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Re: Submission from Comhshaol, the Climate Bar Association

A Chairde,

I am Senior Counsel at the Bar of Ireland and I writing in my capacity as Chair of Comhshaol, the Climate Bar Association. The Climate Bar Association is specialist voluntary association of barristers at the Bar of Ireland, which aims to act at the forefront of environmental justice and law in Ireland and to become a thought leader of climate and environmental law in Ireland.

Enclosed is the submission prepared on behalf of Comhshaol, the Climate Bar Association, for the Citizens' Assembly on Biodiversity Loss. As will be seen, this submission reflects the expertise of our members, supported by a significant volume of research, undertaken over recent years. The submission also makes recommendations on how the law could be strengthened to support the aims of the Citizens' Assembly. We would be delighted to make a presentation to the Citizens' Assembly based on this submission.

Further, following discussions with Art O'Leary at the briefing on 12 June last, we understand that it is thought that it may be useful to provide the members of the Citizens' Assembly with an overview of the process of how laws come into force in Ireland. In this regard, we enclose a power point presentation file containing slides which could support such a briefing. Again, we would be delighted to present this to the Citizens' Assembly, if this were thought to be useful.

Please do not hesitate to get in contact, should you wish to discuss any element of the process or our submission.

Is mise le meas,

Clíona Kimber S.C.
The Bar of Ireland

Chair: Clíona Kimber SC **Secretary:** Christopher Mills BL **Treasurer:** Conor O'Higgins BL
Committee Members: Deirdre Ní Fhloinn BL, Louise Reilly BL, Aoife Sheehan BL, Donnchadh Woulfe BL
Honorary President: Turlough O'Donnell SC



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An Leabharlann Dlí

— Submission to the Citizens' Assembly on Biodiversity Loss

July 2022

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1. Executive Summary/Achoimre Fheidhmeannach

To address the environmental crisis and protect biodiversity, we need good laws and law enforcement to support science and government action.

This document outlines the Comhshaol, the Climate Bar Association's view and proposals on the issue of biodiversity loss and how the State can improve its response to this challenge. As a group of legal practitioners, our suggestions relate to the law governing biodiversity.

Our Recommendations have strong links to the Terms of Reference (TOR) of the Citizens' Assembly, considering among other things:

- how legal reform presents key opportunities to reverse biodiversity loss and addressing its drivers through better regulation and enforcement, (TOR 2)
- how to make biodiversity law accessible to people and how to integrate the concerns and voices of the general public into our laws, (TOR 6)
- how to develop coherence and synergies in our legal and administrative system, (TOR 5) and
- how this will overall improve the State's response to the issue in a resource-efficient way. (TOR 7)

In short, we believe that the law, if used effectively, can help us to combat biodiversity loss. We engaged in extensive deliberations and consultation to reach our conclusions.

Our Recommendations are:

- Introducing an amendment to the Constitution which would recognise the right to a healthy and biodiverse environment,
- Establishing a specialised low-cost environmental and biodiversity Court,
- Strengthening the infrastructure of the State to protect our biodiversity through the establishment of an independent State protector for the environment, whose sole remit will be the protection of the environment,
- Changing the law to open up legal standing (i.e. who can take an environmental case to court),
- Introducing class actions (allowing groups of citizens to take cases together), and
- Improving sanctions to make sure the law is actually enforced,
- Codifying environmental law to make it easier to understand and use.

Chun aghaidh a thabhairt ar an ngéirchéim aeráide agus chun bithéagsúlacht a chosaint, tá dlíthe maithe agus forfheidhmiú na ndlíthe ag teastáil uainn.

Tugann an doiciméad seo achomire ar dhearcadh agus ar mholtaí Comhshaol faoi mheathlú na mbithéagsúlachta agus faoi conas gur féidir leis an Stát feabhas a chur ar a fhregairt agus iad ag tabhairt aghaigh ar an dushlán seo. Mar ghrúpa chleachtóirí dlí, baineann ár moltaí leis an dlí a rialaíonn bithéagsúlacht.

Tá naisc láidre ag ár moltaí leis na Téarmaí Tagartha (TOR) atá ag Tionól na Saoránach, ag breithniú ar, i measc rudaí eile:

- Conas a chuireann athchóiriú dlíthiúil príomhdheiseanna ar fáil chun caillteanas bithéagsúlachta a aisiompú agus chun aghaidh a thabhairt ar a tiománaithe trí rialáil agus forfheidhmiú níos fearr, (TOR 2)
- Conas an dlí bithéagsúlachta a dhéanamh inrochtana do dhaoine agus conas ábhair inní agus guthanna an phobail i gcoitinne a chomhtháthú inár ndlíthe, (TOR 6)
- Conas léirchruinneas agus sineirgí a fhorbairt inár gcóras dlí agus riaracháin, (TOR 5) agus
- Conas a fheabhsóidh sé seo freagra an Stáit ar an gceist ar bhealach atá tíosach ar acmhainní. (TOR 7)

I mbeagán focal, creidimid gur féidir leis an dlí, má úsáidtear go héifeachtach é, cabhrú linn dul i ngleic le caillteanas bithéagsúlachta. Chuamar i mbun pléití agus comhairliúcháin fhairsing chun teacht ar ár gconclúidí.

Is iad ár Moltaí:

- Leasú ar an mBunreacht a thabhairt isteach a thabharfadh aitheantas don cheart do thimpeallacht shláintiúil agus bhithéagsúil,
- Cúirt speisialaithe comhshaoil agus bithéagsúlachta ar chostas íseal a bhunú,
- Infrastruchtúr an Stáit a neartú chun ár mbithéagsúlacht a chosaint trí chosnóir Stáit neamhspleách a bhunú don chomhshaol, arb é a shainchúram é an comhshaol a chosaint,
- An dlí a athrú chun seasamh dlíthiúil a oscailt (i.e. cé atá in ann cás comhshaoil a thabhairt os comhair cúirte),
- Cásanna Grúpaí a thabhairt isteach (ag ligint do ghrúpaí saoránach cásanna a thógáil le chéile), agus
- Smachtbhannaí a fheabhsú chun a chinntiú go gcuirtear an dlí i bhfeidhm,
- Dlí comhshaoil a chódú chun é a dhéanamh níos éasca le tuiscint agus le húsáid.

2. About Us/ Fúinn

Comhshaol, the Climate Bar Association

Comhshaol, the Climate Bar Association, is a specialist association of the Bar of Ireland which aims to act at the forefront of environmental justice and law in Ireland and to become a thought leader of climate and environmental law in Ireland.

CASE STUDY: OUR WORK
Our Draft Law on Irish Honey Bees
<p>The Island of Ireland has a unique ecosystem. Ireland currently imports large amounts of foreign honeybees into Ireland, which are native to southern Europe. Those bees are harmful to native pollinators in Ireland, who are adapted to survive in our climate. Those native pollinators are essential to preventing biodiversity loss.</p> <p>The imported honeybees outcompete native pollinators in terms of nectar (food) collection, but are not adapted to survive in the long term, resulting in a constant need to restock non native hives. These foreign bees also bring diseases which can be devastating for Irish pollinators.</p> <p>The Climate Bar Association drafted a new law to prevent the importation of foreign bees, in order to allow native species to thrive. A key part of this work was to ensure that the new law would not breach EU Law. EU law's default position is to allow free trade in goods across the EU. However, the Climate Bar Association's draft law was found not to breach EU law, on the basis that it represented a proportionate response to the environmental threat cause by bee importation in Ireland.</p> <p>The draft law has been approved by all political parties in the Seanad, and must now be voted on by the Dáil, before being signed into law by the President.</p>

The Bar of Ireland

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,170 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advice of the highest professional standards. The principles the barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

3. Our Methodology/ Ár Modheolaíocht

Comhshaol, the Climate Bar Association compiled this submission and our Recommendations to the Citizens' Assembly using findings from three interrelated sources:



2020-21 Task Force Research Project & Symposium

In 2021, Comhshaol, the Climate Bar Association established a Task Force to review environmental law governance and enforcement in Ireland. It examined best practice world-wide to make proposals for Ireland. These research efforts are the basis of the Recommendations in this submission.

To read the full papers delivered at the Climate Bar Symposium 2022, please go to https://events.lawlibrary.ie/ClimateBarSymposium_Papers

To watch a recording of the symposium, please see our home page: <https://www.climatebar.ie/>

External Stakeholder Engagement 2021

A stakeholder feedback exercise was undertaken in 2021 as part of the Task Force's project.¹

We engaged with people involved in environmental protection in Ireland, including advocacy organisations, community groups, or local authorities, who are often at

¹ This workstream was delivered via the exceptional work of UCD Law student Demetra Herdes and UCD Law graduate (2021) Ruairi McCabe under the supervision of Deirdre Ní Fhloinn BL. The full report including methodology can be found on page 115 at: https://events.lawlibrary.ie/ClimateBarSymposium_Papers.

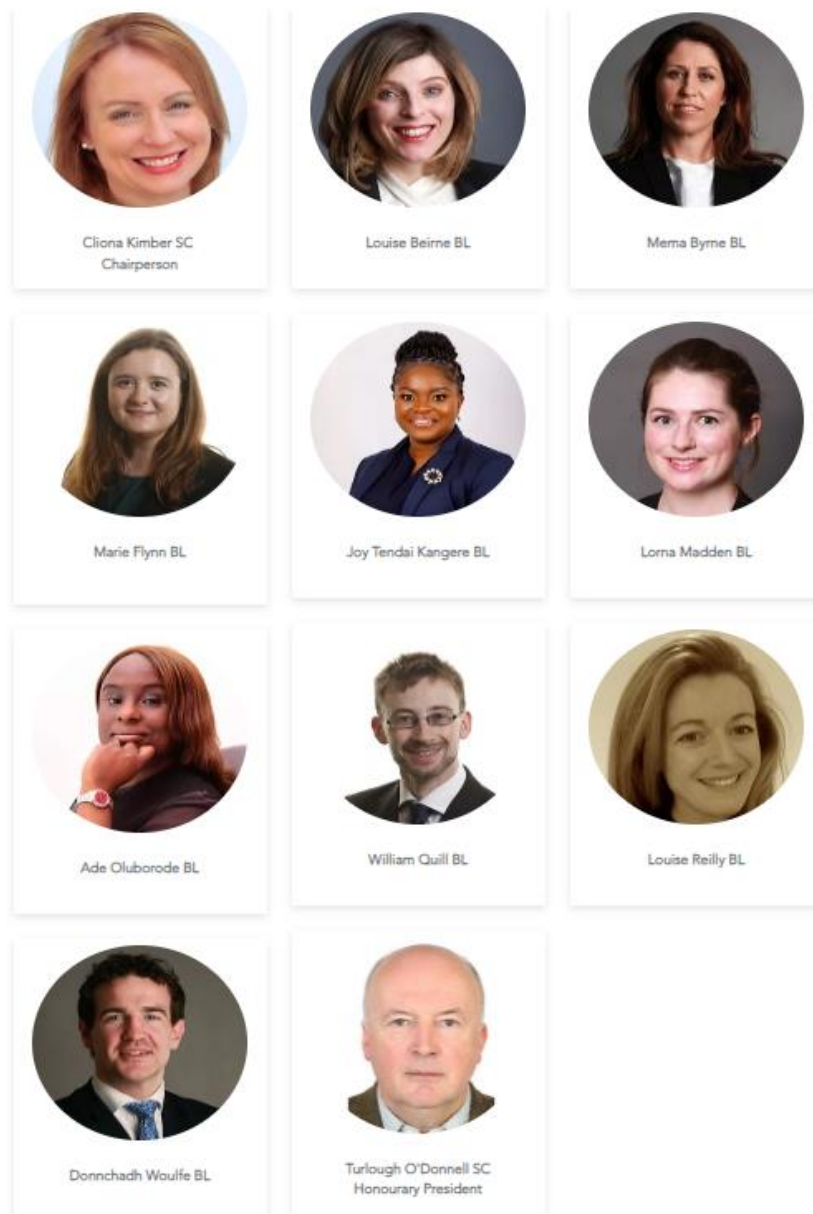
the receiving end of complaints from members of the public about environmental breaches and local biodiversity threats.

Stakeholders were invited to reflect on the current stage of environmental legislation, its implementation, and its shortcomings. The results of that research informed the provisions of the Draft Statute [see Recommendations] and highlighted problems in coverage of environmental and biodiversity legislation and in its enforcement in Ireland.

Internal Deliberation (Think-In)

In July 2022, we hosted a ‘Think In’ with members of the Climate Bar Association to develop further our Recommendations. This was a free-flowing ‘roundtable’ style discussion. Some ideas from the discussion were new while others augmented our existing research.

4. Committee/ Coiste



Full biographies can be found at <https://www.climatebar.ie/committee>

Chairperson: Clíona Kimber SC

Cliona Kimber SC is a Senior Counsel at the Bar of Ireland with a specialist practice in EU and employment and equality law. She has considerable experience in advising, litigation and dispute resolution. Before coming to the Bar Clíona was a lecturer on Environmental Regulation at the University of Aberdeen, Scotland and Director of the Centre for Environmental Law and Policy. She has written internationally on environmental regulatory law. She is also the co-author of two books on employment law and is currently completing a second edition of Employment Equality Law, to be published in 2022. She is a CEDR trained Mediator. Déanann Clíona cleachtadh as Gaeilge chomh maith. She is currently Chair of Comhshaol: the Climate Bar Association and a committee member of Cumann Barra na Gaeilge.

5. What is Law? / Cad is Dlí ann?

A law is simply a rule about what Irish people should and should not do which is backed by the power of the Irish State. Our elected representatives in the Oireachtas debate what rules people in Ireland must follow. Once a decision is reached it is voted on and signed by the President and is called a law. Often rules have to be changed because times have changes, or because new problems arise. Because there are severe challenges to biodiversity in Ireland, Irish people are now debating whether new rules need to be adopted which could stop activities in Ireland which destroy biodiversity, or create incentives for Irish people to take positive actions to protect biodiversity.

In Ireland our laws are enforced in the Irish Courts.

Like the natural environment, which permeates every aspect of our lives, from the air that we breathe to the food that we eat, the law permeates all policies and practices of our society.

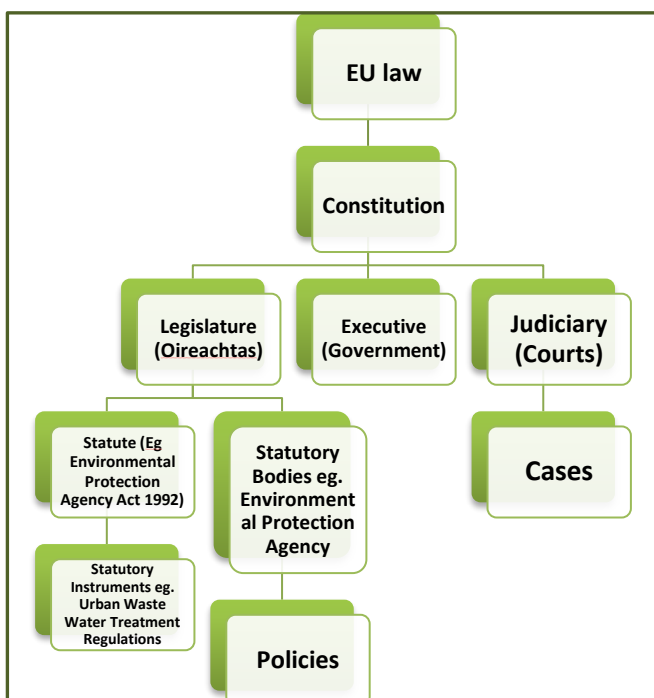
Our Constitution, Bunreacht na hEireann, was enacted in 1937. It is the most important set of rules, and every other rule enacted has to be in line with the Constitution. It not only guarantees our fundamental rights as Irish Citizens, it sets out values as a nation and the principles according to which our State must function. There have been many changes to it from time to time to reflect changing values, for example changes about a right to divorce and about the right to life. At the moment, there is no clear statement that there is a constitutional right to a healthy and biodiverse environment.

The Constitution also sets out the way in which the country is to be run- as a democracy, with a President and a Taoiseach, elected representatives called Teachta Dála, and Senators as well as Courts. These together are called the government of the country. Under the Constitution, there are three branches of government: the legislature, the executive and the judiciary.

The legislature, which is made up of the two Houses of the Oireachtas, the Dail and the Seanad, debates the appropriate rules to be adopted and enacts these as laws.

The executive is the Ministers, Government Departments and the Civil Service. It is the part of government that operates laws and policies, takes in the state monies and decides how the state income is to be spent. The Ministers are allowed to flesh out the detail of the law adopted by the Dáil and Seanad. The Constitution states that while the “sole and exclusive power of making laws for the State” is vested in the Oireachtas under Article 15.1 of the Constitution, a Minister or other State body

to whom that power has been delegated by primary legislation, may make statutory instruments. Statutory instruments are also known as secondary legislation.



The judges in the the courts interpret the law. As Ireland is a common law legal system, the law is developed as it is interpreted by the judiciary in particular cases. When a case is decided cases a legal precedent is set, and the result in that case must be followed in subsequent cases which are decided by lower or equivalent courts. Accordingly, judgments are often referred to as “case law”.

All legislation must comply with the Constitution and cannot interfere with rights established under the Constitution. **At present there is no explicit constitutional right to**

a sustainable environment in which biodiversity is protected.

A referendum could introduce such a right by amending the Constitution.

As a member of the European Union, Ireland also has obligations under European Union law. As part of its commitments under European Union law, Ireland has agreed in a referendum that European Union law in some areas is superior to our national law, including the Constitution.

EU law comes primarily in the form of regulations and directives. Regulations have immediate effect once they are made by the EU. Directives are laws which tell member states, such as Ireland to introduce national laws. An example is the Habitats Directive, which requires Ireland to protect Special Areas of Conservation (SACs) and Special Protection Areas (SPAs).

Ireland also has made International commitments to other States under international law, but those do are not binding in Ireland, unless the Oireachtas passes laws to incorporate the international agreement into national Irish law. Examples of international agreements, which Ireland has signed up to, include the

Aarhus Convention.² Over 60 pieces of Irish law have been used to implement the Aarhus Convention.³

Irish citizens have some additional rights because we signed up to the European Convention on Human Rights and all rights in this document are part of our law. The European Court of Human Rights makes rulings in relation to breaches of those rights, but the decisions of that Court are not enforceable in Ireland.

Ireland's Current Environmental Law Regime

Irish Law that protects the environment and biodiversity is spread over many pieces of legislation. It is **confusing and uncertain**, even for lawyers. For non-lawyers, it is next to impossible to be fully aware of all the relevant laws.

The Climate Bar Association's Task Force compiled an Inventory of Environmental Legal Measures.⁴ That inventory – which is only a list of the names of the laws - runs to some 200 pages. As a case study, **consider the below table below**. It shows the inventory's section on legal measures governing Flora & Fauna and demonstrates the vastness and disparateness of the Irish environmental legal regime.

EXAMPLE: Inventory of Legal Measures Governing Flora & Fauna	
International Conventions and Agreements	
Convention on International Trade in Endangered Species (CITES), Convention on the Conservation of European Wildlife and Habitats (Berne Convention), Convention on Migratory Species (Bonn Convention), Convention on Biological Diversity, Cartagena Protocol (Effective 2003), Nagoya Protocol (Effective 2014), Agreement on the conservation of African Eurasian Migratory Water birds (AEWA).	
European Union Law	
EIA Directive (85/337/EEC), Habitats Directive (Directive 92/43/EEC), Birds Directive (Directive 2009/147/EC on the conservation of wild birds)	
National Law	
Acts of the Oireachtas	
Agriculture Act 1931, Noxious Weeds Act 1936, (Whale Fisheries Act 1937) see in "Fishing", Greyhound Industry Act 1958 (Re: Hares, Irish Coursing Club), Wildlife Act 1976 , Greyhound Industry (Amendment) Act 1993, Heritage	

² The United Nations Economic Convention for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) was adopted on 25 June 1998 in the Danish city of Aarhus. Ireland ratified the Convention in June 2012.

³ <https://www.gov.ie/en/publication/b3b1a-aarhus-convention/>

⁴ This inventory was prepared by Cárthach Ó Faoláin, Dirayati Fatima Turner and Stuart McCabe. It is available at https://events.lawlibrary.ie/ClimateBarSymposium_Papers

Act 1995, Firearms (Temporary Provisions) Act 1998 (32/1998), Wildlife (Amendment) Act 2000, Horse and Greyhound Racing Act 2001, Wildlife (Amendment) Act 2010, Wildlife (Amendment) Act 2012, Heritage Act 2018 (15/2018), Part 3 (ss. 6-10), Greyhound Racing Act 2019.

Statutory Instruments (abridged list; here are 23 of 472 total)

Black Scab in Potatoes (Special Area) Order 1933 (Amendment) Order 1948. S.I. 375/1948, Black Scab in Potatoes (Special Area) Order 1945. S.I. 36/1945, The Colorado Beetle Order 1931, Colorado Beetle Order 1945. S.I. 228/1945, Control of Dogs Act, 1986 (Guard Dogs) Regulations 1988. S.I. 255/1988, Control of Dogs Act, 1986 (Guard Dogs) (Amendment) Regulations 1989. S.I. 329/1989, Diseases of Animals (Disinfection) Order of 1931. S.I. 59/1931, Diseases of Animals Act 1894 (Extension to Horses Asses Mules Dogs and Cats) Order 1933. S.I. 17/1933, Foot and Mouth Disease (Imported Carcasses and Packing Materials) (Amendment) Order 1938. S.I. 287/1938, Foot and Mouth Disease (Imported Packing) Order of 1923 Amendment Order of 1931. S.I. 39/1931, Foreign Hay and Straw Order 1932. S.I. 19/1932, Importation of Carcasses (Prohibition) Order of 1926 (Amendment) Order 1938. S.I. 65/1938, Importation of Strawberry Plants and Blackcurrant and Gooseberry Order 1946. S.I. 358/1946, Nature Reserve (Slieve Bloom Mountains) Establishment Order 1985. S.I. 382/1985, Nature Reserve (Tralee Bay) Establishment Order 1989. S.I. 106/1989, Nature Reserve (Uragh Wood) Establishment Order 1982. S.I. 380/1982, Nature Reserve (Garryrickin) Establishment Order 1980. S.I. 389/1980, Nature Reserve (Glen of the Downs) Establishment Order 1980. S.I. 178/1980, Wildlife Act 1976 (Protection of Wild Animals) Regulations 1980. S.I. 282/1980, Wildlife Act 1976 (Section 44) (Recognised Bodies) Regulations 1977. S.I. 335/1977, Wildlife (Wild Mammals) (Open Seasons) (Amendment) Order 1986. S.I. 306/1986

We can see from this extensive list that while there is a lot of law on biodiversity, a lot of it is very old and the coverage is patchy and confusing. It is difficult even for lawyers to understand. This means that it is very difficult and expensive to enforce.

A law which cannot be enforced is of no use to protect biodiversity.

Relevance for the Citizens' Assembly

A key question for the Assembly to consider is **what does it mean if there are so many different legal instruments governing biodiversity loss, and do they actually work?**

The Terms of Reference of the Citizens' Assembly ask the Assembly to consider opportunities to reverse biodiversity loss, how to create better biodiversity policy coherence, how the State can respond to the biodiversity loss challenge and how it can be best resourced to do so. **A re-think of the law governing biodiversity is a crucial part of this work.**

We ask that you consult the following sections outlining key problems with biodiversity law and how the law can be used to combat biodiversity loss, and to consider our Recommendations that follow.

6. How We Can Use The Law To Combat Biodiversity Loss/ An Dlí a úsáid chun dul in aghaidh meathlú na mbithéagsúlachta

Our Research and Proposals

Comhshaol, the Climate Bar Association has conducted stakeholder engagement, extensive research and much internal deliberation to review the law relating to biodiversity and the environment in Ireland. Based on what we have learned, we have developed **Recommendations** we would like the Assembly to consider. We believe that these reforms will be crucial to tackling the biodiversity crisis in Ireland.

The following sections outline the Climate Bar Association's review of the law relating to biodiversity and the environment in Ireland, as well as our proposals for strengthening and streamlining these laws. **Laws that are simpler to understand, easier to enforce and which afford better rights and protections for nature and for citizens will all create a positive impact for our environment.**

What the stakeholders said

The key findings of the stakeholder research piece highlighted a number of recurring themes that brought up both expected and unexpected issues in the course of our work. These included challenges with enforcing legislation relating to biodiversity protection [see Section 11]. We also found that citizens are often not able to report damage to biodiversity in their community because so much of the damage is gradual and not directly visible, and that people can be reluctant to report their neighbours or local businesses when they cause the damage.

Stakeholders also suggested that there was an **overarching need for an effective national enforcement strategy**, implemented consistently. They noted that some activities that are harmful to biodiversity are barely regulated at all.

CASE STUDY: INADEQUATE LAW

No Law to Prevent Inaccurate Claims in Advertising ("Greenwashing")

In August 2021 Land Rover began a series of advertisements with an online video and "Sponsored Article" in a number of national newspapers, which made claims, amongst others, that buying a 3-litre diesel car was a sustainable option.

Numerous complaints were made to the Advertising Standards Authority of Ireland, (including by members of the Climate Bar Association) saying that the ads were misleading and unsupported by evidence.

Almost one year later, the complaints were upheld, because Land Rover had no evidence to support claims made in their ads. However, the only thing the ASAI could do was direct Land Rover not run the ads again.

However, Land Rover had long since finished their campaign, this ruling had no effect whatsoever.

There is no provision in law fines to be imposed for those who engage in misleading greenwashing, or the newspapers or television channels who are paid to publish the misleading ads.

7. Environmental Courts – a Legal Home for Environmental Issues in Ireland⁵ / Cúirt Comhshaoil – éasca le húsáid agus ar chostas íseal

Solving the environmental crisis and protecting biodiversity needs good laws and law enforcement, as well as science, or government action. It requires enforcing existing environmental and bio-diversity protection laws. Courts must have expertise on the vast array of biodiversity laws and be able to enforce them. Without law and an effective and accessible court process – there is no enforcement and no protection.

There are a lot of gaps in the laws needed to protect biodiversity. We talk about that later. But even where Ireland has enacted laws to protect the environment and biodiversity they are not obeyed: rivers are still polluted; habitats cleared and drained, mature trees cut down, rural hedgerows butchered in nesting season. Why are our existing laws not enforced?

The local authorities and bodies to enforce them have very limited resources, and the legal system to enforce them is too complex and expensive.

Our current court system for environmental enforcement is not fit for purpose. Most environmental litigation is funneled into judicial review of planning permissions. The real issue in controversy is environmental protection, not a breach of planning law procedures. The planning system is hopelessly congested. Legitimate planning and building is delayed.

The adjudication of the breaches of environmental laws and rights creates particularly acute challenges for a court system designed to deal with bi-party litigation.⁶ Why?

⁵ Research conducted by Cliona Kimber SC, with additional research by Marie Flynn BL, Pierce Dunne, Meghan Lennon and Shauna Richardson.

⁶ Warnock, C., 'Reconceptualising Specialist Environmental Court and Tribunals' (2017) 37(3) *Legal Studies* at 391-417.

1. Environmental protection rules impact on a wide range of parties.⁷
2. The issues transcend traditional bi-party litigation - and that is what the current court system is designed for.
3. Environmental issues often need decisions that are future-facing as opposed to fact-finding in relation to the past, and which allocate risk-burdens. The current court system is about finding out who did wrong and sanctioning them.
4. Adjudicators have to decide between complicated disputed scientific evidence and would benefit from their own independence guidance and experts.
5. Environmental decisions work better with conciliation, arbitration and mediation - our current court sanctions are based on criminal law.
6. The ordinary courts are too expensive.
7. The procedures are too complicated.

In 2016, the United Nations Environment Programme saw the need for sound governance and enforcement of the environmental rule of law as crucial to delivering the 2030 Agenda for Sustainable Development and the Paris Agreement on Climate Change. Specialist Environmental Courts and Tribunals are now accepted by the UN as a necessary part of securing the important goals of the UNEP programme.⁸ To assist in the environmental law governance and enforcement, the UNEP commissioned a guide to environmental courts and tribunals to assist legislators in adopting environmental courts in their respective countries.⁹ Since the turn of the millennium, there has been a proliferation in specialist environmental courts and tribunals around the world, with 1,200 such bodies in 44 nations.¹⁰

The internationally accepted study on environmental courts and tribunals is 'Greening Justice' written by G and K Pring in 2009.¹¹ In their two-year worldwide study, Pring and Pring found that where adjudicating institutions are effective in handling environmental disputes, they provide a better pathway to reconciling the

⁷ Warnock, 'Reconceptualising Specialist Environmental Courts and Tribunals' (2017) 37(3) *Legal Studies* 391-417 at page 391.

⁸ UN 2030 Agenda for Sustainable Development and Sustainable Development Goals, Goal 16.

⁹ Pring G. and Pring C. '*Environmental Courts and Tribunals: A Guide for Policy Makers*' (2016: United Nations Environment Programme) available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf>

¹⁰ Warnock, C., *Environmental Courts and Tribunals* (2020: Hart Publishing) at page 2. Robinson, N, "The Nature of Courts' Voight, C and Makuch Z. in *Courts and the Environment* (Edward Elgar:2018) at page 4.

¹¹ Pring, G and Pring C, *Greening Justice, Creating and Improving Environmental Courts and Tribunals*. (2009: The Access Initiative of the World Resources Institute). It was recognised that while governments, including Ireland, signed up to the Rio Declaration at the first Earth Summit that Governments have done less well in offering new means to resolve environmental disputes, justly and effectively. Rio Principle 10 recognizes that effective access to judicial and administrative proceedings and proper redress and remedy are needed to successfully handle environmental issues.

competing interests necessary for achieving sustainable development, greater accountability, and acceptability for decisions on environmental matters.¹²

It is accepted internationally that a truly effective Environmental Court requires a number of features:¹³

1. It should have a wide and comprehensive jurisdiction.
2. It should have broad rules of standing, facilitating access to justice.
3. The judges or adjudicators appointed should be independent and have security of tenure.
4. The adjudicators in the Environmental Court should be composed not only of judges but also of mediators and conciliators.
5. The adjudicators should be able to build expertise through specialisation and also have access to technical scientific expertise in decision making.
6. The Environmental Court must have a capacity to engage in alternative dispute resolution, including mediation, conciliation and arbitration of a dispute.
7. It can be either an administrative tribunal or judicial body, or a combination of both.
8. There should be a limitation on costs.
9. It should provide for just, quick and cheap resolution of disputes.

The Programme for Government adopted by the coalition elected in 2020 provides for an environmental division of the High Court - there has yet to be any thorough examination of what best practice in Ireland for an environmental court or tribunal would be.

The Climate Bar Association believes that there is a good model for Ireland to follow in the Land and Environment Court of New South Wales, Australia. It was established forty years ago. It has been widely seen as one of the best models worldwide.¹⁴ Australia is a common law country, like Ireland. The NSW model could be adopted in Ireland, with some modifications to take account of our Constitution.

¹² Pring, G. and Pring C., *Greening Justice, Creating and Improving Environmental Courts and Tribunals*.(2009: The Access Initiative of the World Resources Institute).

¹³ Preston, B., 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 *Journal of Environmental Law* at page 390; Warnock, C., *Environmental Courts and Tribunals* (2020: Hart Publishing); Pring G and Pring C, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*.(2009:The Access Initiative of the World Resources Institute).

¹⁴ Robinson, N., 'The Nature of Courts' in Voight, C. and Makuch Z., *Courts and the Environment* (Edward Elgar:2018) at page 30.

It could be based on the Irish Labour Court and Workplace Relations Commission models.

An Irish environmental court must be more than a fast-track planning court at High Court level. The High Court system of adjudication is too resource heavy and too slow - both for the state and for users. While High Court litigation is necessary for some dispute, it is not necessary for most disputes.

We therefore propose for Ireland:

1. A specialist Environmental Court, along the lines of the Workplace Relations Commission and Labour Court,
2. Governed by overarching principles of environmental law,
3. With expanded rules of standing,
4. Provision for class actions,
5. Focus on mediation, arbitration and agreed solutions and administrative sanctions for enforcement,
6. With an appeal to the High Court or Circuit Court,
7. Sitting alongside the criminal courts.

There is a detailed paper which examines best practice worldwide in Environmental Courts.¹⁵ It considers these practices in an Irish context. It ultimately presents a proposed model for an environmental court suitable for Ireland. The paper does so in the context as part of the overall Report of the Task Force into reforming environmental law in Ireland.

OUR RECOMMENDATION: ESTABLISH A SPECIALISED LOW-COST ENVIRONMENTAL & BIODIVERSITY COURT

¹⁵Find this on page 5 [here](#).

8. Environmental Rights & Principles – Integrating these into all areas of Law¹⁶ / Cearta agus Prionsabail Comhshaoil – comhtháthú sa Dlí

To ensure the environment and biodiversity is protected, we propose the integration of the following rights and principles in our legal system.

Rights

The rights of nature: We should recognise the rights of nature to be protected, not as natural resource, but for its own intrinsic worth. A river in Quebec, Canada, has been granted legal rights¹⁷, and a number of other countries recognised the rights of nature in their constitutions.¹⁸ This affirms in law that nature deserves to be protected and means that citizens can take action on nature's behalf in court. It also means that citizens can be granted 'standing' to protect nature in court, as discussed in Section 9.

The right to a healthy environment: According to the Supreme Court, there is no legal basis for a right to a healthy environment in Ireland at the moment.¹⁹ An explicit right would protect both people and biodiversity by giving citizens a legal right to have their precious biodiversity protected. This measure, which has been recommended by the UN Human Rights Council,²⁰

EXAMPLE: ENVIRONMENTAL RIGHTS IN LAW

Here's what a constitutional provision on this right would look like:

- 1) All natural persons have the right to live in a healthy environment in which human life and biodiversity are preserved.
- 2) All persons in the State have the right to participate in decision-making procedures regarding the environment.

¹⁶ Research conducted by Louise Reilly BL, with additional research by Bartholomew Begley, Charlotte Rose Bishop and Mercedes McGovern.

¹⁷ Graham, Jack 'Canadian river wins legal rights in global push to protect nature' (24 February 2021, Reuters) available at: <https://www.reuters.com/article/us-land-rights-nature-trfn/canadian-river-wins-legal-rights-in-global-push-to-protect-nature-idUSKBN2AO2I3>

¹⁸ Surma, Katie, 'Panama Enacts a Rights of Nature Law' (25 February 2022: InsideClimateNews) available at: <https://insideclimatenews.org/news/25022022/panama-rights-of-nature/#:~:text=Panama%20now%20joins%20Bolivia%2C%20New,the%20legal%20rights%20of%20nature.>

¹⁹ *Friends of the Irish Environment v. Government of Ireland & Ors* [2020] IESC 49.

²⁰ UN Office of the High Commissioner for Human Rights, 'UN General Assembly must affirm right to healthy environment: UN experts' (6 July 2022: UNOHCHR press release) accessible at: <https://www.ohchr.org/en/press-releases/2022/07/un-general-assembly-must-affirm-right-healthy-environment-un->

would provide a basis for claims against government bodies or private entities who cause damage to biodiversity, because this damage would violate our right.

This right can be added to our Constitution by holding a referendum. Spain recognised a constitutional right to a healthy environment in 1978, and this continues to influence the development of robust laws that protect the environment there, including its Law on Natural Heritage and Biodiversity.²¹ The Government should also support proposals for this right to be added to the European Convention of Human Rights.²²

General principles

Education: Not just “greening” the existing curriculum, but fostering attitudes, integrating an understanding of the interdependency of all life.

Intergenerational equity and duty of care: Ireland should recognise this principle to protect future generations and allow them input into decision-making.

Restorative justice: Going beyond the adversarial paradigm, and trying to ‘restore’ nature before damage through forward-looking incentives and sanctions.

Ecocide: We should legislate to make ecocide (mass destruction/ harm done to nature) a crime, informed by international standards.

The integration principle: Environmental considerations should apply across all policy areas.

Proportionality: We should appropriately weigh the effects of potentially harmful activity, and take a holistic assessment of those effects, taking into account the entirety of processes and causations *involved*.

OUR RECOMMENDATION: RECOGNISE A LEGAL RIGHT TO A HEALTHY ENVIRONMENT: CALL FOR A REFERENDUM ON A RIGHT TO A HEALTHY ENVIRONMENT AND SUPPORT PROPOSALS TO RECOGNISE THE RIGHT IN THE EUROPEAN COVNTENTION ON HUMAN RIGHTS.

experts#:~:text=The%20resolution%20will%20be%20discussed,clean%2C%20healthy%20and%20sustainable%20env
ironment.

<https://www.ohchr.org/en/press-releases/2022/07/un-general-assembly-must-affirm-right-healthy-environment-un-experts#:~:text=The%20resolution%20will%20be%20discussed,clean%2C%20healthy%20and%20sustainable%20enviro>
nment.

²¹ see David R. Boyd, ‘Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment’ in John H. Knox and Ramin Pejan (eds.), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), page 26.

²²See: Willman, Sue and Heatley, Orla and Balfour-Lynn, Harry, The Right to a Healthy Environment in Ireland: Supporting the Proposal for a New Protocol to the European Convention on Human Rights (May 03, 2022). Available at SSRN: <https://ssrn.com/abstract=4104491> (accessed 23 July 2022).

9. Citizens' Voices in Court: Standing Issues in Environmental Cases²³ / Guthanna na Saoránach sa chúirt: buanfhadbanna i gcásanna comhshaoil

Courts globally are grappling with the unique procedural difficulties arising in modern environmental litigation, including in so-called “climate cases”. A key obstacle to the progress these cases is how a plaintiff can establish an entitlement to bring the claim in the first place (i.e. their “standing” in the case). Normally, standing is established only where a plaintiff demonstrates that they have suffered particular or individual harm, but this is more difficult in environmental cases, where the harm alleged is, in reality, more widespread, dispersed, and collective in nature. Damage caused to the biodiverse ecosystem of a river, for example, belongs to everyone but to no-one in particular.

If no standing is established, the courts are not allowed to even *consider* the merits of claims nor to look at whether damage to biodiversity occurred. We recommend that standing rules in environmental litigation are broadened, **to ensure that citizens seeking to take cases in the public interest to protect biodiversity do not fall at the first hurdle on purely procedural grounds.**

First, the Government should pass legislation allowing for the participation of environmental NGOs, as these entities are often best placed to make collective rights-based arguments, in biodiversity litigation. Allowing such groups to give voice to environmental rights claims offer the best guarantee that this kind of litigation develops in a resource-conscious and well-managed way, focusing on the real (public) issues for determination.

We also recommend the broadening of standing rules to vindicate rights of the so-called “future generations” most likely to be adversely impacted by issues like climate change and biodiversity loss. These include those not yet born, or those who have not yet suffered the harm anticipated, i.e. citizens who are alive today but who have not yet suffered the harm that is coming in the future. Permitting environmental NGOs to seek to vindicate the rights of such groups would give these future generations a voice in court, at a time when that voice is likely to have the most meaningful impact.

Finally, we recommend further consideration of how Ireland could better vindicate the rights or interests of the natural world itself; ‘rights of nature’ are now recognised in the constitutional regimes of a number of other jurisdictions and, more significantly, are legally exercisable by human “guardians” or trustees of the

²³ Research conducted by Aoife Sheehan BL, with additional research by Léana Gambert Jouan, Lauren Walsh and Peter Lyon.

environment. Such an approach would reflect the growing public recognition of the intrinsic value of the natural world and the need to afford it greater protection in its own right.

OUR RECOMMENDATION: EMPOWER ALL CITIZENS WITH ‘LEGAL STANDING’ TO PROTECT BIODIVERSITY IN COURT

10. Stronger Together: Empowering Citizens Groups in the Courts with Environmental Class Actions²⁴ / Ní heart go cur le chéile – Saoránaigh a chúmhachtú sna cúirteanna

Some issues affect a large number of people in a way that is very small individually, but it adds up to a lot of harm altogether. We propose that so-called “class actions” are introduced in Irish law so that citizens can group together to take environmental cases that they could never take individually. Class actions are common in the US and in Europe, but are not possible in Ireland because of older common law restrictions still in place.

Under the Aarhus Convention, Ireland must ensure that ‘members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities’ which contravene environmental law. We suggest that the lack of a class action procedure in Ireland means that some citizens do not have this access, and that introducing one would enhance access to environmental justice.

CASE STUDY: FAMOUS CLASS ACTIONS

Erin Brockovich

In the United States, environmental class actions are commonplace. You might have seen the movie *Erin Brockovich*, which tells the story of a group of California residents banding together to take a large company to court for contaminating their town’s drinking water.

It is our view that the current procedures available in Ireland (e.g., where one litigant take a ‘test case’ and others can follow with their own cases based on the result) are inefficient and insufficient. There is a growing trend globally of environmental litigation

whereby citizens attempt to hold their government to account through the courts,

²⁴ Research conducted by Orla Heatley LL.M, with additional research by Léana Gambert Jouan, Lauren Walsh and Peter Lyons.

as in the *Friends of the Irish Environment* case in 2020.²⁵ Groups of citizens affected by damage caused by private entities (e.g. a company polluting their local river) could also band together to challenge this in court. **This would be empowering for citizens concerned about biodiversity and there would also be benefits for the courts system itself.**

CASE STUDY: CURRENT CLASS ACTIONS
<i>Urgenda v Netherlands</i>
A Dutch environmental group, the Urgenda Foundation, and 900 Dutch citizens sued the Dutch government to require it to do more to prevent global climate change. The Court in the Hague ordered the Dutch state to limit GHG emissions to 25% below 1990 levels by 2020, finding the government's existing pledge to reduce emissions by 17% insufficient to meet the state's fair contribution toward the UN goal of keeping global temperature increases within two degrees Celsius of pre-industrial conditions. The court concluded that the state has a duty to take climate change mitigation measures due to the "severity of the consequences of climate change and the great risk of climate change occurring."

The key reasons to introduce a class action procedure are:

More effective- when citizens band together they can make a greater impact

Judicial efficiency – the courts can get through these cases much faster if they are grouped together.

Access to justice – Allowing class actions means that courts can consider the total harm on a large group or on society where the harm to one person might not be enough to justify a case. More people get access to the courts, and access to environmental justice.

Less risk for citizens- there is no risk for an individual citizen of having a large cost bill awarded against them

All of this means that more environmental claims can be heard, and that the environment can be better enforced through empowered citizens who are stronger together.

OUR RECOMMENDATION: ALLOW FOR ENVIRONMENTAL CLASS ACTIONS

²⁵ In *Friends of the Irish Environment v The Government of Ireland & Ors (Approved)* [2020] IESC 49 (31 July 2020), the Supreme Court found the Irish government's plan for tackling climate change was unlawful for a number of reasons, including it did not have the level of specificity required for such a plan.

11. Sanctions and Enforcement of Environmental Law: Current Sanctions and New Remedies²⁶ / Smachtnhannaí agus forfheidhmiú de Dhlí comhshaoil

Enforcing environmental laws is a challenge for most states. It can be costly to fund Environmental Protection agencies, and to ensure that they have sufficient staff and resources to regulate polluters and entities which breach environmental standards. Local authorities and government agencies have stretched budgets and limited capacity to enforce law. Therefore, enforcement of environmental law is often inadequate, and biodiversity suffers as a result. This is not only a matter of funding, but also arises because of structural barriers to enforcement and a lack of clarity as to which body has responsibility for enforcement. A dedicated environmental Court (see *section 7*) and a dedicated body to oversee implementation of environmental law would create synergies and policy coherence.

In Irish law, there are a number of legislative acts that provide sanctions for breaking environmental law, including the Wildlife Act 1976, the Planning and Development Act 2000, and the Waste Management Act 1996. **Generally speaking, the potential sanctions based on criminal law are strong and quite harsh, often threatening high fines or jail-time, but enforcement of these is lacking.** Under the Wildlife Act, for example, there were only 164 prosecutions brought between 2012 and 2020, while the instances of wildlife crime seem to be at record highs.²⁷

²⁶ Research conducted by William Quill BL, with additional research from Luke Filan and Neil Freeman. Colm Scott Byrne BL led this research at the beginning of the Taskforce's project.

²⁷ Ray Ryan, "Wildlife crime unit being examined as record number of protected birds of prey killed last year," Irish Examiner 19th Oct 2020, <https://www.irishexaminer.com/farming/arid-40066109.html>

CASE STUDY: RECENT PROSECUTION

Destruction of a Hedge in Summer

A hedgerow was severely cut and grubbed in County Tipperary in 2020. The length of hedgerow affected was approximately 640m (152m of which were situated along the road), spread over three fields. A small section, of approximately 12m of hedgerow was completely removed. The work took place in August 2020. NPWS investigated following receipt of a report from a member of the public. In court in January 2021, the landowner pleaded guilty and was convicted and fined €1000. He later received a 5% reduction in his Basic Farm Payment. **Is this fine enough to deter such action?**



We suggest a number of reforms that would improve enforcement of environmental law in Ireland and ultimately yield better outcomes for our precious biodiversity.. Getting a conviction in criminal law has a high burden of proof and is time-consuming and costly for the State. Neighbours are reluctant to use the criminal law against their neighbours. **Is punishment after the damages is done always the answer, or would future facing agreement and negotiated binding agreements for the future be better?**

Instead, the introduction of administrative sanctions such as fines and penalties could be added to any of the existing acts. This approach has been taken in the United Kingdom.²⁸ Mediation could be used to discuss what has happened and for all parties to negotiate and sign up to an agreed plan for the future.

A new Environment and Biodiversity Court (as discussed in Section 7) could be given the power to issue compliance notices which order the offending party to cease environmentally damaging behaviour, or a “restorative notice” ordering that the party restore the situation to how it was before a breach or damage occurred. It could engage in mediation. It could issue speedy ‘stop notices’ to prevent action before it happens/

These court orders would take effect more quickly than criminal prosecution, and would better deter people, companies, or other entities from causing environmental damage that threatens Irish biodiversity. In addition, revenue from financial sanctions should be redirected towards making reparations for environmental damage.

OUR RECOMMENDATION: CHANGE HOW BIODIVERSITY LAW IS SANCTIONED

²⁸ Environmental Civil Sanctions (England) Order 2010, SI No 1157 of 2010.

12. Recommendations / Moltaí

Our Recommendations are linked to The Citizens' Assembly's **Terms of Reference**, which are as follows (numbers added):

“The Assembly shall consider, inter alia:

- 1. The international, European, national, regional and local dimensions to the biodiversity emergency;*
- 2. The threats presented by biodiversity loss and the opportunities to reverse this loss;*
- 3. The main drivers of biodiversity loss, their impacts and the opportunity of addressing these drivers;*
- 4. The perspectives of the general public, representative groups, advocacy groups, experts and policy makers on biodiversity loss, and its impact on Ireland;*
- 5. Opportunities to develop greater policy coherence and strategic synergies between biodiversity policy and other policy priorities including, but not limited to, economic development, climate action, sustainable development, agriculture and tourism;*
- 6. Opportunities to promote greater public understanding of, and support for, urgent action in response to the biodiversity emergency; and*
- 7. Opportunities to improve the State's response to the challenge of biodiversity loss, how that response can best be resourced and implemented in a strategic and coordinated manner, and how progress can be measured.”*

The appropriate number for Term(s) of reference appear as footnotes to individual recommendations.

Recommendation 1²⁹

RECOGNISE A LEGAL RIGHT TO A HEALTHY ENVIRONMENT

As discussed in Section 8, a legal right to a healthy environment would strengthen the protection afforded to biodiversity by creating a legal basis for claims against entities who cause damage to nature. Relatedly, the crime of ‘ecocide’ should be introduced in Irish law, and recognition of the rights of nature should be considered.

²⁹ Term of Reference Link: (2), (3) – The lack of enforcement of environmental law is a serious threat to biodiversity loss, and a right to a healthy environment would empower citizens in court and throughout public life and be a key opportunity to reverse this loss. (7) - Citizens with this right can make legal claims against the State where it fails to protect biodiversity, and this measure will therefore improve the State’s response to the challenge.

1.1 CALL A REFERENDUM ON THE RIGHT TO A HEALTHY ENVIRONMENT

A referendum on the right to a healthy environment would give Irish citizens an opportunity to have their voice heard. Recognising this right would empower citizens to make claims against bodies who violate this right by damaging our biodiverse environment, which in turn would lead to much better protection of biodiversity.

1.2 SUPPORT PROPOSALS TO INTRODUCE A RIGHT TO A HEALTHY ENVIRONMENT IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Another option is adding the right to a healthy environment to the European Convention on Human Rights. Irish citizens enjoy protection from the Convention rights as well as those in our own Constitution. The Government should support calls to recognise this right in the Convention.

Recommendation 2³⁰

ESTABLISH A SPECIALISED LOW-COST ENVIRONMENTAL & BIODIVERSITY COURT

A dedicated Environmental Court would provide for the fair, quick and cheap resolution of disputes related to biodiversity. The Court could include a focus on mediation, arbitration and parties agreeing together upon solutions that best protect Irish nature, enhancing our system of sanctions as explained in Section 11.

Recommendation 3³¹

ESTABLISH A STATE PROTECTOR FOR THE ENVIRONMENT

An independent body, whose sole role and responsibility is the protection of the environment, would develop and implement a National Biodiversity Enforcement Strategy and oversee the coordination and implementation of all environmental and biodiversity policy in Ireland – our stakeholder engagement revealed an appetite for this.

³⁰ Terms of Reference Link: (5) – This body would create a greater policy coherence in this area by overseeing all law and policy related to biodiversity, and would liaise with and advise other government entities to create strategic synergies.

³¹ Terms of Reference Link: (5) – This body would create a greater policy coherence in this area by overseeing all law and policy related to biodiversity, and would liaise with and advise other government entities to create strategic synergies.

Currently, many bodies whose role it is to protect and enhance biodiversity have conflicting roles and obligations, and these come into conflict with environmental concerns. An example is county councils, who may have a duty to consider economic growth for their area and this could be in conflict with their duty to protect biodiversity. A dedicated state body would not experience such conflicts.

It would also function as forum for citizens' information on biodiversity (along the lines of a 'Citizens' Information' platform³² dedicated to the environment) and would provide resources for educational purposes. The body would liaise and provide expertise to other bodies and stakeholders.

Recommendation 4

EMPOWER ALL CITIZENS WITH 'LEGAL STANDING' TO PROTECT BIODIVERSITY IN COURT

To prevent environmental cases from falling at the first procedural hurdle, standing should be expanded in the ways outlined in Section 9. Environmental NGOs should be granted standing to make claims on behalf of our biodiverse environment. Courts should also consider the rights of 'future generations' and allow litigants to represent them. The 'rights of nature' should also be considered, with citizens granted standing as guardians or trustees of nature in court.

Recommendation 5³³

ALLOW FOR ENVIRONMENTAL CLASS ACTIONS

A procedure that allows many citizens to pool together and take cases as a group would mean that justice is better served for biodiversity in the courts. More environmental claims can be heard, and the environment can be better enforced through empowered citizens who are stronger together. Section 10 outlines the key benefits of this and provides some examples of successes internationally.

³² www.citizensinformation.ie

³³ Terms of Reference Link: (4), – Allowing citizens' groups to take cases in Court would enhance the impact that the general public and advocacy groups can have for biodiversity protection. (6) - This is an opportunity to generate greater public support and understanding for urgent action, as citizens will be able to group many small harms into one large claim and will see the scale of the biodiversity problem. (7) - All of this, in turn, will improve the State's response to the issue, by exposing state bodies to class action claims, and raising awareness of damages by private parties when claims are brought against them.

Recommendation 6³⁴

CHANGE HOW BIODIVERSITY LAW IS SANCTIONED

6.1 USE INCENTIVES TO PROMOTE POSITIVE BEHAVIOUR TOWARDS BIODIVERSITY

In enacting laws governing biodiversity, the State should consider how they will alter the behaviour of citizens and other entities in a positive way. Instead of backward-looking law that seeks to punish violations, move towards forward-looking measures such as 'compliance orders', which require projects and behaviour to cease until a dispute is resolved. Alternative dispute resolution processes between parties could replace negative sanctions. Laws and court rulings should consider 'restorative justice' i.e. how those in violation of biodiversity law can take measures to 'restore' biodiversity to the state it was in before the damage, to the extent possible.

6.2 MOVE BEYOND CRIMINAL PENALTIES & ENACT CIVIL AND ADMINISTRATIVE SANCTIONS

As discussed in Section 11, civil and administrative sanctions such as fines or fixed penalties may be more effective than just criminal penalties, which are very difficult and time-consuming to enforce. Revenue from these could be redirected to projects which promote biodiversity.

Recommendation 7³⁵

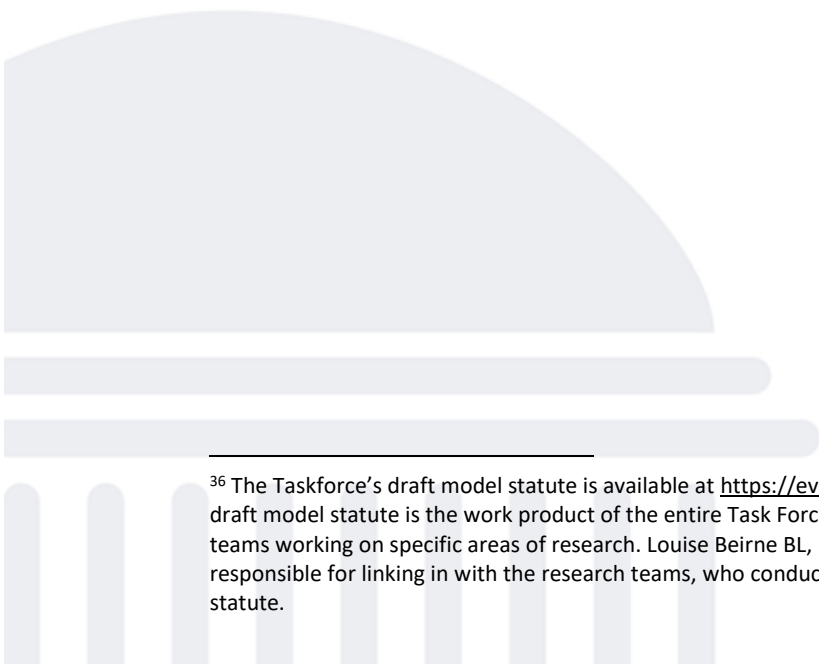
CODIFY ENVIRONMENTAL LAW BY ENACTING OUR DRAFT MODEL STATUTE

Enacting an environmental code would make environmental and biodiversity law more accessible to citizens and lawyers alike by putting the various pieces of legislation in one place. The Taskforce's model statute on environmental law

³⁴ Terms of Reference Link: (2) & (7) – Incentivising positive behaviour and promoting restorative justice create opportunities to reverse biodiversity loss, and would be an improvement on the State's response to the problem. (7) - Fines that are easier to enforce would be a better use of the State's resources and would in fact funnel resources back to the State.

³⁵ Terms of Reference Link: (5) – The Code would be a coherent record of biodiversity-related laws and would make it easier to consider environmental considerations alongside issues like economy and agriculture. (6) – A more accessible Code would enable better public understanding of the laws on biodiversity, and laws which are better understood are more easily acted upon by non-lawyer activist citizens. (7) – This would be a strategic use of resources, as many are wasted at the moment navigating the complex and confusing system of biodiversity laws in Ireland.

provides for the various recommendations of this submission in a single Act, bringing a greater coherency to biodiversity law throughout the State.³⁶



³⁶ The Taskforce's draft model statute is available at https://events.lawlibrary.ie/ClimateBarSymposium_Papers. The draft model statute is the work product of the entire Task Force and was drafted following research by a number of teams working on specific areas of research. Louise Beirne BL, Dirayati Fatima Turner and Stuart McCabe were responsible for linking in with the research teams, who conducted research specific themes, and drafting the model statute.



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SOURCES OF LAW

PRESENTATION FOR THE CITIZENS' ASSEMBLY
ON BIODIVERSITY LOSS

COMHSHAOL – THE CLIMATE BAR ASSOCIATION

Comhshaol, the Climate Bar Association

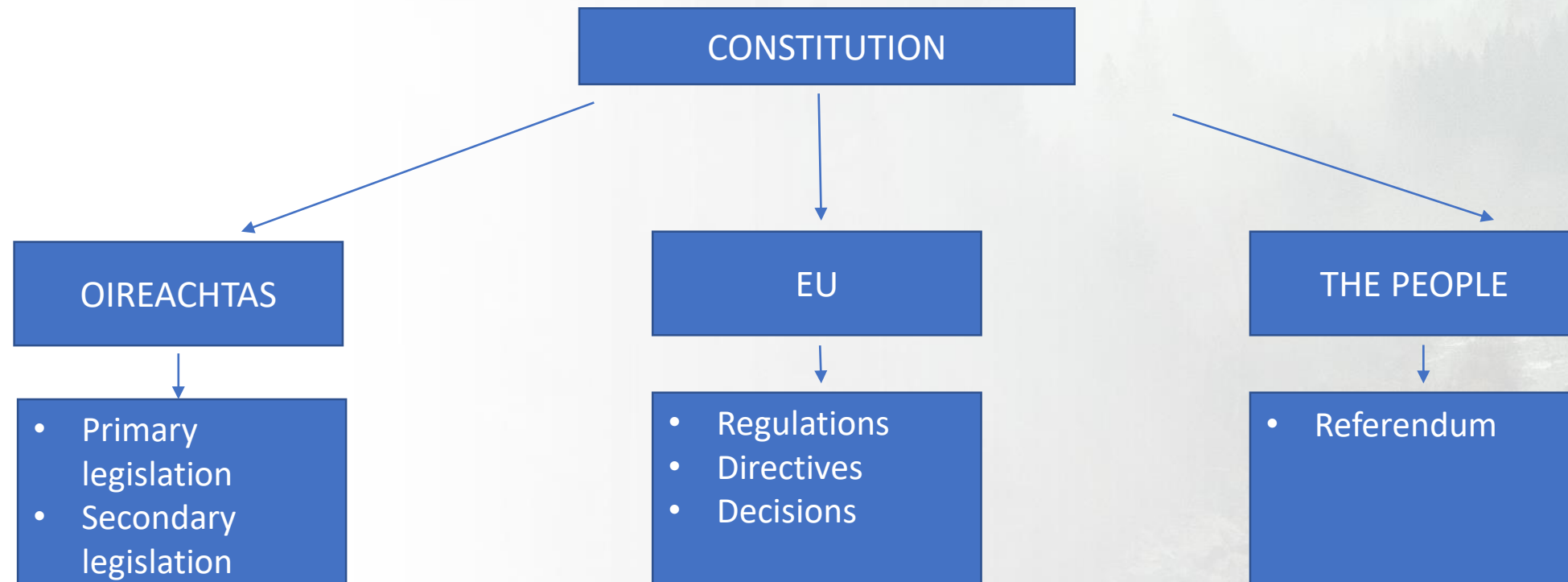
Comhshaol, the Climate Bar Association, is a specialist association of the Bar of Ireland which aims to act at the forefront of environmental justice and law in Ireland and to become a thought leader of climate and environmental law in Ireland.



WHAT IS A LAW?

- Any rule which is enforced by the power of the State
- In Ireland laws are enforced by decisions of the Irish Courts
- In Ireland only laws recognised by the Constitution can be enforced in
Irish Courts

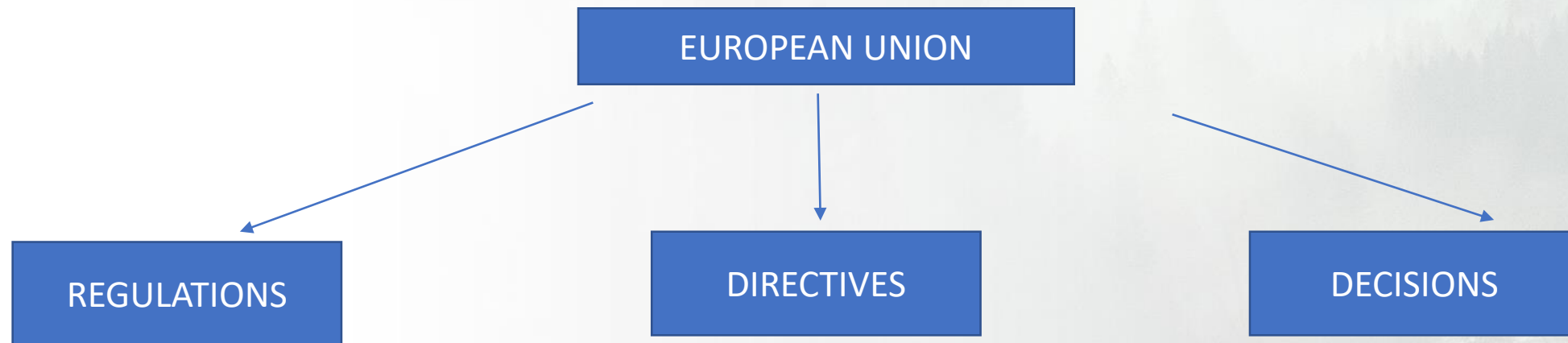
SOURCES OF LAW



OIREACHTAS

- The Oireachtas is the Dail, Seanad and President together
- Primary legislation must be approved by each before it can become law
- As long as it is constitutional, the Oireachtas has very wide powers to make laws – e.g. Climate Act of 2021
- The Oireachtas can also delegate the powers to make laws (secondary legislation), but the scope of those laws must be strictly limited by primary legislation – e.g. setting of Carbon Budgets under the Climate Act

EU LAW



EU LAW

REGULATIONS

- Have immediate effect in Ireland – and across the EU
- No need for new Irish law
- An example is GDPR – data protection regulations
- Once GDPR came into force, people could rely on those protections in courts in Ireland

EU LAW

DIRECTIVES

- Member states are directed to create local laws based on strict guidelines
- In Ireland the Minister uses a “statutory instrument” to make the new law
- Doesn’t need to go through the Oireachtas
- Deadlines are set for implementation - Member States regularly breach these deadlines
- An example is the Habitats Directive

EU LAW

HABITATS DIRECTIVES

- Requires that certain “Special Areas of Conservation” (SACs) and “Special Protection Areas” (SPAs) be created
- SACs protect habitats – SPAs protect birdlife
- Ireland is obliged to create conservation objectives for each SPA and SAC
- Where a development might affect a protected SAC or SPA, an “appropriate assessment” must be carried out before planning permission can be considered.

EU LAW

DECISIONS

- Binding, but only against the subject of the decision
- For example, an EU Commission decision that subsidies for airlines constitute illegal state aid
- Subject to oversight from the European Court of Justice

THE CONSTITUTION

- Establishes the apparatus of the State (Oireachtas, Government, Courts etc)
- It also protects a limited number of rights directly
- For example personal property rights are specifically protected, which resulted in rent controls being deemed to be unconstitutional
- Constitutional rights can limit what the Oireachtas can do, but can also require protection of those rights

CONSTITUTIONAL REFERENDUMS

- Article 6.1: *“All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.”*
- This is given effect through referendums – the only way to change the Constitution
- The creation of a Constitutional right to a sustainable, healthy and biodiverse environment, would reduce restrictions on the Oireachtas to create new laws to protect against biodiversity loss, but would also give rights to future generations if the Oireachtas was not protecting those rights.

RECOMMENDATIONS

- The recommendations of Comhshaol, the Climate Bar Association in respect of how the law can be used to create and protect rights to a healthy and biodiverse environment are contained in its detailed submission to the Citizens' Assembly