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

Friends of the Irish Environment is a network of conservationists and environmentalists established for 20 years as a limited liability company and a registered charity. We are an entirely voluntary organisation active across a wide range of environmental issues throughout Ireland.

In the course of our work we seek to assist citizens and groups who are protecting their natural and built heritage against developments that are threatening their rights.

We refer to the above consultation and in particular note your admirable commitment 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.’

In response you state:

‘The Aarhus Convention adopts a rights-based approach and refers to the goal of protecting the right of every person of present and future generations to live in an environment adequate to health and well-being. Ireland is fully committed to protecting these rights and has illustrated this through its ratification of the Convention and its continued commitment to participative environmental governance and decision-making.’

In the course of addressing the issue of the implementation of the principles of the Aarhus Convention in Ireland we compiled a history of the State’s efforts to implement the Directive in practice. [The

History of Aarhus Initiatives in Ireland, FIE Briefing Note, August 2020]. This paints a very different picture from that presented in this document and is available online¹. It concludes:

‘CONCLUSION The Aarhus Convention requires Ireland to raise awareness of and facilitate the public’s awareness of how to use the three rights embedded in the three pillars. To date, little has been done and some – ENFO, the closest Ireland came to an Aarhus Centre – has been undone. What little that has been done has been unsystematic and haphazard, with nothing approaching the level of systemic national education required to reach the general public. Bridges have not been built between communities seeking their rights and our local and national authorities and democracy has been impeded by the failure to bring alive the Aarhus Convention in Ireland.’

While you argue that ‘The Aarhus Convention and related EU Directives are given legal effect in Ireland by over 60 pieces of legislation’, the recent Study on ‘EU implementation of the Aarhus Convention in the area of access to justice in environmental matters’² makes clear what is well known – the Irish judicial system is a barrier to access to justice through its costs, complexity, duration, and stringent conditions imposed on applicants:

‘While in some jurisdictions the costs of going to court are perceived as a significant barrier, as one environmental organisation/NGO emphasised: ‘In particular, in Ireland and the United Kingdom, costs prevent individuals and NGOs from bringing challenges.’

In our recent appeal over the failure to establish in the High Court that environmental organisations can be funded under the existing Legal Aid regime, the following details the complexity of the work required simply for an appeal in a field where the Law Library holds very few experts.

Court of Appeal

Taking instructions and initiating proceedings: Assembling relevant documents, reviewing and extracting outline legal points. Sending FOI/AIE requests for further documents. Attending public offices to inspect the file. Reviewing files in related cases. Reviewing the relevant Irish and European legislation Attending meetings and consultations, reviewing and synthesising the file to produce outline legal points. Briefing counsel with instructions to draft the appeal. Working with counsel to review and finalise pleadings. Filing papers with the Court of Appeal. Arranging to file notice of appeal proceedings on all other parties. Pre-trial procedure – Preparing for and attending court for directions hearing. Assessing and reviewing respondents notice. Taking instructions and briefing counsel if necessary. Preparing and drafting written submissions. Filing written submissions. Considering written submission of the other parties. Correspondence with other parties. Drafting and agreeing indexes for trial books. Preparing trial books, sharing with other parties. General correspondence with other parties. Trial and final orders– Attending counsel at the trial, taking notes, preparing documents that may need to be circulated and handed in at trial. Conducting any necessary legal research during course of trial. Taking judgment and final orders.

¹https://friendsoftheirishenvironment.org/images/Aarhus/The_History_of_the_Aarhus_Convention_in_Ireland_020920.pdf

² Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters Final report September 2019 07.0203/2018/786407/SER/ENV.E.4
https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implementation_environmental_matters_2019.pdf

Further, the Housing and Planning and Development Bill 2019 proposed restrictions are a retrograde step and it cannot be said that the state has an arguable defence to the following proposed barriers to NGOs like ourselves or to community groups coming together to defend their environment:

- to be established for a minimum of three years (rather than the current one year),
- to have a minimum of 100 affiliated members,
- to have possessed a constitution or a set of rules establishing their area of environmental protection for at least three years, with the additional requirement that such aims and objectives must relate / be relevant to the subject matter of the leave application they wish to make,
- to satisfy a 'substantial' (rather than 'sufficient') interest test and be directly affected by a proposed development in a way which is 'peculiar or personal',
- to bear the burden of new cost capping arrangements.

These proposed restrictions specifically undermine the European's Commissions change in policy as it withdraws from enforcement and relies on member states' judicial system:

'There have been important changes in the enforcement of European Union environmental law over the last 25 years. Environmental law has traditionally been reliant on the European Commission, but the Commission has started to withdraw from enforcement. Instead, it is undertaking efforts to 'outsource' enforcement to environmental non-governmental organisations (NGOs) by systematically promoting access for such groups to national courts.'³

In our work assisting citizens and groups in access to information and in challenging developments we are acutely aware of the needs of the three pillars that were intended to be met under the Convention and the failure to do so.

The Public Participation Networks [PPNs] is offered to answer this need of reaching out to the citizens. Certainly, their funding is almost three times what is given to all 33 registered environmental NGOs combined— €2.9m as opposed to €1.1m. This translates into €12k for Friends of the Irish Environment – a sum that would not meet the photocopying bills for our legal cases last year. With notable exceptions, PPN's have not succeeded for environmental groups as they are not perceived as effective with participation side-lined and environmental representations from the community resisted.

There is a common understanding that PPNs and in particular their role in Strategic Policy Committees [SPCs] are not functioning as intended and deep review has been promised but not activated.

The environmental sector in Ireland quite rightly spent the last 18 years building their organisations since state funding began in 2002. But our recent Supreme Court ruling while quashing the National Mitigation Plan also made it clear that NGOs do not have constitutional or human rights – that these rest with the citizens and it is up to them to claim them.

The development of these rights through an environmental prism requires intervention by individuals. Thus, unless the environmental movement pivots to providing information and education and trained assistance to the citizens, these rights cannot be realised. Lack of knowledge/capacity on the part of the public is the biggest obstacles to them doing so.

³ Andreas Hofmann (2019) Left to interest groups? On the prospects for enforcing environmental law in the European Union, *Environmental Politics*, 28:2, 342-364, <https://doi.org/10.1080/09644016.2019.1549778>

To meet this need, we are proposing an all-Ireland Aarhus Centre, with the cooperation of Environmental Justice Northern Ireland. Their⁴ 'Aarhus Centres on the island of Ireland, a briefing for civil society outlines in some detail the current situation and the justification – indeed the necessity – for the establishment of such a centre that by going directly into the community through initiatives like 'pop up centres' can act as bridge between the citizens and their Government and reinforce a social cohesion that is under unprecedented pressure as the impacts of increasing pressures on our biodiversity and climate are made manifest.

As the EJNI Briefing concludes:

'There is a need for further, detailed research into models and mandates that will best facilitate the establishment of an Aarhus Centre presence on the island of Ireland. The survey undertaken by EJNI has highlighted the complexity of this landscape, however a much more detailed analysis of overlaps, conflicts, potential links and collaborations should be undertaken as part of the preparatory work of any of the interested parties. This analysis should be undertaken using the OSCE guidelines as an analytical tool to assess the various options and should incorporate the OSCE Guidelines requirement for a consultative exercise. Detailed preliminary research undertaken in collaboration with a broad range of stakeholders (including government) will assist the various projects currently in progress in developing collaborative approaches that best deliver access to environmental justice to the citizens of the island of Ireland.'

Yours, etc.,

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⁴ https://friendsoftheirishenvironment.org/images/Aarhus/EJNI_Briefing_3_Aarhus_Centres_.pdf

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