

## Joint Oireachtas Committee on Environment and Climate Action

### Committee's examination of the Citizens' Assembly Report on Biodiversity Loss

#### Opening Statement of Dr Mary Dobbs, associate professor and Dr Orla Kelleher, assistant professor at Maynooth University School of Law and Criminology

1. Thank you, Chair. My name is Dr Orla Kelleher and I am making this joint statement on behalf of Dr Mary Dobbs and myself.
2. The Citizens' Assembly made wide-ranging, important recommendations. A strong cross-cutting message was the need for full and proper implementation and enforcement of existing environmental legislation and policy, e.g. as reflected in Recommendation 8. This also requires adequate funding and addressing structural issues.<sup>1</sup>
3. However, the Assembly also considered that transformative changes were required.<sup>2</sup> They sought to be innovative and ambitious in their recommendations, but in ways they thought would also be practical, logical, *balanced* and linked to Irish culture and history.
4. We focus here on three core, transformative Assembly recommendations:

#### First: Recommendation 27 – *Multilevel* environmental courts

5. The Assembly recommended establishing environmental courts at Circuit and District Court level, to complement existing proposals for one at the High Court level and paralleling approaches to family law. This is of particular significance regarding enforcement actions, where the Circuit and District Courts are the main venues for litigation. Potential advantages include improved enforcement; enhanced expertise; greater efficiency and reduced costs.<sup>3</sup>

#### Second: Recommendation 31(a) and (b) on environmental rights

6. The Assembly called for a referendum on inserting into the Constitution *substantive* human environmental rights (e.g., a right to a safe, clean, healthy, and sustainable environment including a safe and stable climate for the benefit of current and future generations) and *procedural* human environmental rights (e.g., the Aarhus rights regarding access to environmental information, public participation in environmental decision-making and justice in environmental matters).

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<sup>1</sup> Jane Stout and Micheál Ó Cinnéide, *Review of the NPWS 2021: Key findings and recommendations. Report to the National Parks and Wildlife Service (NPWS), Department of Housing, Local Government and Heritage (DHLGH), Government of Ireland* (2021).

<sup>2</sup> The need for transformative change has also been recognised by such as the IPCC and the IPBES. Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (2019), 14; Intergovernmental Panel on Climate Change, *Special Report on Global Warming of 1.5 °C* (2018), 15.

<sup>3</sup> Aine Ryall, 'A Framework for Exploring the Idea of an Environmental Court for Ireland' (2015) 22(3) Irish Planning and Environmental Law Journal 87.

7. There is an intuitive feeling that we should all have a legally guaranteed right to clean air, potable water, a safe and stable climate, and so on. A right to a healthy environment (appropriately elucidated) encompasses and supports these rights.
8. Over 100 states have enshrined a right to a healthy environment or other constitutional protections for a healthy environment.<sup>4</sup>
9. However, *Bunreacht na hÉireann* does not expressly guarantee substantive or procedural environmental rights and the Irish Supreme Court in *Climate Case Ireland* found that a right to a healthy environment could not be read into (or ‘derived from’) the text of the Constitution.<sup>5</sup> They also signalled that a referendum would be a more appropriate avenue by which to enshrine environmental rights in the Constitution.
10. Potential advantages of constitutionalising standalone environmental rights include: raising the profile of environmental issues and providing a basis for the enactment of stronger environmental laws; creating a level playing field *vis-à-vis* other constitutional rights; providing a safety net where there are gaps in the law; and acting as a valuable enforcement tool, in particular if both individuals and NGOs have standing to litigate the right.<sup>6</sup> Constitutional status also helps protect against subsequent erosion, whether accidentally or on purpose. Together, these can facilitate better environmental outcomes.<sup>7</sup>
11. Procedural environmental rights are similarly fundamental and complement substantive rights.<sup>8</sup> We support constitutionalising both substantive and procedural environmental rights and pairing them together in one referendum question. While procedural environmental rights are present within legislation currently, they could be significantly improved.
12. We would emphasise that constitutional environmental rights should not be seen as a panacea or as a substitute to existing environmental laws but as a complementary tool.
13. Potential concerns include weighting environmental rights above other fundamental rights and/or creating a tool that will be abused. These are valid, but manageable concerns.<sup>9</sup>
14. Rights tend not to be absolute. Constitutionalising environmental rights shifts the balance to help protect the environment and thereby humans, reflecting the fundamental value of the environment, its dire state and the need for transformative change. It does not remove or nullify the existence of other rights.

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<sup>4</sup> UNEP, *Environmental Rule of Law: First Global Report* (2019) 156  
<https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report#:~:text=NAIROBI%E2%80%942024%20January%202019%E2%80%9320The,over%20the%20last%20four%20decades> accessed: 13 October 2023.

<sup>5</sup> *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49.

<sup>6</sup> Erin Daly and James May, ‘Comparative environmental constitutionalism’ (2015) 6(1) *Jindal Global Law Review* 9, 21-22; OHCHR *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* A/73/188 (2018); Orla Kelleher, ‘Environmental constitutionalism: a transformative legal discourse?’ (2023 fc) *Irish Judicial Studies Journal*.

<sup>7</sup> OHCHR *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* A/73/188 (2018) [44].

<sup>8</sup> Substantive environmental rights without procedural rights may lie unused and be unenforceable. Procedural rights without substantive rights might ensure fair procedures but these may be tokenistic and may not lead to better environmental outcomes.

<sup>9</sup> Orla Kelleher, ‘Environmental constitutionalism: a transformative legal discourse?’ (2023 fc) *Irish Judicial Studies Journal*.

15. Further, the design and wording of any referendum will be key. The Assembly Recommendations provide an initial template that can be reflected upon and tailored as appropriate to ensure it gives effect to their ambitions, while minimising the chances for abuse.
16. The careful design can be ensured through engaging an expert group, comprising of constitutional and environmental lawyers and academics, along with environmental and other suitable NGOs (e.g. regarding social justice).

**Third: Recommendation 31 (c) and (d): Rights of Nature<sup>10</sup>**

17. The Assembly also called for a referendum on substantive and procedural rights of nature.
18. While rights of nature and environmental rights can complement each other very well, we would recommend that they be put as two separate questions to the public in a referendum.
19. Dr Dobbs' reading of the discussions at the Assembly was that they saw Rights of Nature 1) as a transformative and necessary tool and 2) with links to Irish culture and history, drawing on talks the Members received on Brehon law and the Irish language.
20. As with environmental rights, concerns were flagged, but it was considered that these concerns could be addressed through careful wording of any constitutional referendum and subsequently by legislators and courts. Again, a suitable expert group to advise on wording, design and incorporation into the Irish constitutional context would be key.

We are very happy to elucidate on the above points or to address any questions that you might have.

Many thanks for your time.

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<sup>10</sup> Much of the discussion regarding environmental rights applies here similarly, and we are also aware that there are other panel members with specific expertise in rights of nature, so we will keep our contribution here very brief. To this end, the focus here is more on the Assembly's response and approach to these rights.