

# **GENERAL LAW INDICATORS SUMMARY REPORT**

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## Summary of Indicators by Grading

### Key

Indicator #:1 - How clear and inclusive are constitutional guarantees to the right to a clean and/or safe environment?	very good
Indicator #:2 - How clear and inclusive are constitutional guarantees to the right of access to information held at public bodies?	good
Indicator #:3 - How clear and inclusive are constitutional guarantees to the right to direct public participation in government decision-making?	intermediate
Indicator #:4 - How clear and inclusive are constitutional guarantees to the right of access to justice, including redress and remedy? <b>CORE</b>	poor
Indicator #:5 - How clear and inclusive are constitutional guarantees to the right of freedom of expression? <b>CORE</b>	very bad
Indicator #:6 - How clear and inclusive are constitutional guarantees to the right to freedom of association? <b>CORE</b>	
Indicator #:7 - How clear and inclusive is a framework law supporting broad access to government information? <b>CORE</b>	
Indicator #:8 - To what extent does the law protect government employees who release information to the public in an effort to expose corruption in government conduct or to protect the public interest?	
Indicator #:9 - How limited and clearly defined is the scope of confidential information? <b>CORE</b>	
Indicator #:47 - How well does the law support broad public and civil society organization participation in decision-making by administrative and executive bodies ? <b>CORE</b>	
Indicator #:48 - How limited and clearly defined is the scope of “closed door” decisions that affect the environment? <b>CORE</b>	
Indicator #:49 - To what extent is “the public ” that can participate in decision-making defined to include any interested individual and civil society organizations? <b>CORE</b>	
Indicator #:91 - How well does the law support broad public and civil society organization access to redress and remedy? <b>CORE</b>	
Indicator #:92 - To what extent does the legal system recognize liability for environmental harm?	
Indicator #:93 - How limited in number and clearly defined is the scope of government bodies who are immune to claims? <b>CORE</b>	
Indicator #:94 - To what extent is standing or the ability to bring a claim defined to include any interested individual and civil society organizations? <b>CORE</b>	
Indicator #:137 - How well do laws and rules for registration and operation of civil society organizations promote an enabling environment for CSOs?	
Indicator #:138 - To what extent does the law create diverse legal and regulatory incentives supporting financial independence of civil society organizations?	
Indicator #:139 - How well do laws and rules for registration and operation of media organizations support press freedom? <b>CORE</b>	
Indicator #:140 - How well do laws and regulations enable media organizations to have diverse sources of funding?	
Indicator #:141 - To what extent does the law require the public school system to provide civic education?	
Indicator #:142 - To what extent does the law require the public school system to provide environmental education	
Indicator #:143 - To what extent does the law require the government to provide free legal aid? <b>CORE</b>	

very good
good
intermediate
poor
very bad

## Summary of General Law Indicators

There are 23 general law indicators which seek to measure the extent to which the access principles are built into the legal structure. As the legal system plays a major role in building capacity in the areas of access to justice and access to information, and to a certain extent public participation, this is also measured.

Overall there is a good level of support for the access principles in the Irish legal framework especially in the areas of media freedom and access to information, existence of legal remedies and broad definitions of standing. One weakness in the legal system is the fact that the Irish Constitution was written in 1937, at a time when the environmental agenda had yet to come to the fore and Ireland was still the land of "forty shades of green". As a mainly subsistence level agrarian economy, the country had yet to experience any major industrialization. Consequently, environmental values are not central to the construction of the document resulting in low scores due to the non existence of many rights. This can be seen in the first three indicators, which sought to measure the existence of constitutional guarantees to the right to a clean and safe environment, the right of access to information held by public bodies, and the right to direct public participation in government decision making. These rights are not enshrined anywhere in the constitution directly, which gives them the lowest score. However they are in fact protected in various forms by the legal system, such as the right to a clean and healthy environment being vindicated through the unspecified right to bodily integrity which was found to exist under Art 40.3.2, or the right of access to information being indirectly protected by the inferred right to fair procedures in decision making under Art 40. The situation then is not as dire as the given score may first suggest.

Though the broad framework for access to government information is extensive, it does poorly when assessed for its clarity and inclusiveness. The plethora of legislation together with some poor drafting in the recent Freedom of Information Acts has resulted in confusion as to the extent of restrictions on access and the scope of application on the legislation. The poor results are reflected in other access to information Indicators such as the one assessing constitutional guarantees to the right of access to information held by public bodies (2), which are non existent, the indicator relating to protection of employees who expose corruption (whistle blowers), (8) the indicator assessing the scope and clarity of laws allowing the confidentiality government information (9), an area which is unclear due to poor drafting of the legislation, and also the indicator assessing the scope for the government to take closed door decisions affecting the environment (48), which gets a rating of intermediate, which is slightly higher.

In Indicators 137 and 138 Ireland also receives the worst possible score.

These indicators deal with the laws and rules for registration of civil society organizations (CSO's) (otherwise known as NGOs) and whether these promote an enabling environment for CSO's (Indicator 137), and the legal and regulatory incentives supporting the financial independence of CSO's (Indicator 138). The poor score here can be accounted for by the fact that Ireland lacks any laws and rules for registration and consequently has no legal and regulatory framework for financial independence of CSO's giving it a very negative value. In this country CSO's must operate within the framework of either limited liability company law

or register as a charity. There are limited financial support schemes for national CSO's but no support for any local or regional CSO's, or grassroots organizations.

A similar situation exists with respect to media organizations. The absence of any regulatory framework means that most media organizations operate under the limited liability company framework, which allows them to have funding from as many diverse sources as any other limited liability company. Unfortunately the harsh defamation laws and the huge awards given in compensation this country have been felt by many to have a chilling effect on freedom of the press.

Areas in which Ireland scores highly include the:

The right to freedom of association is expressly protected in the constitution. The scope of government bodies immune to claims is clearly defined and limited.

The definition of the "public" which can participate in public decision making is a broad one encompassing both individuals and CSO's. Changes to the standing requirements for application for judicial review in planning appeal cases, and in other levels of the planning process, made in the Planning & Development Acts 2000 and 2006 have led to broader access and participation rights for both members of the public and CSO's.

Ireland achieves a mediocre score for freedom of expression because the right is subject to extensive and vague limitations, as is the case with the scope of confidential information, which is also vague. A similar score for the constitutional right of access to justice results from the lack of a clear cut right of this kind in the constitution. It is extrapolated by the courts from other constitutional unspecified and specified rights, a questionable status for such an important right. This is also reflected in the intermediate score for the legal requirement to provide legal aid for those who cannot afford it. This is an important aspect of the right of access to justice. The intermediate score given in the area of participation in administrative decision making is reflective of a lack of legislation protecting the access principles.

Finally, Ireland receives a mediocre score in the area of liability for environmental harm (92). Although there is a strong and comprehensive framework of protections, this is constructed piecemeal from a plethora of statutory and common law actions which is confusing in its extent and in the interaction between the different possible forms of action. It is also uncertain in its results due to lack of good precedent in many areas, and there are gaps in the framework. It will be interesting to see the effect that the Environmental Liability Directive will have when it is transposed into Irish Law, and it is expected that it will bring consistency and unity to the area.

## Recommendations

- **Transposition of Directives stemming from the Aarhus Convention on Access to Justice 1998**  
 Directives 2003/4/EC (Access to Information) and Directive 2003/35/EC (Public Participation) were created by the EU to bring it into line with its Aarhus Convention obligations. These have passed their due date for transposition here and the Irish Government is now in breach of its obligations to transpose these Directives and could be open to legal liability on the basis of citizens being deprived of their rights. It is also worth mentioning here that Ireland is a signatory of the Aarhus Convention 1998 (UN/ECE), but as yet has failed to ratify this convention, and is the only one of the original signatories that has failed to do so.
- **Encouraging generation of precedent through Public Interest Cases**  
 There is a need for the government to create schemes and regulations encouraging the number of public law cases being taken on important points of law, to aid the development of good precedent in the area, and thereby clarify the law in the area
- **The removal of the costs barrier in environmental justice cases.**  
 Costs still appear to be a large barrier to access to justice with the fees involved in taking a High Court or Supreme Court case prohibitive for many, restricting access to justice. Recent positive changes to the legal aid scheme are encouraging in this regard but its limited application and long delays mean a large proportion of the population are cut off from access to justice. Reform of the legal aid scheme is worth some consideration, although the main issue seems to be funding by the government. Consideration also needs to be given to the use of Protective or Pre-emptive Costs Orders or other cost shifting measures to reduce the financial risk and burden to those wishing to assert their rights, or protect the public good.
- **Research into the removal of financial barriers to participation.**  
 This is an area in need of more research and debate.  
 Costs are also a barrier to other forms of justice. The fees charged for participating as an observer or objector in the planning process and under the Freedom of Information Acts have both been criticized by many commentators as stifling use of these systems. The Information Commissioner herself has sharply criticized the charge for appeals to the Information Commissioner on refusal of Freedom of Information Requests introduced by the Freedom of Information Amendment Act 2003. While costs at first instance in the planning appeals tribunals are quite low, and have been found to be acceptable to the European Court, they are still a deterrent to participation, exclusionary for people on low incomes, for NGOs who are objecting many times a year in the public interest, and people living in areas of high

development who may have to submit many objections. There are other ways to discourage frivolous or vexatious objections, that do not also indiscriminately penalize genuine objectors. The cost of taking a High Court Judicial Review of a planning decision, with the two stage process involved in this, discourages many genuine and affected people from asserting their rights.

- **Shifting the burden of proof.**

Another feature relevant to accessing justice is the Burden of Proof in environmental harm cases. One huge obstacle for people attempting to pursue justice for environmental harm using the tortious remedies available is the difficulty of proving causation. Often in these cases the only person with access to the evidence proving this is the person responsible for the damage caused. The current system of the burden of proof in these cases places the applicant at a serious disadvantage. Consideration must be given to developing coherent rules for shifting the burden of proof once environmental harm is established, looking at doctrines such as Res Ipsa Loquitur and perhaps models in other jurisdictions.

- **Broader financial support for NGOs at all levels.**

The limited government funding scheme, the EENGOSEC fund, provided from the environment fund, is applicable only to national NGOs. Local, district and grassroots NGO's have no access to this fund and because they are smaller, have less resources and capabilities to obtain funding and support, yet many of these are vital instruments in raising awareness of local issues of national importance

- **The establishment of a legal framework for NGO's**

There is lack of any legal framework to support NGO's. Without a scheme of registry and regulation it is difficult to judge legitimacy of NGO's and many have found that this is an obstacle to both obtaining funding and being taken seriously as participants in debating on the issues with which they are concerned.

- **Consolidation of legislation.**

The issue of environmental legislative reform is too vast to tackle here but suffice to say that the current piecemeal nature of statutory environmental liability, while commendable for its exhaustiveness, is a barrier to access to justice for many as its complexity creates confusion even among legal professionals working in the area, and among the general public as to their rights. This was a recommendation of the Law Reform Commission with regard to the general statutory framework, and has been discussed by the Government recently in the wake of the mistakes made during reform of children's rights and child protection laws.

- **Greater clarity in the drafting of laws.**

Funding of studies and education in the drafting of laws would be a positive development for access to justice, as clearer laws lead to easier assertion of rights and less risk in taking a costly court case because of greater certainty of the likelihood of winning.

- **An amendment to include the Access Principles in the Constitution.**

The lack of basic constitutional guarantees for many of the democratic and environmental rights assessed in these indicators points perhaps to a need for some changes in that area, as perhaps the constitution has become dated in relation to society's current values.

Some would argue that this is unnecessary as many of the rights mentioned are protected by the courts reading them into the unspecified personal rights, as in the right to a clean and healthy environment, or into other constitutional rights, such as the right to fair trial and due process.

It could also be argued that the lack of constitutional guarantees for such rights as access to government information is more than compensated for by the extensive statutory framework in place dealing with these issues.

However, these rights are fundamental and to leave them without the status of proper rights, to be recognized or ignored at will by the mechanisms of judicial interpretation contributes to the lack of certainty as to the outcome of any case taken. One must also have regard to the Precautionary Principle with regard to environmental rights.

Another effect of giving proper recognition to these rights is the raising of awareness of their importance in the legal world and among the public and increasing the chances of them being taken seriously by the courts when people attempt to exercise their rights. An increased certainty about the existence of a right would increase the likelihood of cases being taken on the basis of it, which has the positive effect of generating precedents in the area and thereby enhancing legal clarity and certainty.

The argument against relying on legislature to take care of this area is that most environmental legislation to date has not provided for rights enforceable by individual members of society, but rather for enforcement frameworks by government bodies. Individuals should be able to assert a right to a clean and healthy environment.

Of course this is an area that requires much further study and debate and the purpose of these recommendations is to throw open topics for debate. Any such right would have to be carefully constructed and balanced against economic interests and the common good.

The Constitution has always been amended to reflect changes in society and changes in the cultural mindset of what are considered to be basic fundamental rights. This, combined with judicial activism, is how the Constitution has remained a living document that is still relevant to our times.