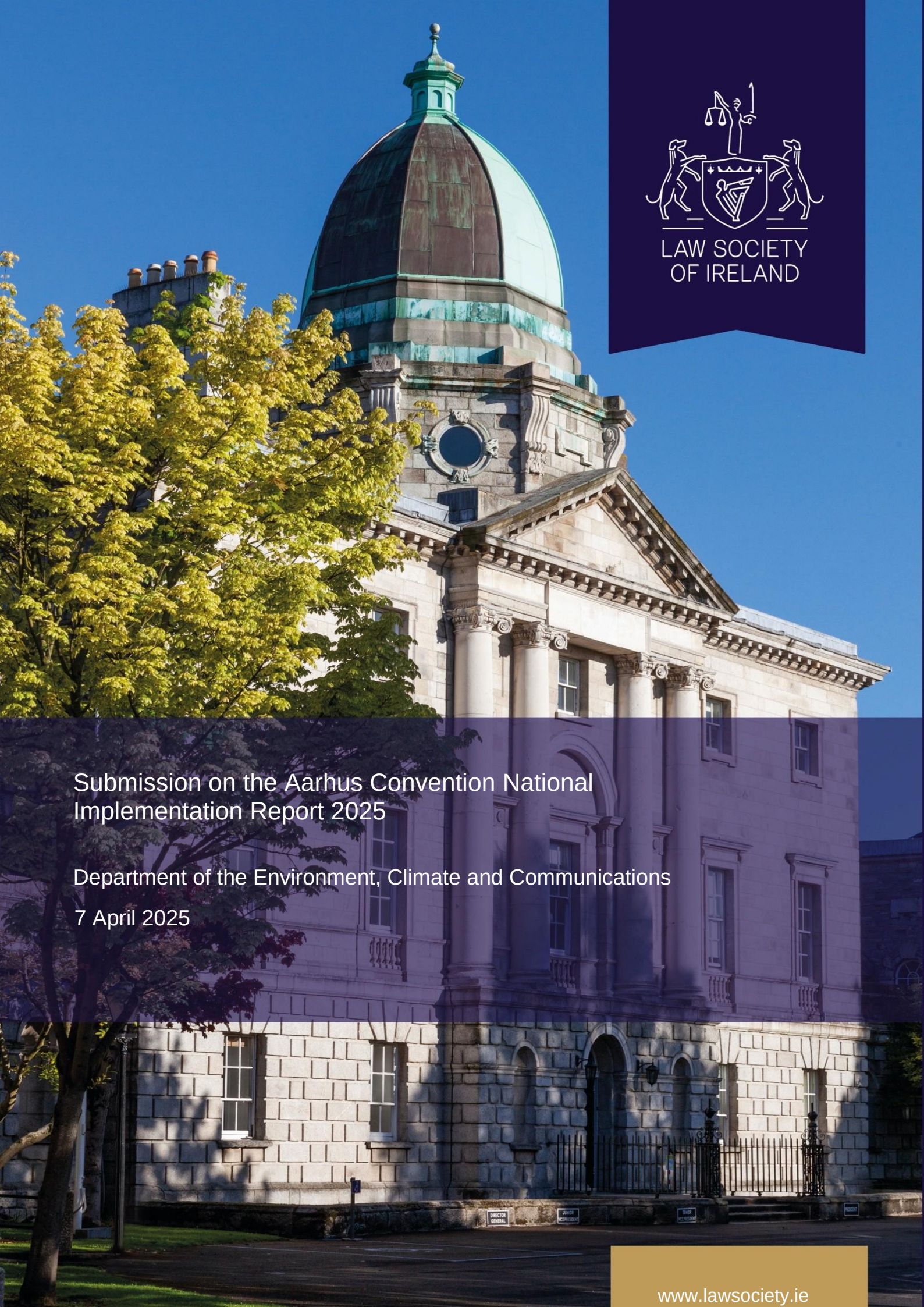

LAW SOCIETY OF IRELAND

Submission on the Aarhus Convention National Implementation Report 2025

Department of the Environment, Climate and Communications

7 April 2025

www.lawsociety.ie

Submission on the Aarhus Convention National Implementation Report 2025

About the Law Society

The Law Society of Ireland (the **Law Society**) is the educational, representative and professional body of the solicitors' profession in Ireland.

The Law Society's main statutory functions in relation to the education, admission, enrolment, and discipline of the solicitors' profession are provided by the *Solicitors Acts 1954 to 2015*. These statutory functions are exercised by the Council of the Law Society or by the various committees, task forces and working groups to which the Council may delegate certain statutory functions. A separate organisation - the Legal Services Regulatory Authority - is responsible for regulating the provision of legal services by legal practitioners. The Law Society delivers high-quality legal education and training and also places significant emphasis on civic engagement, supporting local community initiatives and driving diversity and inclusion. The Law Society is committed to participating in discussion and advocacy on the administration of justice and the effective implementation of public policy.

Introduction

The Law Society appreciates the opportunity to provide a submission to the Department of the Environment, Climate and Communications (the **Department**) on the *Draft Aarhus Convention National Implementation Report 2025* (the **AC-NIR**).

Executive Summary

This submission primarily addresses Part XXVIII of the AC-NIR: *Legislative, regulatory and other measures implementing the provisions on access to justice in Article 9.*[1] These measures address the rights of the public concerning access to justice in environmental matters. The Law Society has concentrated its efforts on this section as we have had to prioritise the efforts of our specialist contributors, including the Environmental and Planning Law Committee and Litigation Committee. Another reason that we focused up upon this section is because the protection of clients and the public interest is one of our core values. The Law Society necessarily adopts a neutral position on the remainder of the AC-NIR.

The AC-NIR has been completed with reference to the Planning and Development Act 2000 (the **P&D Act 2000**) and not the Planning and Development Act 2024 (the **P&D Act 2024**). The AC-NIR rightly identifies that Ireland's system of judicial review is an independent procedure by which the substantive and procedural legality of decisions of public bodies can

[1] Department of Environment, Climate and Communications, *Draft Aarhus Convention National Implementation Report* (NIR) 2025, 7 March 2025 at p80 < https://www.gov.ie/pdf/?file=https://assets.gov.ie/320890/5190c170-2a2a-4125-b166-f312d19f22ef.pdf#page=null>

be challenged and identifies the many components of that procedure which comply with Article 9 of the Aarhus Convention.[2]

However, the Law Society is concerned that the AC-NIR does not address the P&D Act 2024, in so far as it states:

> *"It should be noted that the successor to the Planning and Development Act 2000, the Planning and Development Act 2024 was signed into law by the President of Ireland on 17th October 2024. However, this Report has been completed with reference to the P&D Act 2000, as it represented the law as it stood between 2021 and 2024."*[3]

The result will be that the parties to the Convention will not be consulted on significant changes to access to justice in environmental matters in Ireland that have been enacted during the reporting period. The Law Society submits that the provisions of the P&D Act 2024 should be the subject of this report, consistent with the first bullet point in the Annex to the Aarhus Guidance on Reporting Requirements[4]

> *"Have there been any legislative changes in non-environmental (sectoral) legislation significant for the environment that may limit public participation in certain cases (e.g. facilitating construction of highways or inland navigation issues)?"*[5]

(The Annex in question is "*a checklist of issues that in the* [Aarhus Convention Compliance] *Committee's view would merit being addressed in greater detail in the national reports because of their importance for further work on implementation of the Convention.*)[6]

Accordingly this submission identifies aspects of the P&D Act 2024 that may constitute obstacles to the implementation of article 9. It builds on the prior work of the Law Society in that regard and we intend to summarise previous submissions on the relevant provisions of the P&D Act 2024 (and associated draft Bill) below.

Law Society's Previous Submissions on the Planning And Development Act 2024 and the Aarhus Convention

1. *Opening Statement of the Law Society on the Draft Planning and Development Bill 2022 to the Joint Committee on Housing, Local Government and Heritage (2 March 2023)*

In its opening statement to the Joint Committee on Housing, Local Government and Heritage,[7] the Law Society identified the draft Planning and Development Bill (the **draft Bill**) provisions

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[2] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998 ('Aarhus Convention').
[3] Draft Aarhus Convention National Implementation Report (NIR) 2025 (n1) 3.
[4] Working Group of the Parties to the Convention, Guidance on Reporting Requirements. ECE/MP.PP/WG.1/2007/L.4, 20 February 2007 < https://unece.org/fileadmin/DAM/env/documents/2007/pp/ece_mp_pp_wg_1_2007_L_4_e.pdf>
[5] Ibid at 8.
[6] Ibid para. 38.
[7] Law Society of Ireland, Opening Statement on the Draft Planning and Development Bill 2022 to the Joint Committee on Housing, Local Government and Heritage, 2 March 2023 <https://www.lawsociety.ie/globalassets/documents/submissions/2023-opening-statement-draft-pd-bill.pdf>

in relation to standing in judicial review and costs as the two primary areas where access to justice questions arise.

The Law Society noted that the rules on standing in the draft Bill had become less restrictive compared with the General Scheme published in 2019 but we also noted that there remained questions around their interpretation and compatibility with the Aarhus Convention.

The costs provisions of the draft Bill referred to an administrative scheme for costs and the Law Society expressed concern that the proposed costs reforms remained a draft head at that stage.

The Law Society also made comments on a number of other aspects of the draft Bill, which are outside the scope of this submission.

The Joint Committees report made a number of recommendations, supported by evidence from the Law Society and others, several of which remain relevant:

- *… that Part 9 of the Draft Bill is reviewed against the Aarhus Convention, in particular unencumbered access to justice, barriers to seeking review of decisions, and prohibitive administration or burdensome process which may inadvertently restrict access to justice and updated to comply with current CJEU and Aarhus Convention decisions, ensuring access to justice through proportionality;*

- *… that the retention of the current legislative definition of standing, interest and grounds derived from relevant case law and as defined in the Aarhus Convention;*

- *…that the existing provisions of section 50B of the 2000 Act is retained until the new cost protection regime is enacted in primary legislation*.

The Law Society notes with concern that the Government has not published a review of Part 9 of the P&D Act 2024 against the Aarhus Convention and it proposes to omit any substantive information on the P&D Act 2024 from the AC-NIR. There is a degree of urgency in circumstances where it now appears from the Government's implementation plan for the P&D Act 2024 that it intends to commence the revised judicial review provisions (Ch 1 of Part 9) in Q2 2025 (subject to further engagement with the Courts Service and associated bodies).

2. *Submission on the Planning and Development Bill 2022 (October 2023)*

This Law Society submission[8] concerned the omission of the long-sought provision that aimed to establish a third category of development (also known as established non confirming developments or END) from the Bill. The Law Society reiterates the importance of this submission, although it is outside the scope of the AC-NIR.

3. *Submission to the Interdepartmental Group on Legal Costs (July 2024)*

[8] Law Society of Ireland, *Submission on the Planning and Development Bill 2022* (October 2023) < https://www.lawsociety.ie/globalassets/documents/submissions/2023-submission-planning-development-bill.pdf>

This Law Society submission[9] related to the costs provisions of the Planning and Development Bill 2023 (the **P&D Bill 2023**), which was then at Report Stage in the Seanad. Its purpose was solely concerned with laying out the Law Society's general stance on the proposed costs regime under Part 9 as well as informing and assisting the work of the Interdepartmental Group, as requested in the Department consultation dated 7 June 2024.

As regards the Aarhus Convention, the submission made the following points:

- The Law Society was concerned that this aspect of the P&D Bill 2023 was not compliant with the Aarhus Convention;

- A system that prescribes the costs payable by losing respondents to winning applicants without prescribing the costs that public body respondents may pay to their experts and lawyers risks being contrary to the provisions or the general environmental protection goals of the Aarhus Convention, particularly in terms of where the Convention aims to level the playing field between applicants and Government bodies that are contrastingly highly-resourced with lawyers and experts;

- While the Law Society agrees with the introduction of an environmental legal costs assistance mechanism in principle, such mechanism should be based on tried and tested legal concepts rooted in the case law of the Irish and EU Courts and guidance from the European Commission and Aarhus Convention Compliance Committee. Otherwise, the State risks protracted, expensive and unnecessary satellite litigation in relation to planning matters;

- The mechanism should be established in primary legislation to allow it to be scrutinised for its impact on access to justice and to reduce the risk of satellite litigation in relation to its interpretation and compatibility with Aarhus Convention.

Historical Obstacles to the Implementation of Article 9 of the Aarhus Convention – Planning and Development Act 2000 and Costs

Historically, the potential for applicants to be exposed to high litigation costs has proven one of the main barriers to accessing planning/environmental justice in Ireland. The general rule in civil litigation in Ireland is of course that costs follow the event (i.e. the losing party pays): Order 99 of the Rules of the Superior Courts. However, this rule has been displaced in the case of certain planning and environmental actions by special costs rules under Irish law adopted pursuant to the Aarhus Convention and EU law, which aim to ensure that planning and environmental litigation is not prohibitively expensive, and provide that:

(a) as a starting principle, each side bears its own costs; and

[9] Law Society of Ireland, *Submission to the Interdepartmental Group on Environmental Legal Costs*, (19 July 2024).

(b) the court has discretion to award a winning *applicant* its costs or part thereof See section 50B of the P&D Act 2000[10] and Part 2 of the Environment (Miscellaneous Provisions) Act 2011[11] (**EMPA 2011**).

Where these special rules apply, an applicant can be confident that they will not be exposed to the other side's costs in the event that the applicant loses.[12] Further, applicants in planning and environmental cases can in some cases, in light of these rules, find lawyers willing to act for them on a conditional fee basis. In such cases, the applicant will not pay its lawyers for their time unless and until the applicant's action is successful, at which point there may, at the court's discretion, be an award of costs in the applicant's favour, which will serve to pay the applicant's lawyers for at least part of, and perhaps all of, their time: these arrangements were considered by the Court of Appeal in *Friends of the Irish Environment CLG v The Legal Aid Board & Ors.*[13]

The court may award a winning applicant its costs under the special rules "to the extent that the applicant succeeds in obtaining relief" (e.g. see s. 50B(2A) P&D Act 2000). In other words, if the applicant makes arguments alleging, say, three separate breaches of the Environmental Impact Assessment Directive (the EIA Directive),[14] and the court finds in favour of the applicant in respect of two of the arguments but against the applicant on one, the court may make a deduction in its award of costs on the basis that a material amount of court time was spent arguing a losing point. Thus, in a successful EIA case taken against An Bord Pleanála regarding Edenderry power station, An Taisce was awarded 65% of its costs for this reason: *An Taisce v An Bord Pleanála*.[15] The principle of the apportionment of costs in environmental cases has been the subject of recent judicial consideration including the grant of a certificate of leave to appeal in *Kemper v An Bord Pleanála*[16] raising questions as to the compatibility of this principle with EU Law and the Aarhus Convention but this appeal does not appear to have been pursued.

While these special costs rules have certainly improved access to justice, from the outset there was considerable uncertainty regarding their scope of application, and this led to a significant

[10] S 50B of the Planning and Development Act 2000 <https://revisedacts.lawreform.ie/eli/2000/act/30/section/50B/revised/en/html>
[11] Part 2 of the Environment (Miscellaneous Provisions) Act 2011 <http://revisedacts.lawreform.ie/eli/2011/act/20/revised/en/html>
[12] The potential extent of such costs is illustrated by *Klohn v An Bord Pleanála*, a case which predated the introduction of Ireland's special costs rules, in which Mr Klohn was required by the Taxing Master to pay €86,000 to the Board, having lost his case. After two preliminary references to the CJEU (Cases C-167/17 and C-739/19), the Supreme Court [2021] IESC 51 ultimately reduced Mr. Klohn's liability to €1,250 to reflect the "not prohibitively expensive" requirement under the Aarhus Convention and EU law.
[13] [2020] IEHC 454.
[14] Directive 2011/92/EU of the European parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification), as amended by Directive 2014/52/EU.
[15] [2015] IEHC 633 <https://www.courts.ie/acc/alfresco/8dc9f602-9704-497a-af1d-0d197033ebad/2015_IEHC_633_1.pdf/pdf#view=fitH>
[16] [2022] IEHC 349.

volume of satellite litigation. Indeed, as the Supreme Court commented in *Heather Hill Management Company CLG v An Bord Pleanála* (**Heather Hill**);[17]

> *"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."*[18]

In brief, s. 50B P&D Act 2000 appears aimed at giving effect to Article 9(2) and (4) of the Aarhus Convention (and related EU law), while EMPA 2011 appears aimed at giving effect to Article 9(1), (3) and (4) of the Convention (and related EU law). Nevertheless, as the Supreme Court stated in Heather Hill; *"EMPA and s. 50B should be interpreted together as the legislation by which it was intended that the State would implement the NPE [not prohibitively expensive] requirements of Aarhus [Art. 9(4)]. The overlap between Articles 9(2) and 9(3) means that duplication within the domestic law provisions is to be expected."*[19]

Since s. 50B specifically listed provisions of certain EU directives – namely the public participation provisions of the EIA Directive, the SEA Directive, and the Industrial Emissions Directive and, since an amendment in 2018, Art. 6(3)/(4) of the Habitats Directive – it appeared to some that cost protection under s. 50B may apply only where and to the extent that a case related to one or more of these Directives/provisions. This had a distorting effect on the cases that were taken by applicants in Ireland and on the legal issues raised in cases; e.g. cautious applicants would only litigate points relating to the named Directives, for fear that time spent arguing other points might be on a "loser pays" basis when it came to costs.

In 2018, in its judgment in Case C-470/16 *NEPPC*,[20] the CJEU identified a strong duty of consistent interpretation on national courts, holding that *"where the application of national environmental law […] is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive."*[21] Further to this judgment, and after conflicting judgments of the High Court and the Court of Appeal, in Heather Hill the Supreme Court ultimately held that *"s. 50B means precisely what it says. Any challenge to a decision made pursuant to a statutory provision which gives effect to the listed Directives falls within the costs protection provided for in that provision."*[22] The Supreme Court further held that sections 34 (Permission for development) and 37 (Appeal to Board) of the P&D Act 2000 are statutory provisions that give effect to one of the relevant Directives. In other words, in a challenge to a planning permission decision, the special costs rules under s. 50B apply to the entirety of the proceedings, i.e. to

[17] [2022] IESC 43, [2022] 2 ILRM 313 <https://www.courts.ie/acc/alfresco/6ea188f5-326b-4bbf-8588-fa8f7ae63326/2022_IESC_43.pdf/pdf#view=fitH>
[18] Ibid at 2 per Murray J.
[19] Ibid at 116 per Murray J.
[20] Case C-470/16 North East Pylon Pressure Campaign Ltd v an Bord Pleanála and ors (NEPPC) <https://curia.europa.eu/juris/document/document.jsf?text=&docid=200265&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=17247802>
[21] Ibid at para. 57.
[22] As per Murray J. (n 17) at 126.

all grounds of challenge and not just those grounds relating to the named Directives. While it took many years to get to this point, the Supreme Court's judgment appeared at last to have provided some certainty.

The cost protection provisions under Part 2 EMPA 2011 have similarly resulted in a good deal of satellite litigation. The CJEU's judgment in Case C-470/16 *NEPPC* confirmed that the requirement in s. 4 EMPA 2011 to demonstrate a link with existing or likely damage to the environment before cost protection would apply is unlawful insofar as EU law is concerned. Nevertheless, this requirement has not yet (as of March 2025) been removed or amended, despite other changes being made to the 2011 Act by the Planning and Development Act 2024. This may potentially be explained by the Supreme Court's comment in Heather Hill that, *"While the decision in NEPPC means that for at least some challenges [i.e. EU law challenges] it will be necessary to disapply this requirement, there is no basis for disapplying the clear language of the Act in proceedings concerned solely with national environmental law."*[23]

More recently, in *O'Connor v Offaly County Council*[24] the Court of Appeal appeared potentially to have limited the scope of cost protection under the EMPA 2011 by apparently holding that the scope of proceedings within the meaning of s.4(1)(a), insofar as it relates to an applicant seeking to ensure compliance with or enforcement of a statutory requirement, is limited to cases in which the applicant seeks to ensure compliance with or enforce *into the future* an identified statutory requirement. In contrast, where the applicant is seeking to ensure compliance with a statutory requirement by arguing that that requirement was breached in a *past* decision, cost protection would not apply. The Court noted that whether this represents a breach of EU law as explained in C-470/16 *NEPPC* could only be properly determined in a case in which the issue arises.

There have since been a number of judgments considering the same issue, including *Enniskerry Alliance v. An Bord Pleanála and Project East Meath v An Bord Pleanála Nos. 1, 2 and 3*[25]*, Save Roscam Peninsula CLG v An Bord Pleanála,*[26] and *Jennings v. An Bord Pleanála*[27]*.* Ultimately, giving the judgment of the Supreme Court in *Heather Hill*, Murray J. (who also gave the judgment of the Court of Appeal in *O'Connor*) appears to have developed/further nuanced his analysis in the *O'Connor* case, by citing, without disapproval, Holland J's interpretation of the *O'Connor* judgment (in the *Jennings* judgment), as follows *"s. 4(1)(a) [EMPA 2011] encompasses proceedings in judicial review intended to quash an invalid permit which, if not quashed, would authorise future activity likely to result in environmental damage."*[28] Again, as with the situation in respect of s. 50B PDA 2000, the Supreme Court's judgment in *Heather Hill* appeared to have brought some measure of clarity in respect of costs under the EMPA 2011.

Now, however, the goalposts will shift considerably when the relevant provisions of the P&D Act 2024 are commenced.

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[23] As per Murray J. (n 17) at 113.
[24] [2020] IECA 72, [2021] 1 IR 1 <https://www.courts.ie/acc/alfresco/b983209c-51f3-4867-9d6e-eaa72238db65/2020_IECA_72.pdf/pdf#view=fitH>
[25] [2022] IEHC 6, [2022] IEHC 337 and [2022] IEHC 338.
[26] [2022] IEHC 202.
[27] [2022] IEHC 249.
[28] Ibid at 73 per Holland J.

In summary, much of the new costs regime remains unclear, as it remains to be fleshed out by Regulations that have not yet been produced. However, a central concern is that the new system will create a costs regime in the field of planning and environmental law that is not fair and equitable, as required by Article 9(4) of the Aarhus Convention and EU law. This is because the court will no longer have discretion to award a winning applicant its costs on a market basis under the new system; instead, a winning applicant's recovery of costs will be restricted or capped according to monetary amounts to be prescribed by the Minister for the Environment, Climate and Communications under section 294(2) of the Act. This could have a chilling effect on the number of lawyers willing to act for applicants on a conditional fee basis, further restricting applicants' choice of lawyers. In contrast, other parties in planning and environmental litigation – e.g. respondents and notice parties – will remain free (and able) to pay their lawyers on a market basis, meaning that there will be a potential inequality of arms in the future in such cases.

For the moment, it is worth noting that the new costs regime will replace only section 50B P&D Act 2000. As such, unless and until further legal changes are adopted, Ireland will have two different special costs regimes pursuant to the Aarhus Convention and EU law: one under Part 9 P&D Act 2024, under which a winning applicant's ability to recover costs will be capped; and another under Part 2 EMPA 2011, under which the applicant's ability to recover costs will not be capped but which also does not adequately address judicial review type proceedings of decisions which will no longer be governed by Section 50B or the new Part 9 costs rules.

Changes to the Position Regarding Standing under the Planning and Development Act 2024

The 2024 Act might introduce significant changes to the position regarding standing in Irish planning and environmental law. These potentially significant changes may also raise material concerns regarding their compatibility with the Aarhus Convention.

It is too early to know with certainty how extensive these changes will be in practice, but they are likely to have a significant impact on the ability of members of the public and the 'public concerned' to access the Courts and, similar to the changes to the costs provisions, to create uncertainty in an area where the jurisprudence had otherwise reached a settled position on the principes applicable to standing. More widely they are likely to have a chilling effect on the development of environmental law in the Irish Courts.

<u>Some key concerns of the Law Society include:</u>

(a) Scope of 'Part 9 Judicial Review'

The P&D Act 2024 Act includes a specific Chapter addressing judicial review. The scope of Part 9: Judicial Review, and the attendant more restrictive standing rules applies to a much wider body of decision makers than was the case under the P&D Act 2000.

The 2024 Act now defines 'relevant bodies' to which the Part 9 Judicial Review mechanism applies, includes any government department, the Office of the Planning Regulator, the government generally or a regional assembly. Many of these bodies have responsibilities in relation to environmental issues at the macro level.

The application of the more restrictive rules in relation to standing will apply to challenges to their decisions and policies. The Act itself moves to an (arguably improved) focus on plan and policy approach, but the inclusion of those bodies developing such plans and policies as being subject to the more restrictive standing rules risks undermining the objectives of the Convention.

(b) Requirement to be "directly or indirectly materially affected"

Section 286 of the P&D Act 2024 introduces a definition of "sufficient interest". Under s. 285 of the Act, a party shall not be permitted to plead a ground in Part 9 Judicial Review proceedings unless the party has a sufficient interest in "the matter to which the ground relates". This introduces the concept of "issue based standing" and represents a fundamental resetting of standing rules away from the question of 'who' may litigate to 'what' may be litigated. Having regard to the significantly expanded scope of the categories of decision making coming within the Part 9 Judicial Review procedure, this is likely to have very significant implications for the ability of the public and or the public concerned to subject important decisions concerning the environment to judicial review.

The requirement that an applicant demonstrate "sufficient interest" in the matter to which the ground relates will often be difficult as s. 286 of the Act states that an applicant shall not be regarded as having a sufficient interest in a matter to which a ground pleaded in Part 9 judicial review proceedings relates unless the applicant is, or may be, directly or indirectly "materially affected" by the matter. It is difficult to know what the concept of being "materially affected" by a matter will entail particularly if this is to be assessed on a ground by ground basis and the associated complications that will arise in this respect. Indeed, parallels could be drawn with the difficulties which arose where costs were to be decided on a ground by ground basis.

However, it undoubtedly will significantly impact the ability of members of the public and the public concerned to access the courts and the issues upon which they can access them on, particularly given that the requirement to be "materially affected" is dependent on the matter to which the particular ground relates.

It appears clear that in many cases Environmental Non-Governmental Organisations (**ENGO's**) will not have sufficient interest to litigate matters of considerable environmental concern as they will not be directly or indirectly materially affected, and do not come within the requirements to establish sufficient interest provided in Section 286(2) – discussed below.

In addition, there is a lack of clarity as to the extent to which a person who made submissions during the planning process will only have a sufficient interest[29] to plead a ground if the submission relates to that issue.

(c) ENGO Standing

Some of Ireland's most active ENGO's are small issue based organisations with limited membership.

[29] Section 286 of the Planning and Development Act 2024.

The new P&D Act 2024 provides in s. 286(2) for requirements on bodies to demonstrate "sufficient interest" in a matter to which the proceedings relate, regardless of whether that applicant is or may be directly or indirectly affected by the matter. These requirements are that the proceedings must:

1. Relate to development that is likely to have significant effects on the environment or on a European Site; or

2. To an act or omission by any person that contravenes a provision of the Act, or an enactment under the Act relating to the environment.

Furthermore, once those criteria are satisfied such an Applicant must go on to satisfy the following cumulative criteria:

a. The Applicant has existed for a period of not less than a year prior to when the proceedings were brought;

b. Is either a company in Ireland or an EU member state;

c. Which has constitutional objectives related to the promotion of environmental protection relevant to the matters to which the proceedings relate, and has pursued those objectives for the past year prior to bringing the proceedings;

d. Has no fewer than 10 members;

e. And has passed a resolution in accordance with its constitution authorizing the bringing of proceedings.

These requirements significantly restrict the type of proceedings which might be brought by an ENGO by having to first demonstrate that there would likely be a significant effect on the environment or on a European Site.

This will often be difficult to establish in the abstract at the outset of the proceedings, particularly in cases where expert evidence may have to be procured to substantiate same. Such evidence must be procured within 8 weeks of the date of the decision (and not the receipt of notice) and there is no provision within the Act for any financial assistance for such expert evidence. Obtaining experts willing to act for applicants at short notice with limited resources will be very difficult. Applicant ENGO's seeking to establish standing must effectively find the resources to procure expert evidence of environmental impact within a very short period of time just to establish standing. Further expert evidence may also be required to support the grounds of challenge.

The fact that there is no financial support for same is likely to make proceedings prohibitively expensive for ENGO applicants. The requirements to have 10 members is likely to be a significant barrier to access to justice for small ENGO's, who may be able to satisfy the balance of the requirements but may not have 10 members.

(d) Unincorporated Associations

The new P&D Act 2024 contains very significant restrictions on the ability of unincorporated associations to take Judicial Review proceedings. The Act provides in s. 286(4) that an unincorporated association which can demonstrate that it is or may be directly or indirectly materially affect by a matter to which a ground relates, will only be regarded as having sufficient interest where it satisfies the following cumulate criteria:

1. Where it has a written constitution governing the operation of the unincorporated association in a matter comparable to the constitution of a company;

2. Holds a vote among its members in accordance with that constitution authorizing the bringing of the proceedings;

3. Where that vote passes by two thirds of the members casting a vote;

4. And provides a sworn or attested affidavit outlining compliance with the above requirements and exhibiting a list of the names and addresses of the members of the unincorporated association who voted in favor of the bringing the proceedings.

It is unclear in what respects the written constitution of the association should be comparable to the constitution of a company. A company constitution is almost never suitable for the governance of an association, in so far as it vests control of the company in a board of directors. Unincorporated associations are usually run by a committee.

We are not aware of any explanation for why members must authorise proceedings with a 2/3 majority instead of a simple majority. (Indeed, if the association had a constitution comparable to a company it would usually vest the power to institute proceedings in the board of directors without any requirement for a member's resolution in favour),

The new provision requires the disclosure of the identities of only those members voting in favour of the proceedings. In the US case of *NAACP v. Alabama ex rel. Patterson,*[30] the US Supreme Court found that the forced disclosure of the members of an association interfered with the constitutional right of free association, where there was no compelling justification. Similar arguments could be made that there is no compelling justification requiring the members of an association seeking to exert rights under the Convention from having their names and addresses identified.

The provision appears designed to significantly reduce the ability of unincorporated association to take judicial review proceedings. The Law Society has serious concerns about whether this aspect of the P&D Act 2024 could be compatible with the requirements of the Convention.

[30] 357 U.S. 449 (1958).

Conclusion

The Law Society has consistently called for careful scrutiny of the standing and costs rules in the P&D Act 2024 since its Opening Statement to the Oireachtas Joint Committee on Housing, Local Government and Heritage on 2 March 2023:

> "[Standing in judicial review and costs] *have given rise to significant "satellite litigation" in recent years, where questions around the compatibility of rules relating to both with EU Law and the Aarhus Convention have arisen in the course of challenges to planning decisions. Those questions inevitably have to be explored before the core judicial review challenge can be resolved, which has been the cause of significant delay for many judicial review cases in recent years. The courts have now resolved many open questions about the compatibility of the existing rules with the Convention and EU Law. The Law Society would be concerned that any changes are carefully scrutinised for compatibility with the Convention and EU Law in order to avoid new delays in judicial review proceedings as settled questions of law are reopened.*"

The Law Society continues to be concerned by the lack of transparent scrutiny of the operation of the P&D Act 2024 in this regard, in particular given the *prima facie* obstacles to implementation identified in this submission. It is not aware of any public statement from the Department that explains how the Department considers that the relevant provisions comply with the Aarhus Convention. The Law Society considers that the AC-NIR in its current form is a missed opportunity to explain and test the provisions of the P&D Act 2024 and to learn from the experiences of other Parties to the Convention.

The Law Society respectfully submits that the provisions of the P&D Act 2024 should be addressed in the AC NIR and that the commencement of Part 9 of the 2024 Act should be deferred pending further assessment of their compatibility with the Aarhus Convention and to enable the remaining provisions of the Act to be commenced without introducing further uncertainty with respect to the rules on access to justice whereby the substantive provisions of the Act may be tested.

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

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