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SUBMISSION TO THE JOINT OIREACHTAS COMMITTEE ON HOUSING, LOCAL GOVERNMENT AND HERITAGE

Draft Planning and Development Bill 2022

March 2023

Contents

SUBMISSION ON BEHALF OF THE CLIMATE BAR ASSOCIATION TO THE JOINT OIREACHTAS COMMITTEE ON THE DRAFT PLANNING AND DEVELOPMENT BILL 2022

This is a submission by Comhshaol, the Climate Bar Association to the Joint Oireachtas Committee on Housing, Local Government and Heritage on the Draft Planning and Development Bill 2022. Comhshaol is happy to engage further with the Joint Oireachtas Committee on any aspect of this submission.

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.

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.

This submission focuses on the proposed reforms of the Judicial Review Procedure and the related issue of Costs set out in sections 249 and 250 of the Draft Bill.

Summary of View of Comhshaol on the draft Bill

1. Comhshaol wishes to address its submissions to the change proposed to judicial review by the draft Bill. Its views can be summarised as follows:

    (1) Although Comhshaol recognises the importance of the aims being pursued by the draft Bill, there are serious issues that proposed provisions in their current form are non-compliant with the requirements of the Aarhus Convention and/or EU Directives requiring the adoption of the Convention into Member States' laws.

    (2) The draft Bill as currently formulated may exacerbate some of the issues relating to cost and delay that they seek to alleviate, by adding another layer of contested litigation.

(3) The draft Bill represents a disproportionate restriction on the right of access of individuals and organisations to the courts in order to vindicate environmental rights. Where appropriate the resolution of planning disputes by mediation and arbitration at an early stage, should be explored. An Bord Pleanála and its successor be properly resourced, with sufficient independent members, together with corresponding levels of administrative, technical and legal staff, so as to enable that body to make decisions in accordance with all relevant laws and plans, thereby avoiding judicial review.

The draft Bill in Context: The Aarhus Convention

2. Comhshaol notes in the first place that the current proposals to make amendments to the judicial-review procedure must be considered in the context of Ireland's EU and international treaty obligations, foremost of which is the Aarhus Convention. The Aarhus Convention (AC) was ratified by EU (Decision 2005/370) and forms an integral part of the legal order of the EU - see Article 216 TFEU

3. The overarching intention of the Convention is to remove barriers and broaden access to justice on environmental issues. The Preamble to the Convention provides that the Parties are "[c]oncerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced". The Convention was ratified by Ireland in June 2012,[1] with elements adopted into EU law via Directives 2003/4/EC and 2003/35/EC.

4. Moreover, EU law -Article 19(1) TEU- requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, and in CJEU case law on access to justice in environmental matters. Access to justice in environmental matters is also relevant in the context of Article 41 and 47 of the Charter of Fundamental Rights of the EU.

5. CJEU case law developed over the years has clarified that the Member States are obliged to ensure access to justice in environmental matters covered by EU rules, including on decisions, acts and omissions in a range of environmental policy areas, such as water, nature and air quality. in 2017 the EU Commission issued a Notice to Member States on access to justice in environmental matters. The Notice outlined the standards governing access to justice in environmental matters in terms of procedural guarantees and legal standing for NGOs and

[1] See: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27 (visited 22 January 2020).

individuals. It is also important to ensure that access to the CJEU for members of the public and for NGOs under Article 267 TFEU is not unduly restricted.

6. There is an obligation therefore on Ireland as a Member State and of national courts in Ireland to guarantee the right of individuals and NGOs to an effective remedy under EU law, and this right includes that access to justice should not be unduly burdensome individuals and NGOS'. Burdens which restrict access include difficult and obstructive procedures and standing requirements, as well as a system which is excessively costly to an applicant.

7. The role of national courts is one of the cornerstones of the proper functioning of the EU's system of effective judicial protection. Where necessary, national courts must set aside any provisions that are contrary to EU law, even if these are of legislative or regulatory nature. Therefore, Irish legislation which is contrary to EU law, risks being set aside by Courts.

8. EU law requires[2] –in summary—that Member States ensure that concerned members of the public who have a sufficient interest or whose rights are affected have access to an independent review procedure before a court of law or tribunal in relation to matters affecting the environment. While law gives significant discretion to Ireland with respect to procedural requirements, those procedures "…shall provide adequate and effective remedies…and be fair, equitable, timely and not prohibitively expensive."[3] It further provides that the Parties "shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."[4]

9. Ireland is therefore under mandatory national, international and EU law obligations to give effect to access to justice rights in its national legal system.

Summary of Changes to the Bill with regard to Judicial Review

10. The main proposed changes to the system of judicial review can be represented in tabular form as follows:

[2] By virtue of Article 9 of the Aarhus Convention
[3] The Convention, Article 9(4).
[4] *Ibid*, at Article 9(5), emphasis added.

Judicial Review	Planning and Development Bill 2022
When	All administrative appeals must have been exhausted.
Date of Failure	S. 248- definition of failure to - act is deemed to have failed to be done on earliest date of failure- Comment: each failure is not a new failure for the purposed of time starting- there are no latency or date of knowledge rules. Thus, the clock may already have started with respect to challenges prior to an applicant becoming aware of the problem.
Ex parte	S249(2) Motion on notice Comment: A Leave application on notice is a protracted application- if the objective is to speed things up, it does not make sense to add this step, which will only cause additional time delay. This procedure has been tried and failed in both the asylum context and previously in regard to planning. In all cases it has been an expensive waste of time and scarce judicial resources.
Time Limits	S 249(2) within 8 weeks of decision, act or failure S249(3) all motions and affidavits and exhibits shall be served within 10 days of issues of motion. S249(6) extension of time may only be granted where good and sufficient reason and failure to issue and serve were outside control of application and no delay in making application to extend. S249(7) similar restrictions on amending the statement required to ground application for JR. Comment: This time is excessively short and will place restrictions on an applicant bringing a case at all within the time period and bringing a case which can fully deal all the issues which are often complex. This proposal can operate as a restriction on access to the courts. Where An Bord Pleanála, or its successor, continues to fail to publish files in accessible electronic format, these timelines will act as an effective bar to access to justice for many.

	A similar restriction on amendments is not justifiable as amendments are made as a reaction to events and/or matters disclosed after the expiry of the eight weeks.
Procedure	S 249(5) Bodies can amend decisions, carry out/remedy acts (Mend hand), can apply to do so or to stay proceedings to do so If not opposed, leave deemed granted, body can still object re sufficient interest at hearing. . If opposed – applicant has to show all administrative appeals exhausted, and on terms below substantial grounds, sufficient standing. Comment: this is a highly unusual procedure which has no parallel in judicial review for other areas of law. Such retrospective changes to decisions made do not allow for proper public participation rights as required by Aarhus. Such retrospective changes to a decision, in the course of litigation, do not allow the public access to the decision-making process, without the Commission disclosing its legal advice, which would otherwise be privileged. It is clearly open to abuse and will result in effectively endless rounds of amendments as the Board engages in *ex post* facto. justifications for its decision.
Threshold 1	S249(10) l(b) leave only granted where substantial basis for contending the decision is invalid or there is a reasonable prospect of relief reasonable prospects of success. Comment: this ground is overly restrictive. This proposal can operate as a restriction on access to the courts. It is without parallel in the justice system and no justification has been advanced as to why a participant in a planning matter has to be satisfy a higher threshold than any other person seeking access to the Courts to seek review of an administrative action. It is even more difficult to justify given the requirements of the Aarhus Convention.
Threshold 2	S249(10) all appeals and administrative remedies must be exhausted prior to judicial review being sought. Comment: Reviews of Local Authority decisions are very, very rare currently and are generally limited to instances where the Local Authority have exclusive jurisdiction (i.e., the validation of an application by reference to Articles 22-26 of the 2001 Regulations or the making of a determination pursuant to section 35 of the 2000 Act). If the Bill provides for a commensurate

	exclusive jurisdiction, this section will leave those decisions or acts effectively immune to review. The purpose of this change, brought in in 2022, is not clear and is likely to be subject to legal challenge, in particular in circumstances such as those which existed in Mount Juliet Estates Residents Group[5], where the lack of jurisdiction of the original decision maker meant there was no effective appeal.
Threshold 3	S249(10)(c) applicant must have a sufficient interest- Must be directly and materially affected. Comment: This provision is in unclear and will lead to litigation on its meaning. There is a danger that it seeks to reintroduce indirectly the blocking mechanism that an applicant can only seek review to one of 'substantial interest.' This is overly restrictive and impacts on access to environmental justice. "Materially affected" is devoid of meaning and is clearly open to an interpretation that excludes litigation motivated by purely environmental concerns.
Threshold 4	Section 249(10)(c) If there is an application under s 194 regarding the environment or an EU site, other than an individual with sufficient interest, and applicant must be - A company for 12 months, no less than 10 members, the company objectives must relate to application, the company must have passed a resolution to bring proceedings. - If the above satisfied person must have legal capacity Comment: This change restricts ENGOs bringing an application unless the ENGOs is an incorporated company. This is overly restrictive and impacts on access to environmental justice. The definition of legal capacity is unclear and will lead to litigation. There is no justification for the exclusion of eNGOs from instituting judicial reviews where eNGOs have played a critical role in preventing environmentally destructive projects (i.e., continued burning of peat at Edenderry and the construction of an LNG facility at Shannon)

[5] [2020] IEHC 128

	Where no purpose is served by this restriction, other than the stated aim of reducing judicial reviews (i.e., access to justice), this restriction is certain to be found unlawful by the CJEU.
Appeal	Section 249(15) No appeal to the Court of Appeal from the decisions of the High Court. Comment: This may be unconstitutional. Appeals against such decisions are already heavily restricted and there does not appear to be a lawful basis for further restriction. It is hard to justify the exclusion of the Court of Appeal from planning cases.
Costs	No costs- other than an administrative mechanism Comment: There are no details on the administrative mechanism. and none are set out in law. This leaves the system open to the Minister of the day to impose further restrictions which would hinder access to justice. The current system of protective costs orders and costs being awarded, generally, only to successful parties, allows for appropriate balance to ensure there is access to justice and that costs are not a barrier to same In the alternative, the no-foal no-fee rule would normally be seen as a filtering mechanism for bad cases and practical experience suggests that speculative cases are very rarely instituted. This is borne out by the success rate in SHD cases where approximately 85% of cases have been successful. A mechanism which provides costs for all cases taken may in fact encourage speculative litigation and, as with so much of the Bill, result in more poorer quality litigation leading to more delays.

Detailed Comments on the draft Bill

In light of the State's obligations, including under EU law and the Aarhus Convention, Comhshaol makes the following detailed comments on the draft Bill.

Section 249(2) Proposal that Judicial Review leave applications will be on notice to respondents, i.e., that there will be a contested hearing at leave stage:

11. There are aspects of the draft Bill that would impact on the constitutional right of access to the courts.

12. Judicial review commences with an application to the Court for leave, that is permission- to commence the judicial review action. The purpose of the leave

stage as it currently exists is to allow an impartial decision-maker (i.e., the Court) to filter vexatious or frivolous claims or those lacking substantial grounds for seeking relief.

13. The Bill proposals Require applicants (in s. 249(2)) to seek leave to apply for judicial review on notice to the other side rather than by means of an *ex parte* application – that is simply to Court by one side only at the first stage. Introducing an adversarial element to this process is unlikely to assist in filtering vexatious or frivolous claims. It is likely to lead to significant delays and increased legal costs. In practice, a respondent on notice is highly likely to contest the application for leave. This is likely to result in an increase in cost and delay where, in effect, the case will be fought on its merits at both stages of the judicial review process.

14. Practical experience suggests that the effect of requiring all leave applications to be on notice will be to increase cost and delay. In the area of immigration and asylum law, in 2000 a requirement[6] was introduced that all such leave applications for judicial reviews of decisions in the area would be on notice rather than ex parte. In practice, this resulted in significant delays in these cases being heard, and consequent additional costs. As a result, the system reverted to ex parte applications, with the possibility of the respondent being put on notice, in 2014.[7] As Minister Richard Bruton noted during the passage of the Employment Permits (Amendment) Act 2014, the change provided for "*…urgent and badly needed efficiencies in the operation of the immigration system.*"[8] To the extent that it hasn't already done so, the Comhshaol respectfully submits that the Joint Committee should consult with the Department of Justice in respect of its experience of on-notice judicial-review leave applications in the immigration- and-asylum area.

15. Comhshaol notes that it is at present possible for the High Court to direct that a leave application would be heard on notice. This discretion is used in appropriate cases and is frequently invoked where the sitting judge thinks it appropriate. Section 249(2) would, wrongly, place little faith in judges to be trusted to exercise this discretion efficiently and appropriately. Rather than the blunt instrument of requiring all leave applications to be on notice the current system should be left undisturbed.

16. The Supreme Court criticised delays caused by statutory requirements to seek leave on notice in *Okunade v. Minister for Justice* [2012] 3 I.R. 152. It found that the system of applications for leave on notice (which was "*designed to weed out unmeritorious applications at an early stage*") had significant unintended consequences, primarily the creation of a significant waiting list for a matter to be heard, with the result that "*the concept of leave on notice, while well intended, has turned out to be counter-productive*". Having to seek leave on

[6] Section 5, Illegal Immigrants (Trafficking) Act 2000.

[7] Section 34, Employment Permits (Amendment) Act 2014.

[8] https://www.oireachtas.ie/en/debates/debate/seanad/2014-07-09/14/ (visited 19 January 2020).

notice would, thus, negatively affect the constitutional right of access to the courts—because it would make the exercise of the right more difficult in practice.

17. Further, Comhshaol has significant concerns that the requirement to put respondents on notice of judicial review leave applications could be contrary to timely access to a remedy. This will depend on court resources. A few years ago, when most immigration-and-asylum-judicial-review challenges had to be brought on notice, the waiting time for a hearing date for the leave application after filing the proceedings was over four years. Eventually, the courts put pressure on the parties to agree to "telescoped hearings" where a judge would decide in a combined hearing whether to grant leave, and if so, whether to grant substantive relief. If significant delays were to happen with environmental challenges because of a requirement to bring them on notice, there can be little doubt but that EU law and Article 9(4) of the Aarhus Convention would be breached. Moreover, it will hamper the States objective of getting quicker decisions on judicial review and result in more rather than less delay to development.

18. The negative effects of bringing a leave application on notice summarised in A&L Goodbody's *Irish Planning Law and Practice*, it is stated at para. 29 of Part 11: Judicial Review:

> The PDA 2000, s 50 required, for the first time, that application for leave to bring judicial review proceedings in planning cases had to be made by motion on notice to specified parties. This change from the procedure ordinarily applying to judicial reviews under Ord 84 was made with a view to trying to screen out judicial review of planning decisions at an early stage. The requirement to make the application on notice, and to establish 'substantial grounds' and a 'substantial interest' (subsequently changed to 'sufficient interest') were intended to limit the number of planning judicial review cases that would proceed to a full hearing. Unfortunately, this proved not to be the case. Leave applications were taking a considerable amount of time to prepare for and be heard, and if leave was granted, then there was further delay to the substantive hearing which was in essence, and to a large extent, a rehearing of the leave application. Often the case would, in effect, be heard twice. This led Kelly J in *Mulholland v An Bord Pleanála (No 2)* to comment in the course of his judgment on the leave application that it was 'regrettable that having had detailed argument made to me of the type and depth that will be reproduced at the full hearing, I am precluded from deciding the case. But such is the scheme of the Act of 2000'. As a result, the informal practice grew up of the court directing, with the parties generally acceding, that a so-called 'telescoped' hearing would take place, whereby the leave application proceeds, with the substantive arguments also being made. The Judge then makes the determination as to whether or not leave is

> granted, and if it is granted, the Judge proceeds immediately to determine the judicial review application.
>
> Changes were made to s 50 by PD(A)A 2010, s 32 in particular as a result such that an application for s 50 leave is to be made by motion *ex parte* and is to be granted in a manner specified in the order in respect of an *ex parte* motion for leave. [Footnote omitted]

Section 249(10)(a) threshold for granting leave.

19. Section 249(10)(a) provides that where leave is opposed, the court shall grant leave unless the particular ground "discloses a substantial basis . . . and for these purposes a ground will be regarded as substantial where there is a reasonable prospect of relief being granted". The draft Bill would change the wording of the classic statutory leave test of "substantial grounds" as set out in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125. The purpose of the amended wording is unclear. For legislative continuity and certainty, Comhshaol suggests that the Bill should not tinker with the established wording of "substantial grounds". A requirement of a "reasonable prospect of relief being granted" would still be a relatively low bar to cross. It doesn't add anything to the existing statutory wording and is liable only to lead to unnecessary litigation about its meaning.

20. In any event, Comhshaol considers that the words used in s. 249(10)(a) of the draft Bill, while different to the wording of the existing statutory leave test, would effectively put in place a similar test to the test of "substantial grounds". In *Hunter v. Nurendale Ltd. t/a Panda Waste* [2013] IEHC 430, [2013] 2 I.R. 373, Hedigan J. had to take into account whether the applicant had a "reasonable prospect of success", because of certain ECJ case law on costs not being prohibitively expensive, Hedigan J. noted that the respondent in the case before him conceded whether the applicant had a reasonable prospect of success involved a lower test than the classic leave test of "substantial grounds" as set out in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125, i.e., reasonable, arguable, weighty, and not trivial or tenuous. The Court expressly agreed that the concept of having a reasonable prospect of success was lower than showing substantial grounds for the grant of leave. Hedigan J. stated at p. 385:

> I think that when the European Court of Justice refers to a reasonable prospect of success, it requires that an applicant should be pressing a case that does have a certain measure of substance to it. It is not required that there be a probability of success but there must be . . . at least a good chance of success.

Section 249(10) ©(iii) changes to automatic standing rights for environmental NGOs

21. Section 249(10)(c)(iii) of the draft Bill would change the environmental NGO standing rights, set out in section 50A(3)(b)(ii) of the Planning and Development Act 2000 (as amended) wherein environmental NGOs currently have automatic standing.

22. The draft Bill would limit the ability of citizens to form an organisation in order to challenge a development raises profound issues concerning the constitutional rights of freedom of association (protected by Article 40.6) and of access to the courts (protected by Article 40.3). It is conceivable that small, isolated communities facing the prospect of a proposed development in their locality might be disproportionately impacted by the requirements that an applicant organisation must be a company and have at least 10 members. This will lead to a deprivation of justice for rural communities and prevent them going to Court to protect their rights.

23. Judicial review is a mechanism which is designed to achieve greater environmental protection. The purported exclusion of ENGOs will result in lesser environmental protection. This is not something to which the Bill should aspire.

24. The effect of this change would radically narrow the standing parameters for leave applicants. While the outcome of any judicial review challenge is a matter to be determined entirely on the merits, a key function of the application for leave is to ensure that interested parties are, at the very least, provided with the opportunity to put their case forward for consideration. In this sense, any changes to the leave procedure that restrict access to the courts must be viewed with extreme caution. Such a change is also likely to be contrary to EU law and the legislation could be set aside by the National Courts or following a ruling by the CJEU, leading to embarrassment for Ireland as a Member State.

25. In *Digital Rights Ireland Ltd. V. Minister for Communications* [2010] IEHC 221, [2010] 3 I.R. 251, McKechnie J. stated at para. 46:

> It is . . . clear that where issues of European law arise in litigation, the courts may be required to take a more liberal approach to the issue of standing so that a person's rights thereunder are not unduly hampered or frustrated. The rules on standing should be interpreted in a way which avoid making it "virtually impossible", or "excessively difficult", or which impedes or makes "unduly difficult", the capacity of a litigant to challenge European measures of general application under Article 267 of the Treaty on the Functioning of the European Union (see also *Van Schijndel v. Stichting Pensioenfonds (Cases C-430/93 and C-431/93)* [1995] E.C.R. I- 4705, para. 17; and *Amministrazione delle Finanze dello Stato v. SpA San Giorgio (Case C-199/82)* [1983] E.C.R. I-3595, para. 14).

26. Article 9(3) of the Aarhus Convention provides insofar as is relevant:

> . . . . each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

27. The Aarhus Convention allows Member States to set down in law the criteria for NGOs to have standing to avail of judicial procedures. However, those requirements cannot be overly burdensome. In Comhshaol's view the proposed changes in the draft Bill are unreasonably burdensome and restrict access to justice for citizens.

28. The ECJ has stated clearly that member states must provide 'wide access to justice' and, effective judicial remedies. EU law requires that people who have a sufficient interest to challenge a project and whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts. National rules must not nullify EU law.

29. Comhshaol has significant concerns that the Bill's proposal to amend the rule for environmental NGOs to have automatic standing would breach EU law. The Bill's proposals would significantly narrow the basis on which local environmental groups, particularly in rural areas where there are not large ENGO's could get a foot in the door to bring what could be important litigation. For many communities, the Bill's proposals will be absolute barrier to their ability to take challenges.

Section 250 changes to costs rules

30. Section 250(1) of the draft Bill would provide that the default position in environmental judicial-review proceedings would be that the court would make no order as to costs. However, costs could be awarded against the applicant if the proceedings are frivolous or vexatious or constitute an abuse of process. The draft Bill would give no power to the court to award costs to a successful applicant. This conflicts with the general rule put in place by the Oireachtas in s. 169 of the Legal Services Regulation Act 2015 that costs follow the event, with the winning party being granted costs.

31. Section 250(2) of the draft Bill envisages that an administrative scheme dealing with costs of judicial-review cases arising under Part 9 of the Bill will be established. When viewed side by side with s. 250(1), it would seem clear that the administrative scheme would provide for applicants' costs because the court cannot award costs to an applicant, even if successful.

32. Limiting costs has the potential to limit access to justice. There is already a detailed scheme dealing with costs set out in s. 50B of the Planning and Development Act 2000 (as amended). The current costs provisions provide a degree of equality of arms, perhaps weighing in favour of applicants. The default position is that each party bears its own costs. If either party is particularly deserving of censure, the Court has the means to award costs against that party. The Court has the discretion to award costs to a meritorious applicant, although an entirely successful respondent will not be awarded costs unless an applicant has been particularly culpable. The Court also retains the discretion to award costs in favour of an unsuccessful applicant in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.

33. Removing the ability for a successful applicant to obtain a normal costs order will make it difficult if not impossible for a citizen to hire solicitors and to access Counsel in planning cases. Given the complexity of planning cases it is nearly impossible for concerned citizens to represent themselves with obvious implications for their ability to successfully engage in judicial review.

34. Section 250 has the potential to limit access to justice in environmental cases. It is vital to bear in mind that, in the Legal Services Regulation Act 2015, the Oireachtas has put in place a sophisticated and elegant system of legal-costs adjudication, which ensures that any costs order granted by the courts is limited to costs that are reasonably incurred. Prohibiting successful environmental judicial-review applicants from obtaining a costs order is treating that class of applicants in a manner inferior to how all other litigants are treated.

35. Section 250 is arguably at odds with EU law which seeks to provide the public with access to justice in environmental matters. It acknowledges that citizens "may need assistance in order to exercise their rights".[9]

36. EU law requires that states ensure that the system of access to justice is not "prohibitively expensive". The CJEU has set out detailed guidance on the concept of "prohibitively expensive". These factors are subject to the overarching aim "to ensure wide access to justice and to contribute to the improvement of environmental protection".[10] Ireland has already lost a case before the CJEU on this issue. The CJEU in that case ruled that the possibility that a successful applicant might not recover their costs, because granting a costs order was a discretionary practice, breached the right that access to justice must not "prohibitively expensive".[11] The CJEU also said that rules surrounding costs in

[9] Preamble to the Convention.

[10] Case C-260/11 Edwards v Environmental Agency, at [44]

[11] Case C-427/07 Commission v Ireland, at [93] and [94].

legal proceedings must be clear, precise and predictable in their effect, particularly when they may have a negative effect on individuals.12

37. Section 250 would leave citizens at the mercy of a non-legislative, administrative scheme that could be varied or removed at the stroke of a pen at the behest of a future Executive. This potentially exposes applicants to full and unquantifiable costs risks and introduces significant and obvious uncertainty.

38. In summary, a judicial review is only successful if the state body has acted wrongly or illegally. Why should a citizen be faced with the bill for the states wrongdoing?

General Comment - State Legal Obligations, Complaints and Enforcement

39. While the Planning and Development Act 2000 clearly requires to be updated this Bill does nothing to address the root causes of the volume of judicial review. Judicial reviews are instituted as a reaction to a) the failure by the Board to give any adequate weight to submissions made during the public participation phase and b) the making of repeated and obvious legal errors by the Board. Neither of these issues are cause by the 2000 Act and neither are addressed by the Bill.

40. The major issues with the planning system are caused by the very poor standard of decision making by the Board. Restricting access to justice will not solve this problem and in Comhsaol's view the Bill will in fact result in *more* and not *less* litigation and will be counterproductive in terms of either efficient and effective development, environmental protection or access to justice.

41. Unless members of the public have access to "*adequate and effective remedies*", which are "*…not prohibitively expensive*", Ireland will be in breach of its obligations under Article 9(4) of the Aarhus Convention, and of EU law.

42. The CJEU has confirmed that the Aarhus Convention represents "…an integral part of the EU legal order"[13] following the EU's signature of the Convention and approval through Directive 2005/370.[14]

43. Irish Courts are obliged to interpret Irish and EU law consistently in accordance with Article 9(4) of the Convention, Article 10a of Council Directive

[12] Case C-167/17 *Volkmar Klohn v An Bord Pleanála*, at [50].
[13] C-470/16 *North East Pylon Pressure Campaign and Sheehy*, at [46].
[14] 2005/370/EC: Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.

85/337/EEC[15] and Article 15a of Council Directive 96/61/EC16 to ensure that it is not "impossible or excessively difficult" for members of the public to exercise EU law rights.[17]

44. If Ireland does not comply with its EU and international obligations, it may face enforcement proceedings from the Commission or complaints to the Aarhus Convention Compliance Committee.

45. It should be noted that the Aarhus Convention has an implementation body, to which complaints or non-compliance are brought against States. Complaints brought against the UK when it introduced restrictions on its judicial review procedures, resulted in the UK removing various restrictive amendments.

46. Ireland risks damage to its international reputation if complaints were to be brought against it.[18]

Miscellaneous s241 Tree Protection Orders

47. The Planning Bill at s241 deals with tree preservation orders. It largely restates existing law. Given the current understanding of the importance of trees, particularly mature trees, to reduce the effects of climate change, air quality and to foster for human health and amenity, there is an opportunity to do more to make the preservation of trees easier.

48. There should be a much simpler and easier process for Local Authorities to issue a tree preservation order, and greater fines where the order is not complied with.

49. Also, the built environment and traffic are often given more priority than the preservation of trees. Section 241(3) prevents tree preservation orders where trees might be a nuisance or hazard or become dangerous. It would give more protection to trees if this section could be amended, so that trees could only be cut down or lopped etc. where the trees had become 'extremely' dangerous, or a 'severe' nuisance or an 'extreme' hazard.

50. Finally, given the burdens on local authorities, the provision could be amended to allow any person to apply to the Circuit Court for a tree protection order.

[15] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.
[16]Council Directive 96/61/EC of24 September 1996 concerning integrated pollution prevention and control.
[17] C-470/16 *North East Pylon Pressure Campaign and Sheehy*, at [55]-[58]; C-268/06 *Impact*, at [46].
[18] Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by

the United Kingdom of Great Britain and Northern Ireland

Conclusions

Having reviewed the draft Bill, the Comhshaol believes that it gives rise to the following risks:

- exacerbation of the housing crisis, as a result of significant delays in judicial review cases, as a number of changes are likely to be challenged and overturned by the CJEU.
- significant financial implications for the State arising from the proposed changes, both as a result of increased legal costs to the State from the cost of being require to defend contested leave hearings (and consequent delay)
- potential fines for non-compliance with EU legislation
- genuine environmental litigation may be stifled.
- climate-change goals may be restricted.
- Adverse reputational damage to Ireland

It suggests that part of the work of the Joint Oireachtas Committee and the pre-legislative scrutiny should include a detailed impact assessment to assess the impact of the draft Bill and consider other options of achieving the same goals. The impact assessment should consider:

- What are the potential restrictions on genuine environmental litigation?
- Does the Bill increase the potential of increased legal costs to the State and delay in projects of adding another layer of contested litigation?
- Given the likely breach of EU law, what is the exposure to financial penalties at EU level and what will the effects on efficient planning of good developments be.
- Whether there are other acceptable, yet more proportionate, means of achieving the aims of the draft Bill.

Recommendations

The cumulative (effect of the draft Bill would be to radically curtail the ability of individuals and communities to ventilate environmental concerns. This is particularly alarming at a time when Ireland should be increasingly conscious of its environmental and climate responsibilities. Already, Ireland has one of the highest levels of carbon emissions per capita in the EU.[19] In this sense, the adoption of the draft Bill risks.

[19] https://ec.europa.eu/eurostat/databrowser/view/t2020_rd300/default/table?lang=en (visited 22 January 2020).

exposing Ireland to considerable reputational damage within the international community.

For these reasons, Comhshaol is of the view that the draft Bill, insofar as it modifies judicial-review procedure, should be significantly reworked, if indeed it is decided that there needs to be any amending legislation.

Comhshaol recommends that as a minimum that:

1. The proposed requirement that ENGO's should be registered companies should be removed.

2. An Coimisiún Pleanála should have a procedure for mediation or arbitration for early resolution of disputes, similar to the functions of the Labour Relations Commission for resolution of strikes and workplace disputes.

3. That the prohibition on obtaining costs be abandoned and the current regime reinstated.

4. That the scope for the Board to revisit its decisions *ex post facto* be limited to clerical or immaterial changes.

5. That the requirement for mandatory leave on notice be abandoned and that applications for leave in judicial review proceedings be made *ex parte* as opposed to on notice.

6. That addition is made to the provision on tree protection orders to include a provision for any person to apply to the Circuit Court for a tree protection orders.

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