUSTICE

30. The public should not be constantly catapulted into a situation of having to embark on Judicial Review proceedings where they face the might of a developer with deep-pockets who is resourced to field a high powered legal team with the public yet again being at a disadvantage.
31. In the fall of 2019, the authorities in fact proposed curtailing what limited access to justice there is.
32. The 2019 Planning Bill sought to introduce new requirements and restrictions on citizen and environmental NGOs that may wish to bring Judicial Review proceedings in relation to planning decisions.
33. The changes proposed in the proposed legislation may be summarised as follows: -
 - a. A change to existing cost rules for environmental cases whereby costs should “not be prohibitively expensive” to a cost cap rules system. The special legal costs rules in section 50B(2)-(4) of the 2000 Planning and Development Act currently state that “*each party to the proceedings, including the notice party, shall bear its own costs*” relating to judicial reviews. The current proposals seek to radically change this by replacing it with legal cost capping rules.
 - b. A change in standing rights requirements for applicants from “sufficient interest” to “substantial interest” AND also a requirement that they must be “directly affected” by a proposed development. Head 4: seeks to amend (1) Section 50A(2) of the Act of as follows: (3) The “sufficient interest” test that must be satisfied under section 50A(3)(b)(i) of the Act in order for the Court to grant leave to apply for judicial review be amended to refer to the term “substantial interest”, and to require that an applicant shall - (a) be directly affected by a proposed development in a way which is peculiar or personal...”
 - c. An additional requirement that the applicant must have had prior participation in the planning process. This would compromise someone who was absent (out of the country) during the first stage and who subsequently returned; they would be excluded.

- d. Extension of the minimum time that an NGO must be in existence before it can challenge a planning decision from 12 months to 3 years. Head 4 also seeks to amend “automatic standing rights” criteria of an NGO, as provided for in section 50A(3)(b)(ii) of the Act, to – (a) the minimum time requirement applicable to NGOs in relation to their establishment and pursuit of environmental protection objectives be increased from 12 months to 3 years preceding the date of application for section 50 leave;
- e. A requirement that NGOs must have at least 100 affiliated members. This would be a major disadvantage in rural areas.
34. The new proposals seek to impose a cost cap of €5000 for individuals and €10,000 for groups. This would make it prohibitively expensive for the public and environmental NGOs to take legal cases. It also seeks to impose limits on costs that legal costs to €40,000 which would make it unattractive or even unviable for lawyers to take up such cases on behalf of aggrieved people with genuine issues which deserve to be litigated in the courts in the public interest. This compares with the current costs regime, which allows for each side to bear their own costs and that successful litigants may be awarded certain costs if they are successful. This makes it possible to engage lawyers on a no foal, no fee basis.
35. **Resources of developers & the state:** As it is the public are at an enormous disadvantage in that they are totally under-resourced when up against the deep pockets of many large developers and multi-nationals who can afford to pay teams of lawyers and consultants large amounts of money to essentially buy their way through the courts system. Likewise the state has at its disposal large amounts of taxpayer’s money to defend its many bad decisions. This isn’t fair and needs to be addressed. The current proposals would make this situation even worse.
36. **These recent proposals would make it even more difficult to access justice. It must be said that one of the principle issues with accessing justice is finance. Most communities are ill-equipped financially to take on the might of a well resourced developer who usually have very deep pockets.**
37. **Bad decisions:** The reason the courts have quashed several decisions in cases brought by the public and environmental NGOs are because the decisions were defective. The Government’s solution appears to be preventing people from challenging bad decisions rather than seeking to improve the quality of the decisions. The current proposals are therefore counter-productive and cause the quality of decisions to further deteriorate.
38. **Enforcement:** a MAJOR issue with the planning process is that there has been little or no enforcement of both permitted or unauthorised developments. Retention applications have become a frequent aspect of the planning system; particularly so with the extractive (quarry) industry. We have witnessed numerous planning consents issuing in circumstances where they clearly should not. Recently we witnessed *An Bord Pleanála* permit a particularly problematic operator to apply for retrospective consent on the basis that they might not have been aware that they needed panning permission; this despite a plethora of enforcement letters/ enforcement notices/ section 5’s and a string of complaints from local residents in the years proceeding it.
39. In such circumstances; where both the enforcement and planning authorities have abjectly failed in their function; it is imperative that the public be at least entitled to step in without fear of being pursued for costs in the event of a judge not being able to grasp the facts and the case going against the plaintiffs. One must remember that such activists will typically have worked endless hours assembling sufficient information to ground a legal case and usually do so without any remuneration. This is work they should not and should not have to do if the statutory authorities were functioning as they were supposed to. Moreover such people will already have to fund their own legal people. To also require them to further fund or cover an adverse cost order is unconscionable.

SUGGESTED AMENDMENTS, WHICH WOULD BE HELPFUL

40. If the government/ department really wanted to improve the planning code and streamline the judicial system to reduce costs and time, there are a number of alternatives, which we have taken the liberty of outlining hereunder.
41. **Accountability:** our experience is that there has been a complete lack of accountability on the part of public servants who are charged with upholding and enforcing Ireland's environmental and planning laws. We need laws to make people responsible and accountable and with consequences for people who fail to perform and where *mala fides* may in fact be the case.
42. **Resources:** as stated above; communities and individuals are totally under-resourced and outgunned when up against the deep pockets of large developers and the state itself. This needs to be addressed to give citizens proper resources to deal with shoddy Environmental Impact Assessments and such like. It has been our experience that EIAR's are contrived and drafted entirely in favour of the developer who pays for it. Moreover what they omit can be very significant.

LEGAL

43. **Time Frames:** currently a developer has unlimited time to prepare very complex EIAR's. These are typically very self-serving and often omit crucial information. The very short timeframe permitting 3rd parties to comment on same leaves very little opportunity for a community to examine and comment on same is wholly inadequate.
44. Where it is considered necessary to engage an independent hydrogeologist, the time frame is grossly inadequate as most professionals are unable to accommodate communities at such short notice and allocate the time necessary to analyse and comment as appropriate.
45. I refer specifically to for e.g. a Hydrogeologist. Our experience is that very regularly a community ends up without appropriate professional representation at planning stage. This leaves a resultant decision in favour of an applicant developer extremely vulnerable to Judicial Review. It follows that much longer time frames need to be put in place to accommodate aggrieved persons/ communities.
46. Currently there is a requirement for a Certificate for leave to appeal. This requirement adds significantly to the time and costs involved in JR (Judicial Review). This usually involves the circulation of questions; an exchange of legal submissions and then a hearing. There may be a reserved judgment. This is an area, which could also be addressed in order to cut down time and costs.
47. Although an applicant has 8 weeks within which to bring their case, there is no time limit upon the respondents and notice parties for the delivery of Opposition papers. Often it can take many, many months for the other parties to prepare their opposition papers notwithstanding that the case will have commenced within 8 weeks of the decision. This also needs to be tightened up to cut down time.

I have outlined a number of important issues above and hope that these contributions will be reflected in whatever amendments may be forthcoming as a result of this consultation. I should be happy to collaborate and assist further in this consultation and share give the authorities the benefit of my experience going forward.

ENDS