

Invited submission from Attracta Uí Bhroin, Manager and Law Officer of the Environmental Law Ireland Initiative for:

On the General Scheme of a Civil Reform Bill 2025, for the Joint Oireachtas Committee on Justice and Migration

0. The submission:

This submission has been prepared by the Manager and Law Officer of Environmental Law Ireland, Attracta Uí Bhroin, whose primary focus is the protection of the Environment through Environmental Law, at national, EU and international level, and the public interest for the health and wellbeing of current and future generations in that.

This involves a focus on compliance, progressive legislation, and capacity development, with discussion and engagement with a wide range of stakeholders. Stakeholders regularly engaged with include: the judiciary, the legal profession not limited to the Bar of Ireland and the Law Society, members of the Oireachtas, Local Representatives, Government departments, Public Bodies, State Agencies, the EU Commission and UN bodies and actors, a range of business and industry stakeholders, professional bodies, a wide cohort of eNGOs at local, national and European level extending beyond the EU member states, Civil Society Organisations, individual environmentalists, academics and students at an national and international level, and the media.

This is done largely in the context of Environmental Law Implementation Group Project, ELIG, a joint initiative between the Irish Government, An Taisce and the Environmental Pillar.

Attracta has also been invited to sit on the User Group for the Planning and Environmental Court.

The positions expressed in this submission may, or may not reflect the views of the eNGO member organisations of the project. However, they may of course rely on it in full, and given the public nature of the consultation, and the public interest underlying its preparation, it should be able to be relied upon by the wider public. [1]

Any questions on the submission should be directed to:
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[1] In the interests of transparency, Attracta is also on the Board and a Council member of the European Environmental Bureau, EEB. The EEB is the largest membership based eNGO in Europe, with over 190 members in 41 countries, representing over 30 million individual members and supporters.

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1.Introduction

The opportunity to provide evidence for its consideration is most welcome, and at the outset I wish to express appreciation to the Joint Oireachtas Committee (JOC) on Justice, Home Affairs and Migration, (JHAM) for the invitation to make a submission, and to its secretariat for their assistance.

I would welcome an opportunity to appear before the Committee as it advances its Pre-Legislative Scrutiny. I have made an number of recommendations not just on the Heads – but in respect of the process and pre-requisites to being able to advance a meaning scrutiny exercise particularly in light of the absence of rationale for the Heads within the GS and evidence base – as set out in more detail below.

I am conscious of many experts will be providing submissions to the Committee and have determined to focus on the area of most immediate concern and where I have the greatest familiarity. That is on Part 3 Judicial Review and I focus on that in the context of JR in an environmental context and the very serious concerns arising.
I would say briefly I think Head 1 on Commencement is key also and extreme caution and oversight is needed on the transition to and commencement of these Heads.
I would also briefly say that I have a concern on the burdens arising from certain of the requirement and changes in respect of production documentation under Part 2, particular for the public and eNGOs operating on limited resources and capacity and the burdens which may arise on the Courts from over providing for documentation. It might be preferable to leave such matters more for the prescribtion in Rules of Court and Practice Directions.

I remain available to clarify matters in this submission and to avoid this turning into a huge volume and given the time constraints – I have indicated a number of areas where I would be happy to provide more detail.

Detailed commentary on Heads in Part 3 – Judicial Review

Part 3 – Judicial Review

I wish to say as an overarching remark that what is presented here in the General Scheme (GS) is a profound and largely regressive re-shaping of Judicial Review. It has gravely concerning implications for the direction of travel of our democracy and the rule of law.

Judicial Review is a fundamental part of the architecture of the rule of law, and that contract between the public and public authorities. The powers the public confer on those entrusted to make laws and govern are safeguarded by the right to hold those authorities to account before our courts for the lawfulness of their decision-making and to check excesses of power.

The implications of what is proposed here in Part 3 are most concerning for the most vulnerable in our society, where every effort should be made to safeguard and facilitate their access to the courts. Whereas this GS risks exacerbating the issues they experience not limited to those aired in the Review of the Civil Legal Aid Scheme - Majority Report here and its extensive and important Minority Report here

They are also further compounded by the burdens likely to arise from the onerous obligations in respect of documents arising under Part 2, which suffer from the displacement of the role of the court and the proper exercise of discretion and court rules and practice directions on what is necessary and makes sense in particular instances.

Ireland currently enjoys significant confidence in its judiciary as highlighted in the Eurobarometer* and EU Commission's Rule of Law Reports*. That is to be treasured and protected as a stabilizing influence in our society at a time of serious upheaval and the manipulative use of disinformation and false information to destabilize our democracies.

As we see the effects of an increasingly alienated public from the establishment, it is important to reflect on the risks of compromising the role as safety valve that the Courts play. More radical courses of action may fall to be pursued, and we may suffer further serious fracturing of trust between the public and the establishment, with consequences for our society, economy, environment and public order where -

- recourse to the courts is rendered too difficult,

the value of such access is made or is perceived to be undermined – for example in respect of the quality and accessibility of remedies that the courts can deliver, or

negative perceptions arise in how fairness and equity are perceived to figure in the administration of justice where legislative overreach seeks to overly confine the courts.

The scope of the changes reaches to all Judicial Review (JR) save for some very small carve-out for JR under Part 9 of the Planning and Development Act 2024, pursuant to Head 8(1) with reference to Head 13.

Given my particular area of focus on environmental law – apart from the remarks above which I wish to really emphasise, I plan to focus primarily in my comments on the implications of the GS on environmental JR. For the avoidance of doubt – what is proposed here is clearly not in line with our legal obligations under EU and International Law – including the Aarhus Convention*, and raises serious Constitutional concerns.

The Joint Oireachtas Committee (the Committee) carries a great weight of responsibility in undertaking this particular Pre-Legislative Scrutiny (PLS) in particular.

So, I recommend -

- The Committee's Pre-Legislative Scrutiny must not be rushed, and should facilitate hearing from a wide body of expert witnesses relevant to the significant scope and impact of this General Scheme.
- The Members of the Committee should engage on a cross-party basis with their colleagues in both Houses of the Oireachtas to ensure the Committee's recommendations are given due consideration by the Minister in preparing the bill, and to ensure that the legislative process for the bill should not be subject to guillotine and the delivery of excesses of Government amendments to its own bill without accompanying rationale, and in timeframes which compromise the ability to respond to those amendments, and which compromise Oireachtas scrutiny overall on this legislation given its fundamental impact on the operation of our democracy and the rule of law.

Head 8 – Judicial Review

1 Prefacing comment

This being the first head and given the legal underpinning for environmental JR it is necessary here to set out a number of matters which are relevant for the Heads in Part 3 as a whole. I would have preferred to set certain of these matters out as a separate heading in this submission but was anxious not to be seen to depart too widely from the very strict advice from the secretariat to provide commentary on a head-by-head basis.

But the Committee and its secretariat will be pleased to understand not all the comments on the Heads will be as detailed, but they will need to take the comments here and the legal context and other considerations referred to into account in what follows on the other heads. So I would advise reading this in sequence.

2 Highlevel overview of sub-heads and issues

Sub-head 1 and 2 propose to establish the Act as the basis for a statutory appeal and Judicial Review of an "act" but sub-head 1 is silent on the other important considerations of omissions and decisions, this is albeit they do appear to be envisaged to some limited extent given sub-head (3) specifying what reliefs can be granted by the Court and given the nature of some of the reliefs.

Sub-head (1) also provides for a very limited carve-out from the scope of what will be captured by the new shapping of JR under this part. Sub-head 1 is subject Head 13 (Specialised Provisions), which operates to exempt Heads 10, 11 and 13 just for Judicial Review under Part 9 of the Planning and Development Act 2024 (the 2024 Act), and makes some other specifications which I will deal with under that Head.

Sub-head 2 draws in all references to Judicial Review under Rules of Court in other enactments, and proposes they are to be: "construed as applications for judicial review in accordance with this Act".

This Part 3 therefore apparently seeks to draw in all environmental JR, save for some very, very limited carve out to Planning JR under Head 13. Given the problems which arise consequent on this which I air below – it would be good to think this was an error or oversight of the busy drafters of this complex and far-reaching GS. However environmental JR was clearly in the mind of the drafters as is clearly intended as can be seen from the list of legislation included in the schedule 3, and indeed from the Minister's comments on its publication here.

Sub-head 3 proposes to problematically limit the reliefs which can be sought and granted under JR without explaining why matters such as:

Important declaratory reliefs on failure to transpose and/or implement provisions of EU law are omitted here

It also appears to rule out a planning injunction if for example a public body carries out unauthorized development – and so an act of a public body. These raise concerns particularly in respect of obligations on adequacy and effectiveness of remedies which I expand upon below.

Through sub-heads 4, 5 and 7 - it proposes to establish further and very significant and problematic thresholds and tests which require to be satisfied in order for the court to grant relief. Again these raise concerns particularly in respect of obligations on adequacy and effectiveness of remedies, but also undermine basic obligations around access to justice which I expand upon below.

In sub-head 8 it provides for two very limited carve outs from what is proposed under sub-head 5(a)(ii) and (v) only, and also disapplies sub-head 5(7) which presumably is a typographical error is was meant to refer to subhead 8(7) instead. But if that is not the case the sub-head 7 raises very serious issues particularly in respect of eNGOs. Notwithstanding, these further carve-outs significant and problematic issues arise in particular for eNGOs, but not limited to them which I also address in more detail below.

In the context of environmental JR this Head 8 is all so legally problematic it is difficult to know where to start. But as a navigation aid to the Committee and its secretariat on the detailed considerations which follow if may help to highlight at a highlevel the simple realities that -

a) Environmental JR is underpinned by a complex legal architecture and associated obligations and rights which are not reflected in the Heads, and the Heads are not compliant with.
b) The impingement on right to effective judicial remedies precipitated by these Heads has not been justified and evidenced to be proportionate and does not have the required safeguards which the CJEU made clear are required in case c-73/16 *Puskar*. I expand on this key consideration further below also.

My simple recommendation would therefore be to -

- Entirely remove from the scope of JR provided for here in Head 8(1) – all environmental JR by expanding the scope of the carve out in Head 13 to all JR which falls within the scope of the Aarhus Convention Article 9, and I make a specific recommendation under H13 in that regard.

The following provides further detailed consideration of this and Head 8 under the following headings

i. The lack evidence base is not there and why it is necessary, and
ii. More granular comments on issues with the sub-heads and relevant legal obligations.

I propose to deal with the requirement for evidence base first – as it is more simple and digestible, but it needs to be seen in the context of then of the more detailed analysis of legal obligations impacted on by Head 8 and indeed subsequent heads in Part 3.

i) Lack of evidence base and why it is necessary

The need for a sound evidence base for a legislature in making changes of this profound significance is forgive the pun – self-evident. However, in an EU law context the evidence requirement has additional weight given the need to demonstrate the proportionality of the response where impingement to EU law rights arises including on right to an effective judicial remedy. This is set out and clarified in a key case of the EU Court of Justice – c-73/16 Puskar.

In that regard the following sets out:

a) That the Minister cannot rely on the recommendations from the Peter Kelly review – quite apart from that what is proposed here goes way beyond that.
b) Also highlights that no alternative evidence base has been provided and indeed what the Minister referred to in respect of impacts of JR infrastructural delivery in his comments in the PR accompanying the publication of this GS are not supported by any proper consideration of the data on environmental JR.
c) Also highlights the significant omission even of an explanatory note with each head in this General scheme.
d) The requirements of the EU Court of Justice – c-73/16 Puskar and why they are relevant here.

a) The GS cannot rely on the Peter Kelly Review for the changes proposed on environmental JR.

The Review of the Administration of Civil Justice (the Peter Kelly Review) – provides no basis for changes to environmental JR and to Planning JR in particular. Specifically in that regard – The Peter Kelly Review

- Excluded from its scope statutory judicial review save for some basic procedural efficiencies. Therefore it provides no sound basis for the scale of changes proposed here on environmental JR which is provided for on a statutory basis given its wider legal underpinning under EU law and

international law in particular the Aarhus Convention, a point to which I will return shortly below.

- Also explicitly excluded from its scope Planning JR. This was given the General Scheme of the Housing and Planning and Development Bill, 2019 had been published. That GS proposed extensive changes to JR which albeit in the Planning Acts also had implications for the special rules on costs in all environmental Judicial Review given the reach of s.50B of the Planning and Development Act 2000 and Part 2 of the Environment (Miscellaneous Provisions) Act 2011 (EMPA). In that context the Kelly Review indicated it would not be appropriate to make recommendations in that sphere, stating: (emphasis added)

  "In this regard, the Review Group notes that the Department of Housing, Planning and Local Government published a General Scheme of a Housing and Planning and Development Bill 2019 in December last. The General Scheme provides, inter alia, for

  - amendment of the requirements as to locus standi of an applicant for leave to bring judicial review in this area – including requirements concerning the nature of the applicant's interest, prior participation in the planning process and the conditions to be met by an NGO in order to enjoy "automatic standing rights"[85] and
  - replacement of the existing special legal costs rules in section 50B(2) of the 2000 Act.[86]

  The Review Group notes that the Department invited public submissions on the General Scheme and in light of this does not consider it necessary or appropriate to make any recommendations in respect of the judicial review procedure under sections 50 to 50B of the 2000 Act"

b) Absence of other evidence base.

The Minister does not appear to have provided or published any other evidence basis for the changes proposed other than to assert impacts on infrastructure delivery from JR in his PR, which have not been properly evidenced and properly justified.

In the PR amongst other comments the Minister stated:

> "**The State faces significant challenges in terms of housing shortages, energy deficits, inadequate water supplies and climate changes, all of which are exacerbated by the demands of a rising population. We can no longer**

delay on reform of the judicial review system. The measures in this Bill will not only deliver this reform, they will also support the Government's Accelerating Infrastructure Action Plan, which addresses a range of barriers to developing the infrastructure required to sustain a growing society."

I would be happy to share with the Committee my own detailed analysis on the statistics for JR which are very contrary to the Minister's position. But given the Minister explicitly referred to and is relying on the Accelerating Infrastructure Action Plan – I would also highlight to the Committee the Bar of Ireland's a recent submission it made in response to a public consultation on another matter but where it considers the recent report the Accelerating Infrastructure Taskforce published its report and action plan on the delivery of infrastructure in Ireland, Accelerating Infrastructure Report and Action Plan ("the Infrastructure Report"). Particularly in pages 11-19, the Bar's provides detailed analysis of the nature of JR including the decisions/acts/omissions and the underlying developments, the extent of JR and the nature of who is pursuing JR. The Bar's conclusion on this is significant and damning albeit characteristically diplomatically phrased that: (emphasis added)

> "The fundamental basis of the Infrastructure Report, that the number of judicial reviews is increasing and that this is a primary cause for delays in the delivery of critical infrastructure is **not** supported by evidence. **As highlighted above, the data paint a very different picture."**

c) *Absence of Explanatory Notes in the General Scheme and accompanying evidenced based justification.*

As the Committee will know, the normal approach in a General Scheme is to provide Heads as an outline for a proposed bill together with an explanatory note. The explanatory notes serve to assist understanding, but also critically to provide some insight into the rationale for what is proposed in the heads, and to refer to wider extant evidence based justifications for what is proposed. This is particularly important where there are significant changes proposed, and where they may not be immediately apparent, and where justification is needed and appropriate.

It is quite extraordinary in a bill of this profound impact that it has presented its 39 heads and 4 schedules without one explanatory note to assist the Joint Oireachtas Committee in its Pre-Legislative Scrutiny, and indeed the wider public engage with the bill.

The GS has the appearance to some extent as if envisaged as a draft bill, but that is entirely premature in the context, and it is also alarming given the extent of legal issues within the drafting of the Heads.

I submit respectfully that it is also not reasonable for the Minister in that PR and the Department to simply refer generally to the GS as a GS - "***which delivers on the vast majority of the recommendations in the Kelly Report and expands upon them.***" ***This is a reference as the Committee will know*** the Review of the Administration of Civil Justice led by the Hon. Mr Justice Peter Kelly, (The Kelly Review) and the Report of the Sheriff Review Group 2024. There were 25 pages of recommendations in the Majority report and more in the Minority report. The absences of rationale is particularly where the Minister even acknowledges in the PR accompanying the publication of the GS that it goes further than the Kelly Review,

> "I am pleased to publish the General Scheme of the Civil Reform Bill 2025, which delivers on the vast majority of the recommendations in the Kelly Report **and expands upon them in some cases."**

In fact as is clear from this submission, and I expect from others, that there are radical departures from the Kelly Review, and what is characterised as an 'expansion' are in fact a number of matters which are materially different, and go way beyond codification of current law. This is particularly so in the context of the GS's changes to Judicial Review. Also as highlighted earlier, the Peter Kelly review excluded statutory JR from scope, and therefore environmental JR, and explicitly excluded from scope planning JR.

The absence of justification and rationale is even more problematic when the impingement and curtailment of rights proposed in Part 3 Judicial Review is considered, and the cumulative impact of it with other changes proposed in JR and the environment and landscape for environmental JR and the barriers this presents for access to justice in that sphere – a point I will expand on further below, and given the high standards legally required for environmental access to justice – what has been referred to as the gold-stand for Judicial Review.

But next I wish to simply highlight the requirements on justification required under the Charter of Fundamental Rights.

d) Obligations under Article 51(2) of the Charter of Fundamental Rights of the European Union where impingement of rights arises.

Article 47 of the Charter of Fundamental Rights of the European Union (the Charter) establishes the right to effective judicial remedies to uphold EU law rights. Those rights cover an enormous range of matters including in respect of the EU's environmental acquis and the public interest that the Union recognizes arises from environmental

protection as highlighted by the EU Court of Justice (CJEU) in *Edwards** para 40 and *Commission v UK** para 47. Any impingement of those rights needs to establish it is proportionate and justified and is accompanied by the required safeguards as clarified by the CJEU in in c-664/15 *Protect Natur*[2] and the case law cited therein on C-73/16 *Puškár*[3]

- I recommend that prior to proceeding further with the Pre-Legislative Scrutiny (PLS) the Committee seek explanatory notes to accompany the Heads and for the Department and Minister to set out the evidence base on which they will rely to justify the proposed changes. Otherwise the PLS risks wasting time and second-guess matters, and arguing in a vacuum about what is proposed.

ii) More granular comments on issues with the sub-heads and relevant legal obligations.

Most people naturally turn to and think of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) when one considers access to justice in environmental matters. It sets out rights and obligations across three pillars in the context of key objective centered on the right to a healthy environment, providing in Article 1 Objective that -

> "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

The right to a healthy environment has of course been recognized by the UN General Assembly.

However, it is important to understand and reflect on the important and complex interactions and wider legal architecture which is legally binding on Ireland in the context of environmental JR, and it may be helpful to quickly touch on these.

Ireland is of course a full Party to the Aarhus Convention in its own right as an International Law convention. The impact and enforceability of the Aarhus Convention has greater significance, impact and enforceability as the EU is also a Party to the Convention, and Ireland is of course an EU Member State. The CJEU has made clear the

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[2] JUDGMENT OF THE COURT, 20 Dec 2017, c-664/16 *Protect Natur*
[3] JUDGMENT OF THE COURT, 27 Sep 2017,c-73/16, *Puškár*, EU:C:2017:725, paras to 81

Aarhus Convention is an integral part of the legal order of the EU in case c-240/09 *LZ I** para 30.

The requirements however for access to justice are further underpinned by

- the EU Treaties including and not limited to Article 19(1) of the Treaty of European Union, further supported by Article 191 of the TFEU,
- the Charter of Fundamental Rights (the Charter) and right to effective judicial remedies under Art 47 and the principles around not being excessively difficult, and the further significant protection against any impingement on those rights which derives from Article 51(2) of the Charter as highlighted elsewhere in this submission with reference to the CJEU's clarifications in c-73/16 *Puskar*, and where that standard of evidence, proportionality and requirements for safeguards applies in respect of any impingement of rights under the corpus of EU law, including its significant environmental acquis.

The EU has implemented the Convention in a regulations for the EU Institutions, and in a number of Directives which the Member States are required to transpose and implement faithfully, such as the Public Participation Directive 2003/85/EC* and the Access to Environmental Information Directive*.

But the CJEU has also read the Aarhus Convention access to justice obligations into Directives where no reference to access to justice exists within the text of the Directives, and has weaved together a complex architecture and understanding of the scale of obligations and characteristics required to ensure access to justice, reaching to the Treaties, the Aarhus Convention and the EU Charter. Particularly with reference to the importance of environmental protection and the public interest. That was particularly highlighted in Edwards para 40 and Commission v UK para 47.

The considerations of this body of case law deals with matters deeply impacted and I would say compromised in all the heads in this Part 3 including on:

- *locus standi*, including in particular for environmental organisations, who are afforded particular standing under the Aarhus Convention pursuant to definitions concerning "the public" and "the public concerned" in Article 2 and further explicit requirements on eNGO standing in Article 9(2), and how the Court of Justice has interpreted them and impermissable limitations on national criteria defining eNGOs which operate to unreasonably exclude eNGOs and undermine the objectives intended in affording eNGOs special standing given their focus on the public interest in environmental protection – see for example the CJEU in *Djurgarten**.

- scope of review as set out in Articles 9(1), (2) and (3) of the Aarhus Convention, and

- the characteristics required for JR in Article 9(4) of the Convention which provides for a really meaningful right of access to justice given the qualities required, which stipulate:

> "In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."

The scope of obligations and interpretations on the Aarhus Convention access to justice obligations are also supported by the Findings and Recommendations of the Aarhus Convention Compliance Committee, (ACCC), as endorsed by the Meeting of the Parties (MoP) and the legal implications of that under the Vienna Convention Law of the Treaties. The ACCC has been appointed by the Parties to oversee compliance with the Convention and to interpret the Convention. Therefore this further body of their case law has great significance and impact on our obligations.

Additionally in considering the architecture for access to justice obligations - it is necessary to consider the European Convention on Human Rights (ECHR) and how the European Court of Human Rights has interpreted obligations under that Convention, including in respect of Article 6 and 8 of the ECHR including in an environmental context. (I would be happy to expand on this with reference to CASE OF GREENPEACE NORDIC AND OTHERS v. NORWAY see para 319 in particular. I would also highlight to the Committee the Court also helpfully rehearsed and set out i.a. the developing body on international and domestic case law and instruments in its Part II of the judgement in Para 121 – 180 and that is relied upon in full here, when it was considering rights and obligations and the relevant legal architecture in the context of climate action.)

There is then of course also the further requirements of our own Constitution, including in particular Article 34. Under Article 34.3.1 the High Court has the jurisdiction and power to determine all matters and question of law and fact in civil and criminal proceedings. In addition to further powers under Article 26 and 34.3.2 on the constitutional compatibility of actions and legislation. Articles 40.1 and 40.3 on equality before the law and access to the courts, and Article on Property rights.

I propose only to touch on a couple of stand-out issues particularly in the context of the Aarhus Convention as an integral part of the EU legal order and the Carter also to demonstrate how problematic is what is proposed in Head 8, and indeed the other Heads in Part 3, and given my more particular familiarity and experience with these, while holding that issues arise under the ECHR and Constitution, which I expect will be thoroughly dealt with in other submisisons.

Conclusions on non-compliances under the Aarhus Convention in Particular:

It is submitted that Head 8 in limiting the scope of what falls subject to the right to environmental JR to "acts"– it non compliant with the EU and International law Obligations set out above, particularly those of the Aarhus Convention Articles 9(1) – (3), which sets out the scope of matters which fall subject to the obligations on access to justice under the Convention.

It limits wider environmental JR and indeed Planning JR to "acts" whereas acts, omissions and decisions falling within the scope of Articles 9(1) to (3) need to be provided for as required by the Convention:

"Article 9
Access to Justice

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under
article 4 **has been ignored, wrongfully refused, whether in part or in full,**
inadequately answered, or otherwise not dealt with in accordance with the
provisions of that article, has access to a review procedure before a court of
law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious
procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, **members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment**."

As also highlighted as an integral part of the EU legal order and as interpreted together with Art 47 of the Charter and as it applies to EU environmental law – there is a right to an effective **judicial** remedy which is limited by these heads.

It is submitted that Head 8 (4)(a) sets a new threshold for the grant of relief which is not compatible with the Article 9(4) of the Aarhus Convention on the right to an adequate and effective remedy when read with the rest of Article 9,and creates uncertainty in respect of the rights an applicant for JR can expect to have protected.

Article 9(4) covers all the reviews covered by Article 9 and provides for a set of legally required characteristics – which allow for meaningful and effective access to justice, specifically it requires: (emphasis added)

> "4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide **adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.** Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."

This is particularly compounded by the further threshold for securing relief under Head 8(5) which it is important to note are cumulative requirements, meaning all need to be met – so all of points (i) to (v) in paragraph (a), and a further test in (b) which refers to the impact of the remedy on the applicant in terms of "materially better position" differing from the wording in 8(5)(a)(v) which refers to a requirement that the remedy "provides a significant benefit to the applicant".

In summary, the unlawfulness of the act, (omission or decision I would add), is no longer sufficient for quashing of the decision or securing the relief sought, together with the discretion the courts already exercise in respect of harmless error[4]. These further set of interest and impact tests are proposed in sub-head 5, which the applicant must meet in order to secure their relief are no where reflected or provided for in the Aarhus Convention Article 9 in respect of rights to remedies. Additionally, I submit they serve to make effective judicial remedies excessively difficult in breach of Article 47 of the Charter and such impingement of rights hasn't been justified as set out in my comments pertaining to the CJEU judgment in case c-73/16 *Puskar*.

279. (1) This Chapter appliesto an application for judicial review (in this Part referred to as "Part 9 judicial review") made to the High Court in which a party— (a) questions the validity of any decision made or act done in the performance, or purported performance, of a function by a relevant body under this Act, or questions the

[4] On harmless error and the case law on this and how this is handled by the Courts the Committee may wish to consider what the Bar of Ireland said on it here in response to a recent public consultation relating to JR rules on costs under the Planning and Development Act 2024.

alleged failure of a relevant body to perform such a function, and (b) seeks an order of certiorari, mandamus, prohibition or quo warranto, or seeks declaratory relief.

It is important to note that under **Head 8(8)** a very small carve-out is provided to in respect of the additional threshold to secure requirement to in para (ii) on the need to show harm or prejudice and on (v) on the need to demonstrate the remedy provides "significant benefit" to the applicant. I say small carve out advisedly as it may not be immediately apparent but it only applies to a very limited cohort of the eNGO community and only to qualifying eNGOs in the context of JR under Part 9 of the Planning and Development Act 2024, and does not provide for a carve out even to those qualifying eNGOs in JR outside the 2024 Act. This is because the carve out is limited to "where s286(2) of the Planning and Development Act 2024 **applies**"

It is important to step through this. S286(2) provides:.

> "Where **Part 9 judicial review proceedings** relate to a development that **is likely to have significant effects on the environment or on a European site, or to an act or omission by any person that contravenes a provision of this Act, or an enactment under this Act, relating to the environment**, an applicant shall be regarded as having a sufficient interest in a matter to which the proceedings relate (regardless of whether the applicant is, or may be, directly or indirectly materially affected by the matter) where—
> **(a) the applicant has existed for a period of not less than one year prior to the date on which proceedings were brought and is—**
> **(i) a company, or**
> **(ii) an undertaking incorporated under the laws of a Member State that has—**
> **(I) limited liability, and**
> **(II) a constitution,**
> **(b) the constitution of the applicant includes an object related to the promotion of environmental protection relevant to the matters to which the proceedings relate and the applicant has pursued the object for a period of not less than one year prior to bringing the proceedings,**
> **(c) the applicant has no fewer than 10 members at the time the proceedings are brought, and**
> **(d) the board of directors (or equivalent governing body) of the applicant has passed a resolution in accordance with its constitution authorising the bringing of the proceedings prior to bringing them."**

Quite apart from the fact the carve out is limited, this is very high threshold to qualify as an eNGO under s.286(2) of the 2024 Act. Firstly to step outside certain of the tests required under Head 8(5) to be granted relief means that -

- You have to fall within the scope of matters covered by s.286(2) that expressly refers to Part 9 Judicial Review Proceedings which further to definitions in s.278(1) and the provisions of s.279(1) of the 2024 Act means the exception is in the first instance confined to matters under the 2024 Act. (Again I can step the Committee through this as needed, but am trying not to overburden it at this point.) So the exception does not apply to JRs outside of the 2024 Act.
- Then additionally you have to meet all the specifications on eNGOs in s.286(2) paragraphs a -d. These requirements are likely to exclude small local eNGOs even in the context of JR under the 2024 Act. It is important to reflect on how the CJEU and ACCC have emphasized the important role small local eNGOs play in environmental protection so this block on the effective remedy they can secure and the effective removal of purpose and meaningful outcome for them in pursuing JR is deeply problematic.
- However these tests in s.286(2) paragraphs a -d will even present difficulties for larger eNGOs, particularly given the tight timeframes for bringing proceedings and the procedures and notifications which need to be addressed and the requirements of an organistion's governing documents, company law requirements etc (Again I am happy to expand on this, but don't want to overly lengthen this submission and over-burden the Committee at this point.)
- It is important also to note the other tests in Head 8(5) (a) apply to all, including the eNGOs qualifying under s.286(2) of the 2024 Act.
- It is additionally important to note that the further test in Head 8(5)(b) still applies to all eNGOs which requires that –
    - "In considering whether an error of law or procedure was material to the decision, the Court shall take into account whether, in the absence of such an error, a different decision would have been made, which would have placed the applicant **in a materially better position**"
- This is clearly bizarre and inappropriate in the context of the motivation of eNGOs acting in the public interest to secure environmental protection through the law and through JR, and in recognition for which, together with their expertise and capacity in the environmental sphere they are afforded special *locus standi* under the Aarhus Convention. It runs contrary to the rationale for the limited exemption and carve out provided under Head 8(8) in respect of benefits arising from the relief.

So in conclusion Heads 8(4) and (5) notwithstanding Head 8(8)

- **They undermine the objective of eNGO standing and their rights to adequate and effective remedies.**
- **I would additionally highlight that the tests to secure remedy are absolute and do not provide for the discretion of the Court to deviate from them with all the consequences that has for impacting on the right to an effective judicial remedy under EU law, Art 47 of the Charter in particular for the public generally.**
- **In respect of individuals and groups, they create excessive difficulty in achieving effective judicial protection, and arguably trespass on the Constitutional role of the Court in administering justice.**
- **They do not make clear how rights under for example Article 6 and 8 of the ECHR can be vindicated either in the context of such limitations on remedies.**

Head 8(7) is particularly concerning in that it provides that "costs may only be awarded to an applicant where the final decision of the court provides a significant benefit to the applicant". The Committee will understand that Ireland is a high litigation costs jurisdiction. I highlighted earlier the required characteristics for review under Article 9(4) of the Convention which include the requirement that costs should "not be prohibitively expensive" (NPE). While that is not expressly defined, the CJEU has interpreted it, as has the ACCC. This area is particularly complex and should the Committee wish I would be happy to expand.

But I provide some quick context here for the issue in this sub-head.Given the chilling effect of an award of costs if you lost and the general principle of costs following the event that is loser pays the other sides costs – Ireland implemented back in 2010 and 2011 special cost rules to comply with its Aarhus Obligations. This was under s.50B of the 2000 Act and Part 2 of EMPA, and while in the Planning Act s.50B applies to costs in other environmental JR – eg forestry, aquaculture, climate, etc. (In the interests of time I refer only to s.50B given the EMPA rules are broadly similar except for one problematic additional requirement on environmental damage which I can explain as needed)

Put simply the special costs rules provide each side bears its own costs,. That is except for a public interest and justice exception where the court can grant an award of costs even to a losing party, under s50B(4) and other limited circumstances under s.50B(3) where cost protection may be punctured and forfeit. But even then the CJEU has made clear in NEPPC c-470/16 that the costs still have to fall within the cushion of NPE.

Additionally, if you are successful in securing some of your reliefs you may be awarded your costs, s50B(2A).

These special rules have allowed the operation to some extent of what is referred to 'as no foal no fee cases' as a legal team in assessing the merits of a case, and the chances of wining can be persuaded in some cases, to take the case on the expectation of winning and the award of costs being used to discharge their fees, and in some instances agreeing some arrangement on fees in the event of a loss.

Now multiple barriers are emerging through these provisions when viewed in conjunction with the current special cost rules.

This is because significant additional barriers are put in place in order to secure your reliefs as we have discussed under Head 8(4) and (5). So given the tie in s.50B(2A) on the grant of an award of costs contingent on amongst other things "to the extent that the applicant succeeds in obtaining relief" the additional obstacles to securing relief – render the securing of costs very problematical.

This is likely to be further compounded if the Government advances new rules on awards under ch2 Part 9 of the 2024 Act which limit the awards a successful applicant can be awarded to a scale of fees prescribed under s.294 of the 2024 Act. Deeply controversial caps on fees to be awarded were proposed in a recent consultation which the Bar Council in its submission indicated fell 23 – 35% below market rates, while the other side the State Respondents and Notice Parties which could involve big corporate interests – are not so limited in how they can fund their legal teams creating a serious issue of equality of arms. It raises issues of fairness and equity – key characteristics required under Article 9(4) of the Aarhus Convention, and indeed core principles on the administration of justice.

To be clear "own costs" are required to be considered under the NPE obligation, not just exposure to costs from the other side and there is extensive case law from the CJEU and ACCC in respect of this.

So the implications here are that either

> under the current cost rules in s.50B in the 2000 Planning Act, and Part 2 of EMPA, or
>
> Under the proposed new cost rules in ch 2 Part 9 of the 2024 Act,
>
> this further constraint on the award of costs in Head 8(7) is deeply problematic and is likely to render costs as being to expensive for many applicants to pursue JR. (This appears to be a clear intention and objective of the Government and I would welcome an opportunity to expand on this and why that in itself is legally problematic)

It is also worth highlighting for there not to be a deterrent effect in pursuing access to justice – a applicant needs to have reasonable predictability at the outset of proceedings of the costs involved, and those costs cannot be prohibitively expensive, subjectively and objectively – as clarified by the CJEU in *Edwards*

So the implication of Head 8(7) in not ensuring that costs are not prohibitively expensive for the applicant – it creates an impermissible barrier to access to justice – not just based on the Article 9(4) requirement, but I would argue creating excessive difficulty for applicants in vindicating their EU law rights and their right to an effective judicial remedy under EU Law, including Art 47 of the Charter.

Head 8(9) does not make clear transitionary implications for matters underway. However I see no express provisions on transitionary arrangements – but may have missed this given the limited time I have had to consider this in the timeframes requested by the Committee.

Impact on the public interest

The implications of this in terms of public good should not be overlooked. As Ireland has a poor track record in implementing our environmental law obligations despite the public interest the CJEU and EU Treaties highlight are inherent in such laws. JR has been an important mechanism for enforcing EU law through our national courts and protecting the public interest. Compromising the ability to pursue it as proposed in these heads is contrary to the public good and indeed the common good.

It hardly needs to be highlighted here we are experiencing what
The Intergovernmental Panel on Climate Change (IPCC) and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) have jointly emphasized that climate change and biodiversity loss are **interdependent, mutually reinforcing crises** that cannot be solved in isolation. The two crises share the same causes—primarily human-driven land-use changes and fossil fuel emissions – see the IPCC 6th Assessment Report and IPBES (2019). This has implications for significant economic and societal breakdown, precipitation of further de-stabilisation and conflict around critical basic resources of water, food, land and indeed mass climate migrations and the challenges and moral obligations this all brings quite apart from legal ones

Therefore compromising the ability to uphold EU environmental law, is of serious concern to the public interest and to our security.

So I recommend

- The Committee's extreme vigilance on the effect of the constraints on environmental JR proposed in Head 8 and across Part 3, given the public interest and security arising from environmental protection and how these heads will operate to compromise that.

Rollback on existing implementation and regression on legal obligations.

I would also highlight but do not propose to expand here – that Ireland has implemented a set of laws to comply with and conform to its EU law obligations in environmental JR and has relied on them in setting out its compliance. Departing from them and undermining that implementation is very concerning and problematical especially without evidenced justification, and demonstration of compliance with those obligations.

I would also highlight that what is proposed here is clearly regressive move in terms of access to justice and the implementation we have relied upon for those obligations, which implement not just Aarhus but wider Access to Justice Obligations under EU law and reflect Constitutional requirements. There are complex considerations in respect of regressive moves, including in the context of international law – which again I would be happy to expand on if the Committee would find that useful.

Finally on this Head, it is additionally important to reflect on the general obligation to provide for "wide access to justice" required by the Aarhus Convention. (Advocate General Medina noted, "wide access to justice" is widely acknowledged as a general obligation notwithstanding it arises in the context of Article 9(2), c-252/5510, *Societatea Civilă Profesională de Avocaţi*, para 46.) The changes proposed here in Head 8 and across Part 3 of the GS, need to be viewed and weighed with a multiplicity of other regressive changes recently implemented and proposals well underway and others seemingly clearly envisaged impacting on JR in Planning and on environmental JR. This includes, but is not limited to:

- Chapter 1 of Part 9 of the 2024 Act impacting on standing, scope of review, court processes and impacting on fairness and equity of proceedings and which has been commenced;
- Chapter 2 of Part 9 of the 2024 Act which for matters under the 2024 act replaces the current special cost rules for environmental JR with very controversial changes including on a scale of fees clearly limiting the costs a successful applicant can be awarded. Most members of the public, local groups and organisations, and eNGOs rely on that award to pay for their legal fees. A public consultation just concluded on Jan 15th shows the Government intend to implement limits on the awards which according to the Bar of Ireland's submission to that consultation will

result in awards 23-35% below market rates for the applicant's lawyers. Lawyers can and will probably have to engage for higher fees leaving a successful applicant with a potentially very large legal bill for their own costs - even when they have had their concerns on a decision, act or omission vindicated by the Court while the State Respondents and Notice Parties will not be similarly restricted on the quality and scale of legal effort and cost they expend on the case. Again this is a matter I have particularly expertise and insight on and would be happy to expand upon at an appropriate juncture.

- A GS for a Planning and Development (Amendment) (No 2) Bill , 2025 which proposes amongst other things very problematically proposes to do away with the current JR rules in s.50 and 50A of the Planning and Development 2000 Act (2000 Act), and to extend the application of the controversial JR rules in ch 1 Pt 9 of the 2024 Act to matters arising under the 2000 Act, s.t. very inadequate and problematic transitionary provisions. (It is to be presumed that the intention is to similarly extend the cost rules in Pt 9 ch 2 of the 2024 Act and displace the application of s.50B of the 2000 Act)
- An Aarhus Legal Costs Bill which will align all the other 26+ types of environmental JR across sectors such as foresty, aquaculture, roads etc with the regressive and controversial approach in the 2024 Act.
- New Rules of the Superior Courts and new Practice Directions for the Planning and Environmental Court which while helpful in many respects also present serious challenges and difficulties for the public and eNGOs in environmental JR.

Therefore I recommend that:

- The Committee in advance of proceeding to consider the PLS further, request an assessment from the Minister on how the impact of Part 3 in particular GS of the CRB is compatible with the obligation of wide access to justice and obligations of providing access to effective judicial remedies in light of what else has been recently implemented and is proposed for the landscape of environmental JR and the rules on JR and legislation pertaining to that. In the absence of this it would seem the provisions of Part 3 of the GS cannot be sustained, and should be dropped from the GS lest they take up time in what will be a challenging and significant scrutiny exercise.

- My Ultimate recommendation in respect of Head 8 is that in light of the legal obligations set out above, that :

a) Head 13 is amended to exclude all environmental review falling under Article 9 (1) to (3) of the Aarhus Convention, and so the reference in Head 8(1) which is subject to Head 13 will exclude environmental JR from Head 8 and the effects of Part 3.
b) Head 8(3) be abandoned – it is more appropriate for rules of court to set out the reliefs and to do so comprehensively, or the sub-head needs to be substantially expanded. I see no particular benefit to removing the latin references to reliefs given the efficiency and clarity associated with them. Any word only has meaning when we come to know and understand it and so to with a latin term.
c) Sub-head 4 should not seek to constrain the discretion and role of the Court in determining when to award reliefs. It is likely to cause obvious issues.
d) Sub-head 5 should be deleted in its entirety as it creates an unacceptable bar for achieving effective judicial remedies and adequate and effective reliefs consequent on JR.
e) Sub-head 7 should be deleted as it has not demonstrated it is compatible with the NPE requirement, raises serious concerns it would operate to make access to justice prohibitively expensive and excessively difficult.
f) Sub-head 9 clarify transitionary arrangements
g) A new Head be added on Transitionary provisions.

- I also recommend that the Minister be specifically asked
  How this Head and each sub-head is compliant with the Aarhus Convention as an integral part of the EU legal order, and how and on what specific bases he proposes to justify the impingement of EU law rights inherent in them.

Head 9 Jurisdiction

This head is concerned with jurisdiction and sets out what should be considered in the Circuit and High Court and provides for concurrent jurisdiction. It also limits the role of the High Court as an appeal from the Circuit Court, and raises serious concerns in terms of the Article 267 Preliminary References under the Treaty of the Functioning of the EU. Multiple concerns arises – and this is by no means exhaustive.

Currently, the High Court has exclusive jurisdiction on JR. This I understand is consistent with Articles 34.3.1 of the Constitution. What is proposed therefore creates serious concerns in respect of that proposed change.

It would seem concurrent jurisdiction is likely to be confusing and create serious overhead for the judiciary in planning to have to deal with matters it previously hasn't Ultimately many matters may have substantial grounds argued to bring a matter falling to the Circuit Court under head 9(1) and to avail of access to the High Court under Head 9(3).

Very problematically Head 9(1) includes a number of environmental matters of significance and legal complexity under Head 9(2)(f) and (g). For example but not limited to water and waste where there is significant and complex EU law obligations.

It is not clear how the circuit court would be resourced and positioned in order to deal with these matters. It is notable that JR on such matters currently sits with the High Court.

It is also a practical issue where lawyers capable of arguing these complex legal cases, which are further complicated by complicated fact matricies and technical and ecological considerations will be in a position to run different cases in the circuit court and the High Court given the additional travel and other practical burdens associated with the jurisdictions proposed. This may therefore be very counter productive and result in other cases being held up given those constraints on what is after all a rather small Practice Area in Planning and Environmental law, and where an even smaller subset are willing to act on the terms available to engage to represent the public of ordinary means and eNGOs, and also capable of taking on the State and large well-resourced and often highly motivated Notice Parties.

The Head also fails to recognize the inter-related nature of environmental JR where grounds may involve multiple considerations – so it could involve water, waste matters, wildlife act and foreshore in schedule 2 in the context of major developments for example in the context of Offshore Renewable energy or other renewable energy projects. It is not clear how hybrid matters are to be dealt with.

Very problematically in there being no appeal from the circuit court to the High Court – in respect of leave to apply for JR or an application for JR it would seem to mean the

Circuit Court will act as the court of last instance. On first glance,this restriction on upward appeal would appear to have profound practical implications on the Circuit Courts duty to make Preliminary References to the EU Court of Justice under Article 267 of the TFEU where the national courts need the assistance to interpret EU law so as to ensure a consistent application of EU law. Later on Head 12 appears to make provision for appeal from the Circuit Court to the Court of Appeal but it establishes a very high and restrictive threshold for that, meaning that the requirements for preliminary references may end up being blocked by the Circuit Court. I would be happy to expand further on the what the CJEU has set out in what has become known as the *Cilfit* test and the implications for closing off matters of interpretation of EU law.

Basically, if leave is refused and there is no appeal this would seem to create a real practical and legal issue and a significant burden on the Circuit Court in ensuring capacity to address such matters. At time of writing I would have to consider further the implications of this. It would appear also that what is referred to as a leap frog appeal from the High Court to the Supreme Court bypassing the Court of Appeal under Article 34.5.4 of the Constitution would also be excluded as that is very clearly limited to the High Court only, and of course also requires a high threshold test to be passed providing as it does that:

> "4° notwithstanding section 4.1° hereof, the supreme court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the high court if the supreme court is satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition for the supreme court being so satisfied is the presence of either or both of the following factors:
>
> i the decision involves a matter of general public importance;
>
> ii the interests of justice."

This is again a complex area and I would be happy to expand on this, but wish to flag it as a serious consideration. It is of course not just a consideration for environmental JR but all the matters which might fall to the Circuit Court consequent on sub-head 2 and where EU law issues arise.

I would also flag that sub-head 4 provides for access to the High Court on matters falling to the jurisdiction of the Circuit Court under sub-head 2 – but the threshold test proposed to secure it is very high. This is again very concerning for environmental JR – bit I would add more broadly is a very regressive and concerning step in closing the doors of the courts to those who may be very vulnerable and who won't satisfy the

requirement that the point of law involved is of "exceptional public importance" and also that it "is desirable, in the public interest, that it be heard in the High Court."

- I recommend:
- Notwithstanding my over-arching recommendation that Part 3 not apply to environmental JR – I would also recommend that
- Environmental JR (and indeed all JR) be left to the jurisdiction of the High Court
- That in the event of somehow the jurisdiction of the Circuit Court is extended to JR, that there be a clear and accessible right of appeal to the High Court from the Circuit Court.

I also recommend that the Minister be specifically asked

- a) How this Heads accords with the Constitution, Article 34.3.1 in particular
- b) How obligations on preliminary references are to be properly supported, particularly given
    - (i) the high threshold proposed in sub-head (4) for right to be heard before the High Court on matter falling to the High Court under sub-head 4 and separately also given
    - (ii) the limitation on appeal to the High Court from the Circuit Court under sub-head (5).

Head 10 Application for Leave to Apply

I note that sub-head 1 in establishing the requirement for leave, has a limited carve out in respect of JR under the pt 9 of the 2024 Planning Act and pursuant to Head 13(1). But the reset of environmental JR falls to be impacted very negatively and regressively by this head. ##

It is a rather confusing carve out as it is important to realise that Pt 9 of the 2024 Act dispenses with a requirement for leave pursuant to s280(4). (I would also flag that the recently published GS of the Planning and Development (Amendment) (No 2) Bill 2025 also proposes to expand the application of ch1 pt to matters under the Planning and Development Act 2000 and they will fall to be included under Part 9 of the 2024 Act given the amendments proposed in that GS.

So dispensing with leave appears to have been viewed as the preferred direction of travel by the Government in Planning JR. It would appear logical that they would then propose to dispense with it in other environmental JR – bearing in mind one development could have many consents, permits, licences associated with it and it would seem odd to have differing requirements on leave for all of them.

That said, I am not necessarily in favour with the dispensing of leave, as it risks leaving an applicant open to multiple challenges along the way of the proceedings.

- I also recommend that the Minister be specifically asked
  How this Head and each sub-head is compliant with the Aarhus Convention as an integral part of the EU legal order, and how and on what specific bases he proposes to justify the impingement of EU law rights inherent in them.

Sub-heads 2 and 3: Multiple issues arise in sub-head 2 in respect of the **compound, cumulative list of restrictions proposed here on who and when you can make an application for leave to apply for Judicial Review** given it provides:

> "(2) An application for leave to apply for judicial review may only be sought:
>
> (a) where the act, the subject of the application, has been, or will be, made by a person or body exercising a public function which is derived directly or indirectly from the State,
>
> (b) by a person **directly affected by the act** which is the subject of the application **and who has a sufficient interest in the matter**,
>
> (c) save as provided for in subhead (6), where all appeal procedures or any other administrative remedy available in respect of the decision or act concerned have been exhausted; and
>
> (d) save as provided for in subhead (7), and subject to Head 13, where the application is filed within 8 weeks from the date when grounds for the application first arose."

The issues detailed below are by no means exhaustive, but are all I could cover in the limited window to respond and given multiple other commitments.

Sub-pargraph (a) refers to 'acts' only, neglecting to cover omissions and clearly specify decisions. My comments on the scope of environmental JR in head 8 and particularly in respect of Head 8(1) are relied upon here.

Sub-paragraph (b) goes beyond the requirement for sufficient interest in the matter referred to for example Article 9(2) of the Aarhus Convention and the public participation Directive of the EU, and adds and additional compound requirement that the applicant be "directly affected". This is where matters start to get complicated.

There are important distinctions between what is covered by Article 9(2) vs Article 9(3) of the Aarhus Convention, and the rights of different constituencies of "the public" and "the public concerned" as defined terms under the convention. Importantly the Heads here on an application for leave process – stand in the way of the rights under those articles if they are overly restrictive. What is significant to reflect on is that the Heads make absolutely no reference or distinction back to Article 9(2) and 9(3).

The distinctions and permissible limitations were considered in Case c- 826/18 *Stichting Varkens in Nood and Others*, (the "Dutch Pigs" case).

This summary of the Courts clarification from A&L Goodbody may be useful for the Committee:

> Article 9(2) guarantees a right of access to the courts, in order to challenge a decision falling within the scope of Article 6 of the Convention, only to the "public concerned" and not the "public at large" ie to those affected and not everyone. It also provides that access to the courts by an NGO or environmental organisation cannot be conditioned by prior participation, even where that condition is limited and does not apply if the organisation could not reasonably be criticised for not having participated. So, a minimum right of access is required to be facilitated by Member States, and it is wider for affected individuals and environmental organisations, than it is for the public at large.
>
> Article 9(3) provides the "public at large" with a right of access to the courts when relying on more extensive public participation rights as provided for by national law, but in that instance Member States can impose a prior participation condition, unless the applicant cannot reasonably be criticised for not having participated. So, if Member States allow the "public at large" to participate in decision making processes, then they must also be entitled to access the courts to challenge that decision. A condition can lawfully be imposed in those circumstances, requiring evidence of prior participation, save where they could not reasonably be criticised for not having participated."

At time of writing I have not had an opportunity to fully explore their findings on this, and the extent to which the ACCC views this more broadly than the CJEU. but I would be happy to revert to the Committee as necessary on this.

I would flag however importantly the ACCC's much broader approach to the relevant considerations in the following extract from it's findings in ACCC/C/2006/18[5] (Denmark) para 30 and which arise in multiple other findings endorse by the Meeting of the Parties[6]:

> "When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e. to what extent national law effectively has such blocking consequences for members of the public in

[5] Findings on communication ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4, para. 30 (no noncompliance); endorsed in MOP decision III/6, ECE/MP.PP/2008/2/Add.8, para. 3

[6] Findings on communication ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4, para. 30 (no noncompliance); endorsed in MOP decision III/6, ECE/MP.PP/2008/2/Add.8, para. 3; findings on communication ACCC/C/2008/31 (Germany), ECE/MP.PP/C.1/2014/8, para. 93 (non-compliance); endorsed in MOP decision V/9h, ECE/MP.PP/2014/2/Add.1, para. 1; findings on communication ACCC/C/2008/32 (Part I) (European Union), ECE/MP.PP/C.1/2011/4/Add.1, para. 79 (no non-compliance); endorsed in MOP decision V/9, ECE/MP.PP/2014/2/Add.1, para. 10; findings on communication ACCC/C/2010/48 (Austria), ECE/MP.PP/C.1/2012/4, para. 70 (non-compliance); endorsed in MOP decision V/9b, ECE/MP.PP/2014/2/Add.1, para. 1

general, including environmental organizations, or if there are remedies available for them to actually challenge the act or omission in question. In this evaluation article 9, paragraph 3, should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced."

So it is important to consider in meeting the obligations under the Convention:

- The different constituencies to the considered and the differing thresholds required,
- The fundamental objective and purposes of the Convention in Article 1,
- The definitions in its Article 2,
- The important over-arching General Obligations of its Article 3, and
- All within the confines of the general obligations of providing "wide access to justice" as I highlighted in comments on Head 8 and

The Heads fail to demonstrate that.

It is important to really emphasise here in sub-paragraph (b) that there is no carve out for eNGOs, and a number of the tests here are entirely inappropriate for eNGOs across Head 10. Specifically here, I would highlight this sub-para (b) on the need to demonstrate that the applicant is "directly affected" is clearly an issue for an eNGO motivated to pursue JR for environmental protection and where there is no direct effect on them. That is quite apart from the more complex issues aired above in respect of the failure to distinguish between JR under Article 9(2) and under Article 9(3) of the Aarhus Convention.

Sub-paragraph (c) requires exhaustion of other remedies, and does not allow for any discretion on this. This is also particularly problematic given eNGO rights to challenge, and given the requirement for exhaustion of remedies imposes a restrictive requirement for prior participation, which is not always necessary under EU law as was made clear also in case c- 826/18 *Stichting Varkens in Nood and Others*, albeit naturally ideally participation in the earlier decision-making is clearly preferable.

There is also no safeguard provided in the head here to provide for discretion of the court to exercise discretion so the measure proposed here does not become excessive and disproportionate and compromise someone's or some organisation's rights.

Again these are complex matters I'd be happy to expand upon/clarify as necessary.

Sub-paragraph d) is problematic in setting the clock for the 8 week window in which you have to apply for leave from the date when grounds on which the application first arose, s.t. sub-head 7 which provides for for limited extensions of time

> That needs a little unpicking - as for example where a 'decision' is being challenged – that would mean the clock would start to run from the date of the decision for the 8 week window to make you application for leave, and that view is confirmed by sub-head 3. But the public may not have been notified of the decision for some time thereafter, and the ACCC has made clear in its findings in communication ACCC/C/2015/131 on the UK, that calculation of time to bring JR should run from the date the public is notified of the decisions. See Para 174(d) of in order to meet the obligation that procedures See Para 174(d) of the ACCC findings in that regard.
>
> 174(d) "By maintaining a legal framework in which the time limit to bring judicial review is calculated from the date when the contested decision was taken, rather than from when the decision became known to the public, the Party concerned fails to comply with the requirement that review procedures in article 9 (2) be fair in accordance with article 9 (4) of the Convention;
>
> I would also reach to the CJEU in *Flausch* given the logic set out in respect of notifications on consultations, and the analogy that arises.
>
> So the calculation of time for making an application under Head 10(2)(d) and Head 10(3) are not compliant with the Aarhus Convention.
>
> For omissions or acts – again it is even more complex – given one may have come to suspect or learn of something, but it may have taken time to confirm. Also the 8 weeks from the omission which are the grounds of your JR application may have long, long since passed.

<u>Sub-head 7</u> provides for an extension of time to make an application for leave to apply for JR where there is good and sufficient reason for doing so, and provides for two further compound requirements:

- In sub-head (7)(b) the applicant has to be able to show the delay was outside the control of the applicant or could not reasonably have been anticipated, and then have to additionally prove that

- the applicant would suffer serious harm or prejudice if the extension of time was not granted, and even then there is an upper limit to any extension which cannot go beyond 16 weeks from whence the grounds for the application first arose, under 7(c).

It of course remains to be seen what may be considered to have been reasonable for the applicant to have anticipated under Head 7(b)(ii).

The requirement to additionally demonstrate serious harm or prejudice to the applicant is a major constraint in respect of environmental JR,

This additional requirement of serious harm or prejudice would seem to go far too far in restricting standing, particularly in light of Article 9(1) to (3) of the Aarhus Convention and the role and indeed duty of the public envisaged in environmental protection under the Aarhus Convention, and rights under Article 47 of the Charter. It is also clearly a real issue in respect of eNGOs acting in the public interest and where they can't demonstrate serious harm or prejudice to them as applicants.

I would also refer back to the earlier comments on the failure of the Heads to adequately distinguish between the rights and standing requirements under Articles 9(2) and 9(3) of the Convention.

It is also not clear what is the threshold required to demonstrate and evidence these tests and ultimately what is meant by terms such as "serious harm". It would seem these are possible considerations in respect of other matters particularly in focus in these heads around the asylum and immigration. However there have been comments in the press and in the Minister's PR released with the publication of these Heads which suggest a clear intention to limit environmental JR to those who can demonstrate they have been affected. However while there is case law on this from the CJEU[7] the terminology here does not accord with that, and also these heads fail to recognise rights arising from public participation. Moreover, and importantly, the CJEU has made clear that such limitations do not apply to eNGOs, and there is no carve out from these deeply problematic provisions on leave for eNGOs.

Sub-head (8) proposes yet what may manifest as further restrictions on any consideration of an extension of time – in requiring that when considering whether there is the existence of "good and sufficient reason" to extend the time, that the effect on the respondent or a third party and the effect on public administration be considered. It is notable that there is nothing in this sub-head or sub-head 7 which speaks to the interests and rights of the applicant.

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Sub-head (9) is also very problematic in risking arbitrary dismissal of applications for leave to apply solely on the basis of delay. It is not clear given there is no reference back to sub-head (7) and the delays there and extensions of time under sub-head, that this head is not intended to have broader applications. So even if the 8 week window is met the right to dismiss on the basis of this head is provided for. The sole considerations referred are that delay in applying "has caused or is likely to cause prejudice to a respondent or third party or effective public administration" . It is hard to contemplate any JR where a respondent would not argue this, and more particularly a Notice Party to the decision. All is again expressed without any reference to the rights to review or reminder of obligations on access to justice.

It is worth reflecting, in the context of tests and restrictions imposed under Head 10 on the making of an application for leave, and then further restrictions in Head 11 on the granting of leave – the Heads risk creating impermissible barriers in respect of the rights to access to justice under Articles 9(1) to 9(3) of the Aarhus Convention an and making it excessively difficult to uphold the right to an effective judicial remedies.

Sub-Head 4. I wished to consider the sub-heads dealing with time to apply for leave together, but it is important also to go back and reflect on Sub-head 4. It deals with matters more appropriate for Rules of Court and the Practice Directions. I would highlight the approach also of the Planning and Environmental Court in consulting on changes to its Practice Directions including with a User Group and adjusting them in light of experience and feedback. I would make the comment here and more generally across Part 3 that overly prescriptive provisions in Primary Legislation are likely to be counter-productive and restrict the ability of the Courts to manage their work effectively and in the interests of justice.

It is worth the Committee reflecting on the extent of JR that was highlighted on the issue of NPE alone. Mr Justice Brian Murray reflected on this in the opening paragraph of the Supreme Courts judgement in Heather Hill. Many had hoped that that judgement had brought welcome clarity and certainty and finality to an outstanding key aspect of the the current cost rules under the 2000 Act. It was a salutary and sobering reflection that

> "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 (which I refer to throughout this judgment as 's. 50B' and 'EMPA') 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."

Here in these heads and in the other changes on JR referred to in discussing Head 8 we are seeing the potential for many multipliers of this across fundamental issues of

standing and scope of review, and all the characteristics required for review under Article 9(4) of the Convention – all under fire.

For completeness – I would just also highlight the obligations of Article 9(1) of the Aarhus Convention which is simply concerned with the right of access to justice where "any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law".

- Yet again I would recommend that the Minister be specifically asked how this Head 10 and each aspect of its sub-head is compliant in particular with the rights in particular under Articles 9(2) and 9(3) the Aarhus Convention as an integral part of the EU legal order, and how and on what specific bases he proposes to justify the impingement of those EU law rights where such impingement is inherent in the heads as drafted.

Head 11 – Court's consideration of Application for Leave to Apply.

It is interesting to note that there is no reference to the carve out under Head 13 for Pt 9 JR under the Planning and Development Act 2024. But pursuant to Head 13(1) this Head also does not apply to Pt 9 Judicial Review under the 2024 Act. It is a bizarre exclusion as highlighted earlier as Pt 9 of the 2024 dispenses with a requirement for leave pursuant to s280(4), and this head 11 is concerned with considerations of applications for leave to apply for Judicial Review. Again, it is important to reflect at the outset in considering this head that the reset of environmental JR falls to be impacted very negatively and regressively by it.

Sub-head 1 substantially increases the threshold for leave to apply for JR in the context of the current standard for environmental JR which in my experience focuses on standing and whether this is an arguable case. It is also worth reflecting that probably the most rigorous leave process has been undertaken by the applicant's lawyers before they walk through the doors of the court where they are representing people of ordinary means or eNGOs, as their prospects of getting paid generally rest on whether they are successful or not and the cost award arising from that.

It is submitted the further tests proposed here impact on the right to JR and risk also cases which need to be heard not being heard, and sets out matters to be decided at the leave stage which are more appropriately decided following a hearing on the substantive matters, particularly in forming an opinion at the leave stage in respect of the granting of remedies as is proposed in sub-head 1(b)(iii), and to determine whether the case has a reasonable prospect of success may require fuller consideration of the particulars of the case. This may also necessitate cross-examination of witnesses and discovery and would is a premature consideration.

It also confounds the issue of right to JR with this notion of benefit to the applicant in sub-paragraph (d) which also arose and appeared under Head 8 in respect of the granting of remedies under Head 8(5)(a)(v) and also 8(5)(b). Here this requirement for benefit for the applicant is an irrelevant consideration for the purposes of right of access to justice in accordance with what is provided for under Article 9(1), (2) and (3) of the Aarhus Convention, read in conjunction with Articles 1, 2 and 3 of the Convention. I refer the Committee back to my comments on those rights under the previous Heads, Head 10 in particular in respect of:

- The different constituencies to the considered and the differing thresholds required,
- The fundamental objective and purposes of the Convention in Article 1,
- The definitions in Article 2,
- The important over-arching General Obligations of Article 3, and

- All within the confines of the general obligations of providing "wide access to justice" as I highlighted in comments on Head 8 and

Sub-paragraph (d) is also particularly inappropriate in the context of eNGOs and no carve-out is proposed in respect of them. It is also in sub-para (d) provides for a further bizarre test that the "issue is one appropriate for the court and not de minimis in nature". It is entirely unclear how this will fall to be considered, and what expectations it sets on the court.

It is worth re-iterating, in the context of tests and restrictions imposed under Head 10 on the making of an application for leave, not limited to Head 10(2), and then further restrictions in Head 11 on the granting of leave – the Heads risk creating impermissible barriers in respect of the rights to access to justice under Articles 9(1) to 9(3) of the Aarhus Convention an and making it excessively difficult to uphold the right to an effective judicial remedies.

I would flag in conclusion on this head that the implications of subhead (3)(b) are not immediately clear. I would be happy to revert when I have had more time to consider them, but it appears at this point to possibly be a little confused.

- Hear again I would recommend that the Minister be specifically asked
  a) how this Head 10 and each aspect of its sub-head is compliant in particular with the rights in particular under Articles 9(1), (2) and (3) the Aarhus Convention as an integral part of the EU legal order,
  b) how and on what specific bases he proposes to justify the impingement of those EU law rights where such impingement is inherent in the heads as drafted
  c) the rationale for increasing the threshold for leave and the basis for the tests proposed in sub-head (1) and the evidence base supporting their specification.

Head 12 – Appeal of Judicial Review Determination.

This head proposes significant restrictions on the right to appeal a decision on leave or on the outcome of an application for judicial review. Again the implications of this head are very concerning.

Head 13(1) operates to exclude JR under Part 9 of the 2024 Act from Head 12. But it applies to all other environmental JR as proposed, and risks not just being a barrier to access to justice, but also impacting on environmental protection and the upholding of EU Environmental law and the public benefit arising from that.

Sub-head 1 appears to provide for an absolute requirement for leave in all JRs from the court making the decision in order to appeal to the Court of Appeal. This sub-head 1 and (2) also appears to suggest that appeal from the Circuit Court is only to the Court of Appeal.

> Sub-head (2) provides for a very high and compound test that the decision involves a point of law of exceptional public importance, and also that it is desirable, in the public interest, that an appeal should be heard by the Court of Appeal, and this is a significant threshold for entry to the Court of Appeal from either the Circuit Court or High Court. It is notable that this test establishes a higher threshold than is required by what is known as the leap frog appeal from the High Court directly to the Supreme Court under Article 34.5.4 of the Constitution and which requires
>
> > "...the supreme court is satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition for the supreme court being so satisfied is the presence of either or both of the following factors:
> >
> > i the decision involves a matter of general public importance;
> >
> > ii the interests of justice."

Sub-head (3) does allow for appeals from both the Circuit and High Court to the Court of Appeal where Constitutional considerations arise.

Sub-head (4) proposes to limit the jurisdiction of the Supreme Court to hear appeals directly from the High Court which it can under Article 34.5.4 of the Constitution. However, additional tests are proposed here requiring that the courts considers "that the matter is of sufficient urgency and importance to warrant its exercise of appellate jurisdiction under the Constitution". Any restriction to the Supreme Court's appellate jurisdiction arguably would need to ensure it was compatible with the fundamental objective intended by Article 34.5.4 and was not overly restrictive and be appropriately provided for.

Again on first glance, this restriction on upward appeal would appear to have profound practical implications on the Circuit Courts duty to make Preliminary References to the EU Court of Justice under Article 267 of the TFEU where the national courts need the assistance to interpret EU law so as to ensure a consistent application of EU law. Equally so for the High Court, albeit the High Court certainly does make preliminary references on environmental matters currently. I would be happy to expand further on the what the CJEU has set out in what has become known as the *Cilfit* test and the implications for closing off matters of interpretation of EU law.

Head 13 – Specialised Provisions

Sub-head 1 provides for a limited carve out from the Part 3 provisions in respect of Head 10,11, and 12 which excludes JR under Part 9 of the Planning and Development Act 2024 as has been highlighted earlier. However much this is very problematic then still falls to be considered under Heads: 8 and 9 and this head even for JR under the 2024 Act. Of serious concern also is that the rest of environmental JR falls to be impacted by Heads, 8,9,10,11 and 12 and indeed on the further proposals under this Head with the consequential concerns arising on access to justice rights in the environmental sphere and the protection of the environment and impact to the public benefit and common good arising from that, particularly at this ever narrowing window to address the inter-dependent climate and biodiversity crisis. It is ironic how calls to restrict JR in the context of recent flooding, risk exacerbating the very reasons for the floods, and compounding further climate risk and environmental damage by risk allowing ill-considered and flawed decisions arise stand un-challenged, with very real practical consequences for those who live in and around the consequences of such flawed decisions. Environmental law provides for processes and assessments to facilitate informed decision-making in the public interest and to protect our most important habitats and species. We risk compromising the effectiveness of its implementation and enforcement at the cost and expense of the public interest, albeit as an eNGO I would also speak to the importance of respecting and protecting the species and habitats we share this planet with, and giving proper consideration to our wider obligations on the transboundary and global implications of our environmental decision-making.

Sub-head 2 provides for specific considerations in respect of JR "relating to a decision or determination under Part VIA of the Foyle Fisheries Act 1952" and does not allow a Court decline to consider an application " by reason only of the fact that the decision or determination the subject of the application— (i) was made, or is to be or may be made, outside the State, or (ii) relates to a place that is outside the State."

Sub-head 3 of Head 13 introduces some further specifications in respect of the window of time to file an application for JR under Head 10(2)(d), and further specifications on when an application for leave can be and can't be made *ex-parte* (that is without the other side being present). These two further specifications are set out in schedule 3 in columns 2 and 3 respectively. Currently schedule 3 refers to matters concerned with immigration and assylum matters primarily. It would be concerning to see environmental matters enter here, unless they were to be generously provided for and operate to extend the window for applications for leave for JR and provide for *ex-parte* applications, save where the Court considers it important and in the interests of justice to hear from the other side before determining leave.

Sub-head 4

in sub-paragraph (a) replaces “quo warranto” with “prohibition” in s.279(1)(b) of the 2024 Act – and these do not appear the same. No rationale is clear for this.

In sub-paragraph (b) there is a typo as the subsection being referred to in s279 is missing, but it would seem safe to presume from the substitution proposed that it is ss 2. It operates to replace a reference to the Rules of the Superior Courts with a reference to Part 3 of the bill/Act arising from this GS. Given the scope of matters covered by the Rules of the Superior Court this would seem unwise, and risks omission of matters which have been relied upon as being clear from the rules no longer being so. It also appears to ousters the role of the Rules of the Superior Courts, and the consideration and collective wisdom and experience of the Rules Committee on prescribing matters relevant to the ordering and running of the court etc and which are best left to such rules and not confined to prescription in primary legislation and the practical difficulties that entails.

Head 14 - Enquiry as to the lawfulness of Detention (Habeas Corpus)

It is hard to over-estimate the importance of Habeas Corpus, and Article 40.4 of our Constitution.

In the last circa 6 months in particular we have seen a very evident increased hostility toward environmental defenders and those exercising their rights under the Aarhus Convention in conformity with the Convention in the highly charged and orchestrated narrative we have seen and heard against those pursuing JR in the planning and environmental sphere, and against their lawyers. I have an extensive catalog of this and would be happy to share it with the Committee if interested.

Additionally, we have the ongoing failure to meaningfully address Strategic Litigation Against Public Participation, SLAPP and associated intimidatory practices. In that context we have also seen enacted in 2024 and commenced this summer really chilling provisions on standing which require small local groups to disclose and exhibit in their application for JR the names and addresses of those who supported the taking of the JR.

We have seen an unspeakable decline in respect for Human Rights in the UK, including on the right to peaceful protest, and the highly questionable and prescription and outlawing of organisations.

There is in short no reason for complacency here in respect of the importance of Habeas Corpus, and the ability of the Court to make inquiries as to the lawfulness of Detention, and the ability to request that. I am conscious of one former member of the judiciary saying to me – it is the greatest privilege and duty of a judge.

I would simply further highlight the obligations under Article 3(8) of the Aarhus Convention which provides:

> "Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings."

I would recommend

- The Committee needs to exercise every vigilance throughout its PLS and beyond in respect of protecting Habeas Corpus.
- The Committee should take the opportunity of this GS to address the issue of SLAPP effective and to revisit and lower the strike-out threshold for it. I would be happy to provide more details on this.

Sub-head