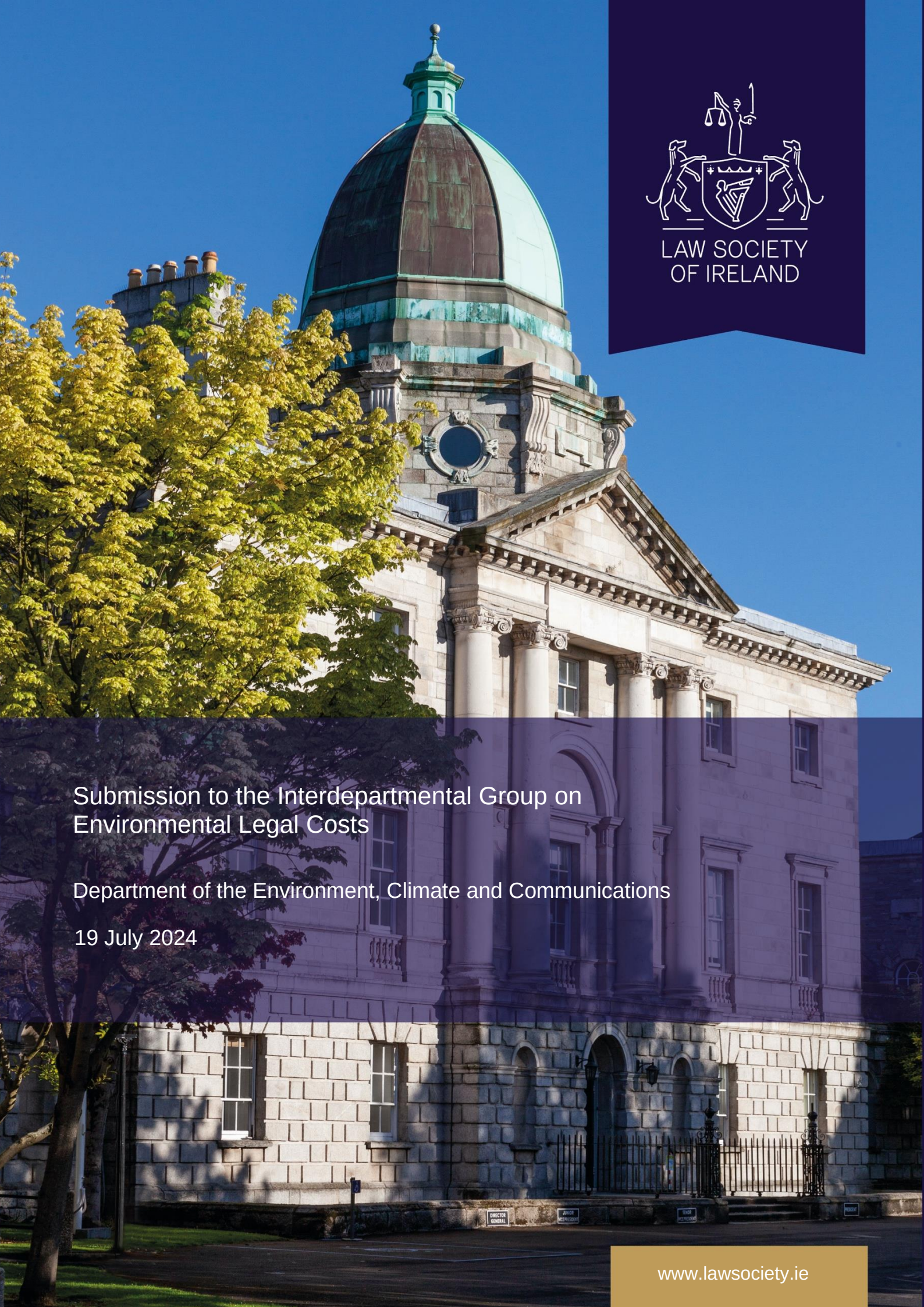

LAW SOCIETY OF IRELAND

Submission to the Interdepartmental Group on Environmental Legal Costs

Department of the Environment, Climate and Communications

19 July 2024

www.lawsociety.ie

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Introduction

The Law Society of Ireland (the **Law Society**) is the educational, representative and regulatory body of the solicitors' profession in Ireland. The Law Society delivers high-quality legal education and training and also places significant emphasis on civic engagement, supporting local community initiatives and driving diversity and inclusion.

The Law Society is committed to participating in discussion and advocacy on the administration of justice and the effective implementation of public policy.

The Law Society appreciates the opportunity to provide a submission to the Department of the Environment, Climate and Communications (the **Department**) on a discrete aspect of the Planning and Development Bill 2023 (the **Bill**). This Bill is of significant overall interest to the Law Society: in particular, the Law Society is strongly interested in the proposed reforms governing the judicial review of planning decisions from the perspective of access to justice for applicants in environmental cases.[1]

The Law Society notes that an Interdepartmental Group on Environmental Legal Costs (the **Interdepartmental Group**) has been established. We understand that this group will advance the drafting of regulations under the Bill. The work of the Interdepartmental Group will consider (a) the creation of a scale of fees for all judicial review applicants, and (b) any potential risks arising from the establishment of an environmental legal costs financial assistance mechanism. It is envisaged that this proposed mechanism will provide a contribution to an applicant's costs, in line with the aforementioned scale of fees, when an applicant is unsuccessful in obtaining relief.

The Bill is currently at the Report Stage in the Seanad after clearing the final stages of the Dáil in June. This present submission is solely concerned with laying out the Law Society's general stance on the proposed costs regime under Part 9 as well as informing and assisting the work of the Interdepartmental Group, as requested in the Department consultation dated 7 June 2024.

This submission aims to provide a background and context to recent developments in how the provisions of the Aarhus Convention concerning access to justice in environmental matters are implemented in Ireland.

Secondly, this submission describes the policy position of the Law Society on the environmental legal costs assistance mechanism. It also puts forward proposals that the Interdepartmental Group might consider prior to the drafting of regulations on foot of the Bill.

[1] This submission was prepared with the help of the Environment and Planning Law Committee.

Background

The Aarhus Convention (the **Convention**) is an international agreement that Ireland ratified in June 2012. It and the relevant implementing EU Directives (Directive 2003/4/EC on Public Access to Environmental Information and Directive 2003/35/EC on Public Participation) require that costs in certain environmental cases should not be prohibitively expensive in nature. Article 9 of the Convention requires that certain groups of people including, if necessary, bodies corporate, have proper access to review procedures in order to challenge decisions or acts that affect the environment.

This will allow members of the public and non-governmental organisations to seek High Court judicial reviews appealing decisions by public or local authorities which may affect the environment without being dissuaded by the potential for high legal costs, for example. Section 50B of the Planning and Development Act 2000 (the **2000 Act**) and the Environmental (Miscellaneous Provisions) Act 2011 (the **2011 Act**) aimed to give effect to this costs requirement in Ireland. This regime will be further amended by Part 9 of the Bill which introduces both the new environmental legal costs financial assistance mechanism and changes related to judicial review.

The provisions of the 2000 and 2011 Acts were subject to extensive 'satellite' litigation over the following years concerning which categories of cases were covered and what grounds were specifically covered by costs protections.[2]

For example, the 2022 Supreme Court decision in *Heather Hill v An Bord Pleanála*[3] brought clarity in the context of challenges to planning decisions. There have also been questions as to whether the concept of "not prohibitively expensive" should include an obligation to provide legal aid to applicants in environment-related cases. This was considered by the Court of Appeal in *Friends of the Irish Environment v The Legal Aid Board and Others*[4] in which the Court held that the Civil Legal Aid Act 1995 permits the provision of legal aid only to individuals and not to bodies corporate, including environmental NGOs.

Status of the Bill

The Bill has been passed by the Dáil and is currently (17.07.24) at Report Stage in the Seanad. Part 9 of the Bill consists of 24 sections of what is a much larger Bill running to over 700 pages, including schedules.

It is also noted that aspects of the Bill, outside of Part 9, have been criticised as being non-compliant with the Convention by the UN committee responsible for overseeing countries' implementation of the Convention (the Aarhus Convention Compliance Committee) into their national law.[5] The Law Society is concerned that the Bill may not comply with the Convention, and therefore suggests that this aspect of the Bill requires closer scrutiny by the Department to ensure that any regulations introduced under the Bill's provisions are compatible with both EU Directives and the Convention.

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[2] As Mr Justice Brian Murray noted in relation to the current rules on costs in environmental matters in *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43:
"*In a period of a little over a decade, the provisions intended to give effect to the 'not prohibitively expensive' requirements of the Aarhus Convention … have generated at least thirty-five reserved judgments of the High Court, four decisions of the Court of Appeal, three references to the Court of Justice of the European Union, one judgment of that Court (so far) and, now, this decision of this Court.*"

[3] [2022] IESC 43.

[4] [2023] IECA 19.

[5] See https://www.irishexaminer.com/opinion/commentanalysis/arid-41416933.html

The Environmental Legal Costs Financial Assistance Mechanism

The Commission Notice on Access to Justice in Environmental Matters (2017/C 275/01) (the **Commission Notice**) states that the Aarhus Convention requires contracting parties to consider the establishment of appropriate assistance mechanisms to remove or reduce financial (and other) barriers to access to justice. The provision stops short of requiring that a legal aid scheme is established necessarily.[6] It is clear that access to the courts in Ireland might be limited by an applicant's lack of financial resources, which is the main principle underpinning the legal aid system. In cases of particular importance, the Law Society agrees with the principle that legal aid fees should be fully or partially waived, as the case may be and depending on the means of the applicant, so that an award of costs made against an unsuccessful plaintiff does not dissuade plaintiffs from coming forward. The Law Society has previously argued that legal costs in domestic violence cases, for example, should be abolished.[7] The Law Society argues that environmental legal cases are particularly important to the public interest as judicial reviews made against planning authorities and other Government bodies are an important check that ensures planning decisions are undertaken in an environmentally sound manner.

It is also acknowledged that the Commission Notice mentions that the existence of a legal aid regime is not, in and of itself, evidence that costs are not prohibitively expensive (even if such a system is means-tested) as the 'not prohibitively restrictive' requirement applies even to individuals and associations with the capability to pay.

On foot of Article 9 of the Convention, the environmental legal costs financial assistance mechanism is contained under section 290 of the Bill. It seeks to reduce financial barriers that might restrict plaintiffs from bringing forward judicial review applications seeking to halt or reverse decisions by public bodies in relation to the environment. Under section 292 a plaintiff must submit a statement of eligibility and a statement of resources and this eligibility must be assessed by the relevant authority[8] within 28 days.

We understand from the consultation letter that a corresponding scale of fees will also be introduced for all planning-related judicial reviews and other Aarhus Convention cases and each party shall bear its own costs. Where an applicant is unsuccessful or doesn't receive costs, the applicant will be able to apply to the mechanism for a contribution to costs. The level of contribution will be determined by an assessment and, depending on the applicant's circumstances, could be up to 100% of the applicable scale fees. It is proposed that both the financial assistance mechanism and the scale of fees will be administered and regulated by the Minister for the Environment, Climate and Communications.

Law Society Position

Access to Justice

The Law Society is strongly committed to improving access to justice. The Law Society's firm position is that access to justice and legal representation are fundamental rights and that every effort should be made to avoid inequity in the legal system.[9]

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[6] At 57.
[7] See https://www.lawsociety.ie/news/media/press-releases/law-society-calls-for-abolition-of-legal-aid-fees-in-domestic-violence-cases-and-outlines-how-to-better-protect-vulnerable
[8] Meaning the Minister for the Environment or anyone empowered by regulations under section 294 to administer the assistance mechanism.
[9] See https://www.lawsociety.ie/gazette/top-stories/2023/september/law-society-expresses-great-concern-on-funding-failure

The Law Society believes that cases related to environmental justice are of particular importance and that access to justice should be prioritised when it comes to the creation of a regime of financial assistance for certain types of environmental legal cases. The removal or minimisation of financial barriers is a crucial aspect of access to justice in these matters. Broadly, the Law Society is in favour of the principle of introducing a mechanism for the reduction or elimination of legal costs in environmental legal cases and sees this as a positive development provided it is implemented correctly and in accordance with the Convention, in particular by removing the potential for prohibitively expensive legal costs in environmental cases.

It is also noted, following a review of international best practice, that Sweden has a particularly permissive system for appealing decisions made by public authorities that may affect the environment.[10] The Swedish system should be looked at more closely with a view to determining what aspects of it are suitable for adoption in Ireland. We recognise that Ireland would of course be free to impose limits on the provision of legal aid provided these restrictions do not make bringing a judicial review prohibitively expensive. It is acknowledged that in this context Ireland is a considerably different jurisdiction from Sweden, but a more interventionist attitude in this important area could benefit plaintiffs and the public in this important area.

The Law Society acknowledges that there is a potential risk of an increase in vexatious applications or applications solely intended to delay developments arising from the effective covering of legal costs through the financial assistance mechanism. This risk is mitigated to some degree by section 291 which ensures that applicants will not be entitled to monies out of the financial assistance mechanism where any part or all of their claim was vexatious, intended solely to secure money or intended to delay a development (to be determined by the High Court). The Law Society believes that, if implemented correctly, this offers a counterbalance for criticisms that effectively subsidising legal costs for applicants in environmental cases would overwhelm the system with unmeritorious claims.

Scale of Fees

The Law Society is opposed to the introduction of a binding scale of fees mechanism for judicial review applicants. The Law Society believes that reductions of legal costs are crucial in improving access to justice, including environmental legal cases, and recommends the introduction of guidelines to restrict legal costs in environmental cases as a more appropriate mechanism to maximise access to justice and improve transparency.

One of the risks inherent in such a scale is the fact that over time, the fees become outdated and do not reflect the value of the work, increasing the complexity of issues and increasing costs and inflationary effects. The situation that is currently being experienced in relation to the fees payable in the context of criminal legal aid clearly demonstrates just how problematic and unworkable scale fees can become.

In the District Court, scales of costs (that primarily focus on the amount of damages awarded by the Court) have impeded access to justice by failing to fully consider the amount of work undertaken by solicitors. Disparities between costs awarded and costs incurred is then covered by the client, leading to inequality in the system that favours clients with greater financial resources. The Law Society believes that tables of binding maximum costs would

[10] Page 204. In Sweden, "*members of the public may appeal acts and decisions by public authorities in environmental matters to a superior administrative authority or to a court free of charge. Moreover, the person seeking administrative or judicial review of the case does not risk paying the costs for the public authority or the operator of the activity in case the appeal is lost.*"

encourage an upward price trajectory in legal costs. Additionally, these tables would have to be regularly revised to reflect economic changes such as inflation.

Prescribing the costs payable by losing respondents to winning applicants without prescribing the costs that public body respondents may pay to their experts and lawyers in the same proceedings may also undermine the fairness and equity of the system. State bodies will have the capacity and resources to engage highly experienced and skilled practitioners, while applicants taking challenges against planning decisions will be expected to identify, source and fund legal expertise without the same level of resources available. A system such as this risks being contrary to the provisions or the general environmental protection goals of the Aarhus Convention, particularly in terms of where the Convention aims to level the playing field between applicants and Government bodies that are contrastingly highly-resourced with lawyers and experts.

The Law Society recommends the introduction of guidelines to restrict legal costs in environmental cases as a superior option. As noted in the findings of an EY report on legal costs commissioned by the Bar of Ireland and the Law Society,[11] guidelines are the best option for maximising access to justice. Additionally, they require minimal legislative intervention to introduce. Such guidelines allow for the length and complexity of a case to be accounted for, while also not sacrificing transparency and predictability of outcomes. Guidelines could also be more easily updated in line with economic changes than a rigid scale of fees.[12]

Primary vs Secondary Legislation

The discretion afforded to the Minister in the proposed scales of costs and environmental legal costs financial assistance mechanism does not have a precedent in any other type of proceedings.

On its own terms this may have implications for the right of access to justice. In particular, it is not clear why the existing provisions for the assessment of costs on a party and party basis are unfit for purpose in this context and why special provision must be made for the assessment of costs in planning matters. Matters of critical importance in the administration of the environmental legal costs financial assistance mechanism are left to a Minister of the Government.

As an example of this, in section 294 the Minister is permitted broad powers to make regulations to ensure that Aarhus Convention proceedings can be taken by applicants in a manner that is “not prohibitively expensive”, to ensure the equitable and orderly access to the courts, to extensively regulate the mechanism including the amount of funding available for legal aid, the rates of fees for lawyers and the rules of the scheme itself.

Under the Cityview test,[13] primary legislation must include sufficient guidance for the secondary legislation to follow: delegated law may only expand on the details of policies already existing in primary legislation. The parameters for any secondary legislation to be made under primary legislation must provide a sufficient basis for the secondary legislation and must accord with this test.

However, the amount of leeway given on the specifics of the scheme could be inconsistent with case law of the Court of Justice of the European Union. Provisions of a Directive (such as the Environmental Impact Assessment Directive and Habitats Directive to which the Aarhus

[11] Analysis of the impact of proposals to reduce legal costs in Ireland (EY, May 2022). Available at: https://www.lawlibrary.ie/eyreport-3/#:~:
[12] Ibid, at 51-53.
[13] *Cityview Press v AnCo* [1980] IR 381.

Convention applies) must be (a) implemented with clear binding force, (b) be specific, precise and clear to ensure legal certainty, and (c) persons affected by the Directive must be enabled to ascertain the full extent of their rights.[14]

The Law Society is concerned that this significantly large delegation of functions to the Minister creates a substantial risk for a lack of legal certainty around the implementation of the Directives. Ministerial regulations are not scrutinised to the same extent (if at all) as primary legislation, meaning they cannot, prior to their making, be easily assessed on whether or not they improve access to justice. This latitude given to the Minister by the Act may be too broad given the importance of compliance with the Convention and the importance of this mechanism on access to justice.

Although the Law Society broadly agrees with the introduction of the environmental legal costs assistance mechanism in principle, any regulations introduced in relation to the mechanism should be based on tried and tested legal concepts rooted in the case law of the Irish and EU Courts and guidance from the European Commission and Aarhus Convention Compliance Committee. If this is not the case, the State risks more protracted, expensive and unnecessary satellite litigation in relation to planning matters.

The Law Society notes the recommendation of the Joint Oireachtas Committee on Housing in its Report on the pre-legislative scrutiny of this Bill (then known as the Draft Planning and Development Bill 2022) that "*the existing provisions of section 50B of the 2000 Act* [should be] *retained until the new cost protection regime is enacted in primary legislation.*"[15]

The Law Society agrees with this recommendation. The Law Society is also of the view that many of the matters proposed to be delegated should be further defined and enacted by way of primary rather than secondary legislation to allow them to be scrutinised for their impact on access to justice and in order to reduce the risk of satellite litigation in relation to their meaning and compatibility with the Directives and Convention.

Eligibility

The Law Society has particular concerns in relation to the assessment of eligibility, which may include an assessment of such matters as standing and whether the proceedings are likely to succeed by an official appointed by the Minister. The time period for determination of eligibility is 28 days and the consequences for delay are not established. Applicants who require financial assistance and cannot embark on proceedings without costs certainty would have to establish eligibility and apply for judicial review within eight weeks of the decision sought to be challenged.

Delay in the courts system is prejudicial to the public interest and delay in environmental proceedings would be especially hostile to improved access to justice. An assessment process needs to be particularly expeditious, although a 28-day period would be suitable if the assessment were more complex or if there were more safeguards for the applicant. The Minister may investigate the possibility of introducing a more dynamic assessment period dependent on the circumstances of applicants, as opposed to a strict 28-day limit.

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[14] See, for example, Case C-197/96 *Commission v France* [1997] ECR 1-1489 at para 15 and Case C-207/96 *Commission v Italy* [1997] ECR 1-6869 at para 26.

[15] Report on the Pre-Legislative Scrutiny of the Draft Planning and Development Bill 2022 (Joint Committee on Housing, Local Government and Heritage, March 2023), at 21. Available at: https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_housing_local_government_and_heritage/reports/2023/2023-09-26_report-on-pre-legislative-scrutiny-of-the-draft-planning-and-development-bill-2022_en.pdf

It is currently not established what a legitimate interest is for an environmental NGO and when an NGO is recognised as such. The Law Society submits that these definitions should be provided for in the text of the Bill.

Dispute Resolution

Unfortunately, the Bill does not provide a method of an inexpensive and efficient resolution of disputes at the lowest level to provide adequate access to resolution and justice without necessarily resorting to judicial review. The merits of a mediation or arbitration procedure, such as the Workplace Relations Commission procedure for the resolution of workplace disputes, albeit in the context of planning, could be considered by the Government particularly in the interests of access to justice and given the often expensive nature of court proceedings.

It is Government policy to promote mediation as an efficient and cost-effective way of avoiding court proceedings and there are strong benefits afforded by the use of mediation to resolve disputes.[16] The Government introduced the Mediation Act 2017 for this exact purpose of encouraging mediation by default. Seeking a judicial review to overturn planning decisions on environmental grounds is an expensive and time-consuming process: even when an applicant has some or all of their legal costs waived under the proposed new scheme, an applicant still has to go through potentially lengthy and stressful court proceedings. The prospect of this may have a chilling effect on applicant's taking such judicial review applications at all.

The Law Society strongly supports alternative dispute resolution (including mediation) as a means to avoid expensive, adversarial and time-consuming court proceedings. All of these drawbacks to court proceedings are clear barriers to access to justice. For example, the Law Society welcomed the development of the Mediation Act 2017 (which sought to encourage the resolution of disputes out of court) and it has recommended that alternative dispute resolution should be encouraged at an earlier stage of the dispute process to the benefit of litigants and particularly lay litigants given it is a lower-cost and faster alternative to court proceedings. There may also be a place for encouraging mediation at the enforcement stage.

Given the importance of environmental objections as a check on planning decisions, and considering the time-consuming, costly and stressful nature of court proceedings, having an official, alternate means of resolving disputes specifically over planning decisions on environmental grounds would be likely to enhance Part 9 and would improve access to justice. The Minister could consider codifying an ADR-first approach in any subsequent regulations to encourage the use of dispute resolution in environmental legal cases, including mediation, lessening the volume of litigation that passes through the Irish courts system.

Summary of Proposals

1) Broadly, the Law Society is in favour of the principle of introducing a mechanism for the reduction or elimination of legal costs in environmental legal cases and sees this as a positive development provided it is implemented correctly (see Proposal 3) and in accordance with the Convention.
2) The Law Society is opposed to the introduction of a scale of fees for environmental legal cases as this would undermine access to justice. The Law Society suggests the adoption of guidelines as an alternative for measuring and allocating costs as this is the best option for maximising access to justice and ensuring transparency.

[16] Use of Mediation as an Alternative Dispute Resolution mechanism in the resolution of workplace, contract and other disputes (Department of Public Expenditure and Reform Circular, Circular Number 17/2017) 1.4-1.5. Available at: https://circulars.gov.ie/pdf/circular/per/2017/17.pdf

3) The environmental legal costs financial assistance mechanism should be defined and enacted by way of primary rather than secondary legislation in order to allow it to be scrutinised for its impact on access to justice and any risk of satellite litigation. The Law Society is concerned that this significantly large delegation of functions to the Minister creates a substantial risk for a lack of legal certainty around the implementation of the Directives.
4) Subsequent regulations should provide for an inexpensive and efficient resolution of disputes at the lowest level to provide adequate access to justice, specifically in environmental legal cases, without necessarily resorting to judicial review (such as a mediation or arbitration procedure).
5) The legislation should define what a legitimate interest is for an environmental NGO and when an NGO is recognised as such.
6) In the absence of a more complex assessment procedure, the hard time limit for the assessment of eligibility might be excessive and lead to delays in the process which would harm access to justice for plaintiffs. The Minister might review this and seek to replace it with an adaptive time limit that helps to reduce delay in the courts system.

The Law Society appreciates the opportunity to provide this submission to the Department of the Environment, Climate and Communications.

The Law Society, in particular through its Environment and Planning Law Committee and also its Litigation Committee, remains available to assist the Department and the Interdepartmental Working Group on any aspect of the future development of the Planning and Development Bill. We welcome an opportunity to meet with the Department and the Interdepartmental Working Group to discuss this submission and to assist on the drafting of regulations on foot of the enactment of the Bill.

For further information on any aspect of this submission, please contact the Policy Department of the Law Society of Ireland at: PolicyTeam@LawSociety.ie

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