Aarhus Convention Rights in Ireland: Implementation Gaps

SUMMARY

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Executive Summary

The Aarhus Convention (UNECE, 1998) arose out of Principle 10 (UNEP) of the Rio Declaration 1992 (UN, 1992), which embodies a key principle of international environmental law, that environmental decisions are best handled with the participation of those concerned. The three pillars of the Convention are Access to Information about the Environment, Public Participation in Environmental Decision Making, and Access to Justice when these rights are denied. Implementation measures have been undertaken by the EU in the areas of Information and Participation rights and this is the main way these obligations make their way into Irish Law (e.g. the EIA Directive (Environmental Impact Assessment) and Access to Environmental Information (AIE) Regulations). There is no dedicated Access to Justice measure under EU law but there has been some implementation of this strand through the case law of the Court of Justice of the European Union and the Irish Courts. However, implementation remains incomplete and fragmentary, leaving members of the public without full vindication of their rights under the Convention.

Some of areas where there is work to be done include:

- Capacity building of the public regarding their Aarhus Rights. A consistent program of public education, starting in secondary schools, moving into communities, in a way that consistently target disadvantaged groups in society, would go a long way towards making the public aware of their rights under the Aarhus Convention.
- Access to Information: Poor first instance decision making by public bodies 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/implementation of guidelines. Ongoing awareness raising/training 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. Underfunding of the Office of the Commissioner for Environmental Information (OCEI) should be addressed immediately.
- Public Participation procedures need re-evaluation. Inconsistent practices are evident across many areas, and a lack of consideration of diversity and inclusion issues in public participation is evident. Barriers to public participation should be researched, and decisions regarding standing rights should not be made in absence of good data.

- In the area of Access to Justice, legal aid provision and tackling dysfunction and underfunding in the Courts service are likely to have the biggest impact on the area of Access to Justice, followed closely by tackling the issue of costs and improving education on how to use the Courts system for the general public.

1. Introduction

1.1 The Aarhus Convention (UNECE, 1998) arose out of Principle 10 (UNEP) of the Rio Declaration 1992 (UN, 1992), 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 NGO's at the table (Wates, 2004), and NGO's 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.

1.2 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.

2. Ratification & Implementation

(Relevant to Section II NIR):

2.1 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).

2.2 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.

2.3 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 obligations through a complex piecemeal set of amendments to various pieces of legislation, which has been the subject of infringement actions[1] brought by the Commission against Ireland. Implementation is widely regarded as unsatisfactory.

2.4 It is incorrect to state that Ireland fully implemented the provisions of the Convention prior to ratification in 2012. 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 resolve the fact that in some cases access to justice is prohibitively expensive, or to ensure that access to justice was fair, equitable, timely and to put in place a system of financial supports for those wishing to access environmental justice. In particular a recent ruling shows that NGOs will never be considered eligible under current laws for State financial supports for those accessing justice.

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

3.1 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 €1.7million, this still falls below the level funding available in Northern Ireland or the UK). 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.

3.2 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 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.

[1] 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

3.3 Environmental law is notoriously complex, fragmented legislative regime, 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 professional. Government funded advice services like Citizens Information lack the capacity to assist in such a specialist and complex are.

3.4 There are no government provided services building the capacity of citizens and NGOs to access justice specifically in relation to the environment.

3.5 There is no system in place to implement Art 3(8) of the Convention, creating specific protections against harassment for environmental defenders. The whistleblower legislation cited in this regard (the Protected Disclosures Act), 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 does not protect those who take environmental judicial reviews or other court proceedings to prevent environmental harm, or make complaints in a personal capacity to State Agencies.

4. Access to Information

Relevant to Section VII - X

Law

4.1 The Access to Information Regulations 2014- 2018[2] 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 analysis, matters affecting human health and the food chain.

4.2 This regime is complemented by Freedom of Information[3] 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).

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

4.4 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

[2] 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

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

documents circulated by Cabinet are amenable to disclosure (see CLG v An Taoiseach [2018] IEHC 371 below).

4.5 The Aarhus Convention requires that public bodies gather environmental information and disseminate it. 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.

Effort

4.6 Despite a comprehensive legislative regime, there appears to be a low level of awareness of access to information rights among the general public (Ewing, Hough, & Amajirionwu, 2011).

4.7 Also, NGO's report difficulties with public bodies 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).

4.8 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, but this one off training appears to have been insufficient to achieve the kind of access envisaged by the Regulations (see below).

Effectiveness

4.9 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 NGO's.

4.10 This has been the subject of a complaint by the NGO campaign group RightToKnow CLG[4] (R2K) who lodged a complaint before the Aarhus Convention Compliance Committee (hereinafter the ACCC) in 2016[5] regarding access to environmental information in Ireland, which has not yet been decided. 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. 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

[4] www.righttoknow.ie

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

as amended which sets down a four month[6] timeframe for determination. The Aarhus Convention Compliance Committee recently found this lack of clear timeframe to be a breach of the Convention[7].

4.11 The extensive delays have been stated by the OCEI to be due to lack of resources[8]. 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 conclude that although funding was increased, it was not increased sufficiently to enable the authority to function as required by EU law.

4.12 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[9] [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.

4.13 The Aarhus Convention Compliance Committee has found that these excessive delays constitute a breach of the Convention[10].

4.14 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 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.

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[6] 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

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

[8] 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

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

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

4.15 Similarly, in CLG v An Taoiseach [2018] IEHC 371 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.

4.16 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. 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)[11], the EIA Portal[12]. However there are many instances where information is not routinely provided, and other examples of provision of information that is inadequate (e.g. many instances of poor quality or inaccessible planning files on Local Authority websites, and An Bord Pleanála[13]). For example An Bord Pleanála's website[14] is very difficult to use, lists decisions in weekly batches with no categorization and not in searchable format.

4.17 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. Procuring cultural change in an organization is a difficult task and it is recognized that culture trumps rules every time (O'Riordan, 2017). 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. One of the steps that have been identified as important to achieving culture change is the use of Performance Management Systems. The Irish public service utilizes the PMDS system[15] (Performance Management Development System), which is supposed to include cyclical education in all aspects of roles. However, the evidence suggests uneven application of this system across the public service (O'Riordan, 2017, p. 21). (Ewing, Hough, & Amajirionwu, 2011). While it is acknowledged that the Department of Environment (now Communications, Climate Action and Environment) did roll

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

[12] https://www.housing.gov.ie/planning/environmental-assessment/environmental-impact-assessment-eia/eia-portal

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

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

[15] https://hr.per.gov.ie/performance-management/

out training to Local Authorities on Access to Environmental Information when the new AIE Regulations were introduced, addressing cultural barriers and organizational values takes a more ongoing and consistent approach, and this could be an important contribution to producing real access to information.

Conclusions on Access to Information

4.18 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, as well as better practice guidelines for public bodies, with a view to producing a culture change in attitudes to transparency. Full and even implementation of the PMDS system would assist this. 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.

5. Public Participation

Relevant to Sections XV - XX

EU Law

5.1 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.

5.2 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").

5.3 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

5.4 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.

5.5 Some matters of concern include the Strategic Housing Developments[16] and Strategic Infrastructure Developments[17] which by-pass the local authority stage and go straight to An Bord Pleanála, and have shortened timeframes for submissions and observations.

5.6 Strategic infrastructure development[18] 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.

5.7 Public participation periods are restricted to 6 weeks[19], 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.

5.8 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.[20] These are discussed in detail under Access to Justice, below.

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[16] 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

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

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

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

[20] "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

5.9 Fees remain an issue in participation in this area. For example it costs €20 to make an observation on a planning application at Local Authority level, €50 to An Bord Pleanála[21], €220 to make a third party appeal to An Bord Pleanála[22]. This is not counting the time involved in reviewing and writing submissions, the cost of hiring experts to help with submissions/observations, time spent off work for oral hearings etc.

Environmental Impact Assessment (EIA)

5.10 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[23] as amended by 2014/52/EC[24].

5.11 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, 2018). Ireland has not yet implemented these provisions for Waste Licensing.

5.12 There are some areas such as Forestry[25], Aquaculture[26] and Peat extraction[27] where thresholds are set so high that they take almost all projects out of the purview of the public participation/environmental impact assessment process. Additionally, NGO's have raised concerns regarding project splitting[28], to keep projects within these thresholds and avoid triggering the EIA/participation obligations. This is the subject of a (second run) High Court decision in EPA v Harte Peat ltd [2014] IEHC 308, 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.

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[21] http://www.pleanala.ie/appeals/observation_guide.htm
[22] http://www.pleanala.ie/about/Fees/appeals_fees.pdf
[23] 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
[24] 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
[25] Removal of 70 hectares of coniferous forest.
[26] 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)
[27] Above 30 hectares (Planning and Development Regulations 2001 – 2019, Schedule 5).
[28] https://www.thejournal.ie/climate-change-ireland-1186621-Nov2013/

Aquaculture & Foreshore

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

5.14 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.

5.15 A new Maritime and Offshore Bill[29] drafted in 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 draft legislation has not been progressed.

5.16 Fees are substantial for third party appeals, costing €152.37[30]. Issues arise when multiple licenses are granted/renewed for a single area[31], and therefore individuals would be forced to pay multiples of this in order to participate in all of the decisions that affect them.

Effort

5.17 The public are generally aware of their rights to participate in and object to Planning Applications, and the planning site notice has been a fixture of the Irish countryside for many decades.

5.18 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

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

5.20 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.

5.21 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

[29] https://www.housing.gov.ie/sites/default/files/legislations/general_scheme_of_maritime_area_and_foreshore_amendment_bill_2013.pdf

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

[31] 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/aquacultureforeshoremanagement/aquaculturelicensing/aquacultureforeshorelicenceapplications/cork/

central electronic portal established for carrying out public consultations, and still restrict to publishing on their own websites[32].

5.22 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[33] 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[34],[35],[36] 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.

5.23 Another issue highlighted by NGO's is inconsistent practice when it comes to "taking into account" contributions to public consultations. 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.

5.24 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.

5.25 The establishment of the Public Participation Networks[37] 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. These consist of the placing of representatives of various

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

[33] 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/

[34] 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

[35] 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/

[36] 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/

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

community groups and NGO's 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. 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. 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/NGO's is not a substitute for true community engagement.

Effectiveness

5.26 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. There are considerable challenges for ordinary members of the public attempting to participate in these decision-making processes. The requirement of fees 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.

Conclusions on Public Participation

5.27 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 fulfill 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[38] for Strategic Environmental Plans and Policies currently in place).

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

- The removal of fees would be desirable.
- In addition to review of 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.

5.28 Another matter for consideration is that the Aarhus Convention mandates early participation[39] when all options are on the table, including what is known as the "zero option" or the possibility 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.

5.29 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.

6. Access to Justice

Relevant to Sections XXVIII-XXXI

Law

6.1 There is no specific EU law covering access to justice at Member State level. There is no single specific piece of legislation addressing the right of access to justice in environmental matters in Ireland.

6.2 There is a framework for judicial review of environmental decisions[40] 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.

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[39] 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

[40] 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.

6.3 Court costs are a huge barrier to access to justice, and in the context of a drastically underfunded and dysfunctional Civil Legal Aid Scheme[41], there is no assistance for Plaintiff's seeking to challenge environmental decisions, as legal aid is mostly restricted to family law cases by funding restrictions.

6.4 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 struck an appropriate 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. This has been described by Ryall (Ryall, 2018) as a successful intervention leading to an increase in environmental litigation generally.

6.5 The Government has recently issued draft heads of a Bill[42] designed to alter this, by creating a protective costs cap on Plaintiff's of €5,000 - €10,000. There is a costs cap of €40,000 for Defendants. These measures are clearly designed to remove the kind of "no-foal, no-fee" litigation that is currently the main mechanism facilitating access to justice in a high-costs jurisdiction[43]. This would definitely disincentivize litigation, and it is unlikely that it would be considered compatible with the Not Prohibitively Expensive Rule[44] under the Aarhus Convention.

6.6 The new proposals also threaten to change the current position regarding Standing Rights. Standing rights are the entitlement to bring a court case. Currently NGO's 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.

6.7 Under the new proposals, many individuals and NGOs would lose standing rights. The new proposals would require NGOs to be in existence for 3 years and to have a minimum of 100 members[45], eliminating many grassroots community groups. This would not seem to be compatible with the Aarhus Convention requirement to foster broad access to justice.

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

[42] The General Scheme Housing and Planning and Development Bill 2019

[43] https://www.irishtimes.com/news/environment/environmentalists-say-proposed-bill-makes-it-harder-to-object-to-planning-decisions-1.4080944

[44] See for example references to the rule by the CJEU in Commission v Ireland C-427/07, 16 July 2009 and Case C-470/16 North East Pylon Pressure Campaign Ltd v An Bord Pleanála EU:C:2018:185. http://curia.europa.eu/juris/document/document.jsf;jsessionid=624F1CE5E4566BB043C7848F71C69142?text=&docid=200265&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4442803

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

6.8 The new proposals impose an additional requirement 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[46]. 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[47]. NGOs currently must be in existence for one year before taking the review action, and must have environmental objectives.

6.9 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[48].

6.10 The new proposals would also require 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 application must take place within eight weeks[49] 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[50].

6.11 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.

6.12 These attempts to place barriers in the way of access to justice, when so many barriers already exist are would represent a retrograde step in terms of fulfillment of the obligations of the Aarhus Convention.

Effort

6.13 There is no coherent framework for educating the public about how to exercise their rights to access justice in relation to the environment. Court procedure is arcane, with large portions of it consisting of unwritten conventions of behavior

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[46] Harding v Cork County Council [2008] IESC 27.
[2008] I.E.S.C. 27
[47] Environment (Miscellaneous Provisions) Act 2011, s.20.
[48] "LZ No. 1" Case 240/09, "Djurgården" Case C-263/08, "Trianel" Case C-115/09.
[49] Section 50, Planning & Development Act 2000.
[50] HC74 - Judicial Review Applications in respect of Strategic Infrastructure Developments http://courts.ie/Courts.ie/Library3.nsf/pagecurrent/797211DDCD63BD008025822800555D4D?opendocument

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. There is no consistent education & outreach for the public on their legal rights in general (other than the Citizens Information initiative). 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.

Effectiveness

6.14 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, PILA and the Chief Justice Mr. Frank Clarke[51][52].

6.15 NGOs have recently been found by the High Court to be ineligible for the State funded Civil Legal Aid Scheme[53].

6.16 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 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.

[51] 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

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

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

7. Conclusions on Access to Justice:

7.1 Deficiencies in the Legal Aid System needs 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 compliance with Art 9(5) of the Arhus Convention).
7.2 Underfunding/Understaffing in the Courts Service should be urgently addressed.
7.3 Modernization of the Courts system and the adoption of digital technologies has great potential to increase access to justice.
7.4 Court costs in general need to be addressed. These include filing costs, stamp duty on court filings and lawyers' fees.
7.5 Consideration should be given to setting up a specialist environmental court.

8. KEY RECOMMENDATIONS

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

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 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.

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.

Capacity Building exercises for the public on Aarhus rights are badly needed and could take the form of:

- Funding a dedicated, independent, NGO-led Aarhus Centre on an all-island basis[54] to enhance capacity building of NGOs and individuals and disseminate information on Aarhus Rights in accordance with Art 3 of the Convention.
- Workshops conducted across the country on all three pillars of the Aarhus Convention. It is necessary to go out into communities to engage with those who are not being reached.

[54] 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

- Mixed media approaches are proven to be effective – an appropriate mix of in real life and online engagement is most effective at capturing a broad spectrum of stakeholders.
- Moving into alternative spaces, outside of authoritarian spaces which may be avoided by those on the fringes, and into a diverse range of spaces such as pubs and non-alcoholic venues should be considered to reach a broad spread from different elements of society.
- 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, as well as immigration rights organizations like MASI.

Barriers to public participation should be the subject of study and decisions regarding standing rights should not be made in absence of good data.

A re-evaluation of public participation procedures among public bodies is also essential, and a diversity and inclusion analysis needs to be brought to bear on how these consultations are carried out.

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.

Finally, legal aid provision and tackling dysfunction and underfunding in the Courts service are likely to have the biggest impact on the area of Access to Justice, followed closely by education on how to use the Courts system for the general public.

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