CLIMATE BAR
Comhshaol

Drafting a new Environmental Code –
What it would look like and what would it do?

Cóir Environmental Code Project 2021-2022

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Introduction

1. This short paper serves as a foreword to a draft Code, which was written as part of the Climate Bar Association Task Force on a Model Environmental Code. The annexed draft Code is the work product of the entire Task Force and was drafted following research by a number of teams working on specific areas of research. The purpose of the draft Code is to set out elements of a Model Environment Code, with a view to promoting legislative reform in this area.

2. Public interest litigation is a well-established means of achieving social change. However, if we listen to the stories of the people behind many of the landmark cases, we hear of the immense stress and difficulty which the litigating parties experienced.[1] Also, some of the great legal victories that had a profound positive impact on the law, did not necessarily have a corresponding impact on the lives of the individual litigants. For example, Irene Grootboom, the housing activist, who successfully invoked her Constitional right to housing to challenge South Africa's housing policy, was still living in a shack when she died some eight years after the landmark judgment, which bears her name, was delivered.[2]

[1] Paulyn Marrinan Quinn's podcast series *"Cases that Changed People's Lives"* offers an interesting insight into several of the landmark Irish constitutional law cases from the perspective of both the litigants and the parties who represented them.
[2] *Government of the Republic of South Africa. & Ors v Grootboom & Ors 2000* (11) BCLR 1169; Joubert, Pearlie (8 August 2008), "Grootboom dies homeless and penniless", Mail & Guardian. https://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless

3. Also, we know that a litigant's prospects of success are dependent on the wording of the legislation or Constitutional provision upon which they seek to rely. In the first instance, a claim may not be justiable. Secondly, even if it is, it may fail if it does not come squarely within the scope of available legal provisions. Thirdly, existing legislation may not envisage the remedy desired or required by a potential litigant. Moreover, issues around standing and costs may pose barriers.

4. The *"landmark ruling"* of the Supreme Court in the case of *Friends of the Irish Environment v. Government of Ireland* [2020] IESC 49 has been widely recognised as a *"significant victory for climate action"* and a *"turning point for climate governance".*[3]

5. For our purposes, it is useful to recognise that that decision hinged upon the wording of the *Climate Action and Low Carbon Development Act 2015 ("the 2015 Act").* It is clear from the judgment in that case that the use of clear, specific and mandatory words in the 2015 Act; for example, *"achieve", "shall"* and *"specify"*, were key to the Supreme Court's decision that the Government's plan to address climate change, and particularly the substance thereof, were justiciable issue.

Friends of the Irish Environment v. Government of Ireland[4]

1. The central issue in that case was:

   > *"whether the Government of Ireland ("the Government") ha[d] acted unlawfully and in breach of rights in the manner in which it ha[d] adopted a statutory plan for tackling climate change".*

2. The plaintiffs argued that the government's plan ("the Plan") was unlawful on the basis that the level of detail, which it contained, did not meet the requirements of the 2015 Act. Further, while accepting that the Government enjoys a very wide degree of discretion in determining measures required to combat climate change, the plaintiffs argued that *"in*

[3] Áine Ryall, "*Supreme Court ruling a turning-point for climate governance in Ireland",* Irish Times, 7th August 2020
[4] *Friends of the Irish Environment v, Government of Ireland & Ors* [2020] IESC 49

adopting in the Plan, measures which will allow for an increase in emissions over the lifetime of the Plan, the Government had acted unlawfully".

3. The Government's position was that it had complied with mandatory requirements in the Act, identified by the plaintiffs. Moreover, while the Government accepted that *"questions concerning compliance with the provisions of the 2015 Act, concerning the procedures adopted in formulating the Plan"* were justiable, it argued that the substantive provisions of the Plan were not so on the basis that they *"involve policy choices made by the Government".*

4. Sections 3 and 4 of the 2015 Act provided:

> *"3. (1) For the purpose of enabling the State to pursue, and achieve, the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050 (in this Act referred to as the "national transition objective") the Minister shall make and submit to the Government for approval—*
>
> *(a) a national mitigation plan, and*
>
> *(b) a national adaptation framework".*
>
> *"4. (1) The Minister shall—*
>
> *(a) not later than 18 months after the passing of this Act, and*
>
> *(b) not less than once in every period of 5 years, make, and submit to the Government for approval, a plan, which shall be known as a national low carbon transition and mitigation plan (in this Act referred to as a "national mitigation plan").*
>
> *(2) A national mitigation plan shall—*
>
> *(a) specify the manner in which it is proposed to achieve the national transition objective,*
>
> *(b) specify the policy measures that, in the opinion of the Government,*

would be required in order to manage greenhouse gas emissions and the removal of greenhouse gas at a level that is appropriate for furthering the achievement of the national transition objective,

(c) take into account any existing obligation of the State under the law of the European Union or any international agreement referred to in section 2, and

(d) specify the mitigation policy measures (in this Act referred to as the "sectoral mitigation measures") to be adopted by the Ministers of the Government, referred to in subsection (3)(a), in relation to the matters for which each such Minister of the Government has responsibility for the purposes of—

(i) reducing greenhouse gas emissions, and

(ii) enabling the achievement of the national transition objective.

(3) For the purpose of including, in the national mitigation plan, the sectoral mitigation measures to be specified for the different sectors in accordance with subsection (2)(d)—

(a) the Government shall request such Ministers of the Government they consider appropriate to submit to the Minister, within a specified period, the sectoral mitigation measures that each such Minister of the Government proposes to adopt in relation to the matters for which each such Minister of the Government has responsibility,…"

…….

(8) The Minister shall, before making a national mitigation plan—

(a) publish, in such manner as he or she considers appropriate, a draft of the national mitigation plan that he or she proposes to make,

(b) publish a notice on the internet and in more than one newspaper circulating in the State inviting members of the public and any interested parties to make submissions in writing in relation to the proposed national mitigation plan within such period (not exceeding

2 months from the date of the publication of the notice) as may be specified in the notice, and

(c) have regard to any submissions made pursuant to, and in accordance with, a notice under paragraph (b)."

5. Having conducted an analysis of the relevant statutory provisions, Clarke CJ. concluded that: *"the overriding requirement of a compliant plan is that it specifies how [the national transition objective] is to be achieved by 2050".* Further, having particular regard to section 4(1)(b), which requires that there be *"new plan at least every fifth year"*, he concluded that:

> *"the legislation contemplates a series of rolling plans each of which must be designed to specify, both in general terms and on a sectoral basis, how it is proposed that the NTO is to be achieved"*

as opposed to a series of consecutive plans, which the Government posited that the Act envisaged.

6. As regards the justiciability issues raised by the Government, he noted:

> *"If the government of the day were to announce that, as a matter of policy, it was going to publish, after public consultation, a plan designed to achieve precisely that which is defined in the 2015 Act as the NTO and then publish a plan which arguably failed to do what it was said it should do, then such questions might well arise.* ***However, the position here is that there is legislation [emphasis added]."***

7. The Chief Justice concluded that while "*there may be elements of a compliant plan under the 2015 Act which may not truly be justiciable"*, the question of whether the Plan complied with *"specificity requirements in s.4"* of the 2015 Act was *"clearly justiciable"*. Having considered the Plan, he concluded that it fell *"a long way short of the sort of specificity which the statute requires."* In so doing, he accepted that it seemed *"reasonable to characterise significant parts of the policies as being excessively vague or aspirational".* Further, in so doing, he determined that the legislation envisaged a 33-year plan, which was reviewable on 5 year basis. Finally, for our purposes, having quashed the Plan *"on*

grounds which are substantive rather than purely procedural", the Chief Justice set out elements of a Plan which would comply with the 2015 Act.

Key Elements of a Model Code

8. Inez McCormack, a signatory of the McBride Principles, whose successful campaigns included the inclusion of groundbreaking human rights and equality provisions in the Good Friday/Belfast agreement, spoke about rights holders not needing lawyers and policy-makers to tell them their rights. Rather, she spoke about the need for *"technicians",* who would use their skills to assist rights holders in realising their rights.

9. Having regard to the foregoing, the starting point for any environmental legislative drafting project must be issues identified by stakeholders. It is clear from the Stakeholder Feedback Report that *"enforcement of environmental legislation [was]* a significant problem identified across all of [the] respondents". The *"piecemeal"* nature of environmental legislation was identified as a particular *"barrier to enforcement".* Additional barriers identified included the usability and accessibility of environmental law.[5]

10. It is noteable that the key issues raised by the stakeholders were the need to ensure compliance with existing legislation and make it easier for people to rely on rather than; for example, a need for more stringent penalties for breaches of environmental legislaion. Those observations chime with the findings of the Sanctions Team, insofar as that Team noted a greater emphasis on criminal, as opposed to administrative sanctions, in Ireland compared to other jurisdictions. The observations of the stakeholders and the findings of the Sanctions Team are reflected in the draft Code insofar as it provides for administrative sanctions, in addition to enforcment actions by individuals and groups.

11. Difficulties in enforcing environmental legislation raised by stakeholders also chime with issues around justiciability, such as those which we have discussed in the *Friends of the Irish Environment Case*, and standing, which are commonly identified by lawyers as

[5] Stakeholder Feedback Report, p. 4.

barriers to effective environmental litigation.[6] In that regard, and as previously noted, the aspects of the 2015 Act, which were challenged in that case, were justiciable because of the wording of specific provisions contained in that particular Act. Further, while the Supreme Court concluded that the plaintiffs had standing to bring a claim to challenge the compliance of the government's climate change Plan with the Act, the Supreme Court ultimately concluded that the plaintiffs did not have standing to bring a claim under the Constitution or the European Convention on Human Rights in that case. Therefore, while the *Friends of the Irish Environment Case* was indeed a 'gamechanger' in terms of climate litigation, significant challenges in enforcing environmental rights through the courts remain.

12. With a view to addressing those types of challenges, the draft Code includes specific provisions which relax the general rules around standing for environmental litigation, to include provisions which allow for natural or legal persons to be granted standing as *amicus curiae,* in addition to provisions which allow for class action proceedings. Additional provisions aimed at increasing the enforceability and implementation of environmental legislation include statutory duties in terms of public education and decision-making, including policy-making, a proposal for a specialist Tribunal dealing with environmental law and provisions aimed at protecting those, who are acting to protect the environment, against vexatious proceedings.

13. However, rather than any one provision, it it is hoped that the key strength of an Environmental Code would be the simple act of bringing together all of Ireland's existing legislation through a single piece of legislation in order to increase its usability. The compilation of such a Code would be in keeping with projects of the Law Reform Commission to increase access to legislation through its compilation and maintenance of a series of revised Acts. The usefulness of such a legal tool is evident when the Law Reform Commission's commentary on the revised *Planning and Development Act 2000* is considered:

[6] Model Statute for Proceedings Challenging Government Failure to Act on Climate Change: An International Bar Association Climate Change Justice and Human Rights Task Force Report, February 2020, pp. 7 – 9. The *Friends of the Irish Environment* Case, supra note 3, also contains a significant discussion on the issue of standing.

> *"For example, the Planning and Development Act 2000 has been amended or otherwise affected by over 160 Acts and Statutory Instruments since it was originally enacted. The costly exercise of assembling, reading and understanding the amendments made to the 2000 Act is avoided by the availability of a consolidated Revised Act version of the Planning and Development Act 2000"*[7].

14. Ideally, existing environmental law would be consolidated into a single Act, which would unify and consolidate environmental law, similar to the *Companies Act 2014* for company law, However, having regard to the significant impact which European law has on environmental law, it is not necessarily practical to seek to reduce the amount of environmental legislation, which is currently in force, to a single piece of legislation. Rather, in order to address the usability and accessibility concerns raised by the stakeholders, our key task involved finding a way to unify and increase the user-friendliness of the existing legilslation.
15. It is envisaged that an Environmental Code would exercise a function akin to the *Interpretation Act 2005*, save that it will apply to environmental legislation only. In order to achieve that aim, Part I sets out principles which apply to environmental legislation. Environmental legislation is defined in the draft Code as Acts, statutory instruments and European Regulations, which are listed in the Schedule to that Code and the Code contains a specific provision that allows for the Code to be updated by Ministerial Order.[8]

Advantages and Pitfalls of Codification

16. *"A code is a complete system of positive law, scientifically arranged, and promulgated by legislative authority."*[9] Traditionally, of course, codes form the basis of legal systems in

[7] https://revisedacts.lawreform.ie/revacts/intro [Accessed: 3 January 2022].

[8] This mechanism for consolidating and updating an extensive list of legislation is drawn from the Food Safety Authority of Ireland Act, 1998.

[9] *The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.* [Online]. What is CODE? Available at: https://thelawdictionary.org/code/ [Accessed: 6 October 2021].

civil law jurisdictions, while common law jurisdictions tend to lean on legal precedent. According to Byrne and McCutcheon:

a. *"Since [the development of common law] depended on cases being brought before the courts by the aggrieved parties, the law responded to actual rather than anticipated problems. The law in a civil law system is now contained in comprehensive legal codes, which are enacted by legislators and which attempt to provide for every legal contingency."*[10]

17. This dichotomous view is not entirely true. Legal historian Masferrer clarifies that it was not the intention of the original drafters of the French *Code Civil*, regarded as the first modern code, to provide *"for every legal contingency"*.[11] The most prominent of the drafters of the *Code Civile*, Portalis, stated that:

> *"The possibility of supplementing the law by natural truths and the right directions of common sense should be left to the judges. Nothing could be more childish than to endeavor to take necessary steps in order to provide the judges with strict rules."*[12]

Further, he stated that his Code did not pretend *"to govern all and to foresee all,"* because *"whatever one does, positive law can never completely replace the use of natural reason in the affairs of life."*[13]

18. A code can provide more legal certainty and easier access to law, and it does not strictly have to be in the same model as European civil codes. Some common law jurisdictions, notably Australia,[14] have implemented codes as part of their legal system. Indeed,

[10] Byrne et al (2020), *Byrne and McCutcheon on the Irish Legal System*. (7th edn). London: Bloomsbury Professional. para. [1.12]
[11] Masferrer, A. (2019) French Codification and "Codiphobia" in Common Law Traditions. *The Tulane European and Civil Law Forum, 34*.

[12] Portalis, J. (1803) *Code Civil*. Quoted by Wienczyslaw J. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, 2, 1952, *St. Louis U. L.J.* 335, pp. 350-351.
[13] Portalis, J. (1827; reprinted 1968) *Discours préliminaire prononcé lors de la présentation du projet de la commission du gouvernement*, P.A. Fenet, Recueil Complet des Travaux Préparatoires du Code Civil 469.
[14] Australian Capital Territory: Crimes Act 1900 and Criminal Code Act 2002; Northern Territory: Criminal Code Act 1983 (NT); Western Australia: The Criminal Code; Queensland: The Criminal Code Act 1899 (Qld); Tasmania: Criminal Code Act 1924 (Tas).

Australian law students are taught in their first-year law curriculum that legislation is today the main legal source.[15] As Masferrer says:

> *"[t]he time is ripe for legal historians to admit that codification neither belongs to the civil law tradition nor constitutes a peculiarity of the civil law tradition, as if it was incompatible with common law tradition unless common law itself is abrogated altogether."*[16]

19. It should be noted that codification does not always yield positive results. Meiners and Yandle suggest that the rise of codification in the United States in the 1970s may have undermined their environmental law regime, due to its focus on meeting legal limits instead of avoiding damages to a person. They observed that: *"[a]t common law, there were no EPA permits or uniform technology requirements that sanctioned the action of the polluter."*[17]

20. While we must, of course, be alive to these dangers, it is suggested that an Environmental Code, if drafted properly, would complement the existing common law system and create a more robust environmental law regime.

Conclusion

21. Our draft Environmental Code is, of course, not the first such initiative. For example, in Germany in the 1990s, the "Group of Professors" developed a draft Code. That project was in turn taken on by the Ministry of Environment during Angela Merkel's tenure in that role. Ultimately, the project's aim to develop a *"uniform Environmental Code for the whole of Germany"* was not realised. However, *"four so-called Environmental Code Replacement Acts* (the Act on the Consolidation of Environmental Law, the Act on the Revision of Water

[15] Hall, K. (2002) *Legislation*. Butterworths. "*Our common law system has two main sources of law, cases (law made by judges through judicial decisions) and legislation (law made by parliament). Traditionally, case law was considered the most important source of law in our common law legal system. Today, however, legislation has overtaken case law as the most prolific and significant source of law."*
[16] supra note 11
[17] Roger Meiners & Bruce Yandle (1999) *Common Law and the Conceit of Modern Environmental Policy*, 7 Geo. Mason L Rev.

Legislation, the Act on the Revision of the Federal Nature Conservation Act and the Act on the Protection against Non-Ionizing Radiation)*"* were achieved.[18]

22. The International Bar Association has also developped a "Model Statute for Proceedings Challenging Government Failure to Act on Climate Change".[19]

23. The annexed draft Code is but a draft document, which sets out in broad brushstrokes what the Taskforce has concluded that a comprehensive Environmental Code ought to contain. However, we hope that it starts a conversation to the effect that an environmental Code is not only a moral imperative, but desirable and achievable.

[18] https://www.umweltbundesamt.de/en/environmental-code-0#development-of-the-environmental-code;
[19] supra note 6

DRAFT/Code

Dréacht/Cóir Dlí

Part 1: Principles and Purposes/ Bunphrionsabail & Bunchúraim[20]

Purpose of the Code

1. — (1) The goal of this Act is the protection of humans, the environment and biodiversity for future generations.

Application

2. — (1) The principles in this Part are applicable to each and every provision of this Act and the environmental legislation listed in the Schedule. [21]

Definitions

3. "Environmental legislation'' means—

(a) the Acts (including any instruments made thereunder) specified in Part I,

(b) the statutory instruments specified in Part II,

(c) the Regulations of an institution of the European Communities specified in Part III,

of the Schedule in so far as they relate to the environment;[22]

"The Commission" has the meaning assigned to it by section 8;

and

[20] The principles in this Part have been derived from TFEU Articles 191-192; the Rio Declaration 1992, Principle 22; Aarhus Convention; the European Convention on Human Rights, the German Model Umweltgesetzbuch and the Indonesian Law No. 32 of 2009 on Environmental Protection and Management, (Linked document is an **unofficial** English translation).

[21] Provision modelled on Interpretation Act, 2005, section 4.

[22] Definition modelled on the definition of *"food legislation"* contained in Food Safety Authority of Ireland Act, 1998.

"a party" has the meaning assigned to it by section 9.

Environmental Duties

4. – (1) The State shall endeavour to protect and improve the environment and to safeguard the marine and terrestrial flora and fauna within its jurisdiction.

(2) The State recognises the dependence of all persons on the natural environment and its responsibility to protect the natural environment for the benefit of all persons and all other living things and ecosystems.

(3) The State recognises that ecosystems have a status and a right to exist independent of their benefits to humans.

(4) The State has a duty of care to exercise its powers with reasonable care so as not to cause harmful environmental effects.

(5) The State shall facilitate and promote citizens' access to information regarding the environment. All reasonable steps should be taken in order to ensure that:

(a) Public authorities act in a transparent manner;

(b) Information is provided in a timely fashion, not longer than two months following an application for information;

(c) Information is comprehensible, and supplied in a format requested by citizens;

(d) Environmental information is retained;[23] and

(e) Environmental information, including information in relation to categories of harm, relevant legal protection, and enforcement mechanisms, are publicly available in a comprehensible format.

[23] Section 5(a) to (d) are drawn from Aarhus Convention, Article 4.

(6) A public body which exercises a function under environmental legislation shall, in the performance of its functions, have regard to:

(a) The principles defined in this Part;[24] and

(b) its duty to promote environmental education.

(7) All persons in the State have a duty of care to act with reasonable care so as not to cause environmental harm.

Environmental Rights

5. – (1) All natural persons have the right to live in a healthy environment in which human life and biodiversity are preserved.

(2) All persons in the State have the right to participate in decision-making procedures regarding the environment. [25]

General principles of interpretation

6. – (1) For the protection of people and the environment, the following principles of interpretation shall be applied to this Act and the environmental legislation listed in the Schedule:

(a) Dangers and damage to humans and to the environment are to be avoided;

(b) As far as is possible, significant risks and damages for humans, the environment and biodiversity are to be limited and avoided; and

(c) Standards for the protection of humans and the environment must be suitable, necessary, appropriate and reasonable. They should aim to achieve a high level of protection and for that reason the shifting of disadvantageous environmental effects from one environmental resource to another or onto humans is to be avoided.

[24] Provision modelled on Irish Human Rights and Equality Act, 2014, section 42.

[25] Aarhus Convention, Article 6.

(2) With a view to achieving social, ecological, and economic sustainable development, this Act and the environmental legislation listed in the Schedule shall be interpreted to further the following objectives:

(a) Environmental resources, that cannot be renewed, should be conserved and their use should be reduced. Where possible, resources should be used to make renewable environmental goods so that the resources are available in the future for reuse or renewing;

(b) The nature, capacity and function of natural habitats should be protected; and

(c) Public and private undertakings, as well as authorities and other bodies, must contribute to corporate governance that ensures environmental sustainability and responsible management of the environment for the achievement of the goal of this Act.

(3) In any proportionality weighting by a court, tribunal or public body, economic imperatives and energy requirements cannot outweigh the need to maintain and preserve a healthy environment for all persons and nature.

Principles regarding the assessment of environmental liability and damage

7.– (1) Damage to the environment will be subject to the polluter pays principle, and other effective and dissuasive remedies and sanctions. [26]

(2) Whoever engages in, directs, or is responsible for activities which cause significant damage or are likely to cause damage to the environment, are to be made responsible for these activities or omissions.

(3) It is recognised that environmental damage will rarely be traceable to one sole cause, therefore:

(a) partial causes are considered legally liable for environmental harm due to that cause among others;

(b) The cumulative effect of the entirety of processes involved in any activity, upstream and downstream of that activity, shall be taken into account in judging its environmental impact; and

(c) The cumulative effect of pollution shall. be taken into account in apportioning fines.

(4) Strict liability shall apply in relation to environmental harm.

(5) Environmental damage should as a priority be rectified at source.[27]

[26] TFEU, Article 191 (2). (Polluter pays principle).

[27] TFEU, Article 191 (2). (Rectification at source principle).

Part 2: The Environmental Relations Commission/ An Binse Comhshaoil

The Environmental Relations Commission

8.– (1) On the establishment day, there shall stand established a court to be known as Binse Comhshaol or, in the English language, the Environmental Relations Commission (in this Act referred to as "The Commission"), that-performs the functions conferred on it by this Act.

(2) The Commission may hear applications in relation to:

(a) violations of rights set out in section 5; and

(b) breaches of the environmental legislation listed in the Schedule.

(3) The Commission shall have a chief executive officer, appointed by the Minister for Environment, known as the Commissioner for the Environment.

(4) The chief executive officer shall appoint a panel of Environmental Commissioners, who have such qualifications, expertise, interests, or experience as, in the opinion of the chief executive officer, would enable them to determine or otherwise resolve disputes brought to the Commission in accordance with this Act and the environmental legislation contained in the Schedule.

(5) The Commission, Environmental Commissioners and Environmental Officers shall, subject to the provisions of this Act, be independent in the performance of their functions.

(6) The Commission may publish codes of practice and procedural rules.

(7) Decisions of the Commission shall be subject to a general right to appeal to the Circuit Court.

Part 3: Legal Standing /Locus Standii do Saoránaigh[28]

Generally applicable principles regarding legal standing

9.– (1) Any party, making a claim of environmental harm in their own right or demonstrating a bona fide interest in the protection of the environment, may seek appropriate relief before the Commission or the court, which has jurisdiction by reference to the rateable valuation or value of the claim, in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Part 1, or any provision of the environmental legislation contained in the Schedule.

(2) For the purposes of subsection (1), any party includes:

(a) any legal person, whose objects demonstrate a bona fide interest in environmental protection; and

(b) the State.

(3) The natural and imprescriptible rights of all children, as recognised in the Constitution, are understood to include the right to prohibit actions which will have possible or probable long-term effects on the environment. Any party, within the meaning of this section, may bring a claim, within the meaning of subsection (1), on behalf of children or future generations.

Standing for Interveners and *Amicus Curiae*

10.–(1) On appropriate notice to the parties in any claim, within the meaning of subsection 1 of section 9, any court or tribunal may

[28] The starting point for this Part was the Model Statute for Proceedings Challenging Government Failure to Act on Climate Change: An International Bar Association Climate Change Justice and Human Rights Task Force Report, February 2020, Article 4.

grant standing as an intervener or *amicus curiae* to:

(a) any natural person who demonstrates a particular expertise in an issue raised in any such proceeding; and

(b) any legal person whose objective is to protect the public interest and demonstrates a particular expertise in an issue raised in any such proceeding.[29]

Standing to bring enforcement actions

11.– (1) Where, on application by any party to the High Court or the Circuit Court, the Court is satisfied that a person has failed to comply with a requirement of or under the legislation in the Schedule, and that that failure has caused, or is likely to cause, a risk to human health or the environment, it may by order—

(a) direct the person to comply with the requirement, and

(b) make such other provision, including provision in relation to the payment of costs, as the court considers appropriate.

(2) An application to the High Court or Circuit Court for an order under this section shall be by motion, and the court when considering the matter may make such interim or interlocutory order as it considers appropriate.

(3) An application for an order under this section may be made whether or not there has been a prosecution for an offence under any enactment in relation to the activity concerned and shall not

[29] Model Statute for Proceedings Challenging Government Failure to Act on Climate Change: An International Bar Association Climate Change Justice and Human Rights Task Force Report, February 2020, Article 5.

prejudice the initiation of a prosecution for an offence under any enactment in relation to the activity concerned. [30]

Part 4: Class Actions/Cásanna Grúpaí

Class Actions

12.–(1) One or more members of a class may apply for certification to initiate proceedings, in the Commission or the ordinary courts, as representative parties on behalf of all members of that class, only if:

(a) the claim relates to the protection of the environment, this Act or the environmental legislation contained in the Schedule;

(b) the class in question has 7 or more members;[31]

(c) there are questions of law or fact common to the class;

(d) the claims of the representative parties are typical of the claims of the class; and

(e) the representative parties will fairly and adequately protect the interests of the class.[32]

(2) A Judge, or an Environmental Commissioner, as appropriate, shall not refuse to certify a proceeding as a class proceeding solely on one or more of the following grounds:

(a) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

[30] This starting points for this provision were section 160 of the Planning and Development Act 2000 and section 10 the Local Government (Water Pollution) Act 1977.

[31] Federal Court of Australia Act, 1976, Section 33C specifies "7 or more persons".

[32] U.S. Federal Rules of Civil Procedure, Rule 23(a).

(d) the precise number of class members or the identity of each class member is not known; or

(e) the class includes a sub-class, whose members have claims that raise common questions of law or fact not shared by all the class members.[33]

(3) Once subsection (1) is satisfied, the class proceedings may proceed only if the court or the Commission is satisfied that:

(a) the proposed respondent to the proceedings has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(b) the court or the Commission finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a[34] class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact. [35]

(4) For any class certified under subsection (3)(a), the court will have discretion to relax the requirement of subsection (1)(b) where it is satisfied that it is in the public interest to do so.

(5) For any class certified under subsection (3)(b), the court or the Commission must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members, who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

[33] Federal Court Rules (Canada), 334.18.

[34] U.S. Federal Rules of Civil Procedure, Rule 23(b).

[35] Federal Court Rules (Canada), 334.16(1)(d).

(a) the nature of the action;
(b) the definition of the class certified;
(c) the class claims or issues;
(d) that a class member may enter an appearance through a firm of solicitors if the member so desires;
(e) that the court will exclude from the class any member who requests exclusion;
(f) the time and manner for requesting exclusion; and
(g) the binding effect of a class judgment on members.[36]

(6) The powers of a court or the Commission in relation to all class proceedings instituted under this Section shall include, but are not limited to:
(a) the power to discontinue the class proceedings where the requirements of subsections (1) and (2) are not satisfied or where the interests of absent class members are otherwise not sufficiently protected;
(b) the power to substitute a representative party who is not adequately representing the interests of class members in accordance with the requirements of subsection (1);
(c) the power to order that notice of 'any matter' be given to class members;
(d) the ability to decline or approve settlements; and
(e) the power to make any order it considers appropriate or necessary to ensure that justice is done in the proceeding.[37]

Part 5: Sanctions/ Smachtbhanna Riaracháin[38]

[36] U.S. Federal Rules of Civil Procedure, Rule 23(c)(2).

[37] Johnson, Briggs and Gaertner, "The Class Actions Law Review: Australia" https://thelawreviews.co.uk/title/the-class-actions-law-review/australia#footnote-037-backlink

[38] A range of existing administrative sanctions regimes were consulted when drafting this Part, including Part 7A of the Residential Tenancies Act 2004 and the Central Bank Act, 1942. We also consulted the

Sanctions

13.–(1) A breach of a provision of legislation in the Schedule, which gives rise to a criminal liability, may also give rise to one or more administrative sanctions, which are provided for subsection 2.

(2) Where a breach of a provision of legislation contained in the Schedule by any person has been proven, either the Commission or an appropriate court may impose one of more of the following administrative sanctions, on that person:

(a) a caution,[39]

(b) a reprimand;[40]

(c) a requirement to take such steps as the Commission or the appropriate court may specify, within such period as it may specify, to secure that the breach does not continue or recur ("a compliance notice");[41]

(d) a requirement to take such steps as the Commission or the appropriate court may specify, within such period as it may specify, to secure that the position is, so far as possible, restored to what it would have been if the legislation had not been breached ("a restoration notice"); [42]

(e) a requirement that to pay a sum of money as restitution or part restitution to any aggrieved party, without prejudice to any legal right of the aggrieved party;[43] and

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General Scheme of the Gambling Regulation Bill 2021, Sections 86-89 and the Environmental Civil Sanctions (England) Order 2010, SI No 1157 of 2010.

[39] Central Bank Act, 1942, Section 33AQ.

[40] *ibid*

[41] Environmental Civil Sanctions (England) Order 2010, SI No 1157 of 2010.

[42] *ibid*

[43] Section 7(9) of the Solicitors (Amendment) Act 1960 provides the Solicitors' Disciplinary Tribunal with the power to make an award of restitution in favour of a complainant.

(f) administrative financial sanctions.

(3) All administrative financial sanctions shall be paid to the exchequer and will be appropriately segregated to pay reparations for environmental damage.

(4) A decision by the Commission to impose a sanction on any person, save for a decision to impose a sanction pursuant to subsection (2)(a), shall not take effect unless it is confirmed by the Circuit Court.[44]

(5) In this section, "appropriate court" means

(a) in case a caution or reprimand imposed under subsection 2(a) or (b) or an administrative financial sanction up to €5,000, the District Court, or

(b) in the case of any sanction under subsection 2, the Circuit Court, subject to a maximum administrative financial sanction of €15,000, including in respect of an order of restitution or part restitution, or

(c) in any case, the High Court.

[44] Residential Tenancies Act, 2004, Part 7A.

Part 6: The offence of Ecocide/I gCoinne Comhshaoldhíothú[45]

The offence of ecocide

14.–(1) A person shall be guilty of the offence of ecocide who acting unlawfully, either intentionally or recklessly, causes severe and either widespread or long-term damage to the environment. For the avoidance of doubt, the offence of ecocide may consist of a single act or a series of acts.

(2) A person guilty of an offence under this section shall be liable on indictment to a fine not exceeding €20,000,000 or to imprisonment for a term not exceeding 10 years or to both.

Part 7: Regulation of Strategic Lawsuit Against Public Participation[46]
Rialachán (CE) maidir le, Rannpháirtíocht Phoiblí sa Phróiseas Cinnteoireachta

Regulation of Strategic Lawsuit against public participation

15.–(1) Strategic lawsuit against public participation ("SLAPP") refers to an action whether civil or criminal, brought against any person, institution or any government agency or local government unit or its officials and employees, with the intent to harass, vex, exert undue pressure, or stifle any legal recourse that such person, institution or government agency has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of environmental rights.

(2) It shall be a defence to any civil or criminal claim filed against a person involved in the enforcement of environmental laws,

[45] This definition is adapted from the Independent Expert Panel for the Legal Definition of Ecocide. The only addition is: "*For the avoidance of doubt, the offence of ecocide may consist of a single act or a series of acts".*

[46] This Part is modelled on the Rules of Procedure in Environmental Cases of the Philippines, Rule 6. It is also influenced by the Indonesian Law No. 32 of 2009 on Environmental Protection and Management, Article 66. (Linked document is an **unofficial** English translation). Anti-SLAAP defences have been successfully relied upon in a number of cases in Indonesia, including *Willy Suhartanto vs H. Rudy,* Pengadilan Negeri Malang, Decision Number 177/Pdt.G/2013/PN.Mlg; Pengadilan Tinggi Surabaya, Decision Number 701/PDT/2014/PT.SBY; Mahkamah Agung, Decision Number 2263 K/Pdt/2015.

protection of the environment, or assertion of environmental rights, that the proceedings in question are a SLAPP.

Part 8: Miscellaneous/ Forálacha Ilghnéitheacha

Paralell claims

16.–(1) Where a party has referred an application to the Commission and either a settlement has been reached by mediation or the Commission has begun an inquiry into that application, the party:

(a) shall not be entitled to recover damages at common law in respect of the case, and

(b) shall not be entitled to seek redress in any other forum in respect of the breach,[47] unless the Commission, having completed the inquiry, and in an appropriate case, directs otherwise and so notifies the applicant and respondent.

(2) Where a party has initiated proceedings in the District, Circuit or High court in relation to any breach of the legislation in the schedule to this Act, the party shall not be entitled to refer a complaint to the Commission, unless those proceedings are withdrawn.

Amendment of Schedule

17.–(1) The Minister with responsibility for environmental issues may by order amend the Schedule 1 by making additions thereto or deletions therefrom.[48]

Inventory

18.–(1) Within 12 months of the coming into force of this act, the Minister will publish online an inventory of all environmental law in Ireland, gathered and organised into relevant environmental sectors, in both the Irish and English languages, to include all domestic law currently in force,

[47] Employment Equality Act, 1998, section 101.

[48] Modelled on Food Safety Authority of Ireland Act, 1998, section 5.

Directives and Regulations of the European Union and all international conventions to which Ireland is a signatory, presently in force.[49]

Part 9: Schedule[50]

Environmental Legislation

Part I

Acts

Part II

Secondary Legislation

Part III

Regulations of an Institution of the European Communities

[49] A blueprint for the structure and style of the Inventory is contained in the collection of papers for the Comhshaol - the Climate Bar Symposium, January 2022.

[50] See blueprint. That inventory does not directly correspond with the Schedule for two reasons: The definition of "environmental legislation" contained in this Act does not require statutory instrument made under Acts, which appear in Part I of the Schedule to be listed in Part II. Also, while the Inventory includes European legislation, which require incorporation, Part III of the Schedule only contains European Regulations.