Submission to the Joint Committee

on Housing, Local Government & Heritage

on the

Draft Planning and Development Bill 2022

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INTRODUCTION

[1] I thank the Committee for the invitation to discuss the draft Planning and Development Bill 2022. This brief written submission sets out some general observations which may be of assistance to the Committee in its deliberations.

[2] I am a Professor at the School of Law, University College Cork and Co-Director of the Centre for Law & the Environment. I served as Vice-Chair of the Organisational Review of An Bord Pleanála which reported to the then Minister for the Environment, Community & Local Government in February 2016.[1] I currently serve as Chair of the United Nations Economic Commission for Europe (UNECE) Aarhus Convention Compliance Committee. This submission is made in a personal capacity.

GENERAL OBSERVATIONS

Overall setting in which planning law operates

[3] A review of planning law is a very welcome development. It is widely acknowledged that the current planning legislation is not fit for purpose. The Planning and Development Act 2000 has been amended on numerous occasions since its adoption. The law is highly fragmented and difficult to decipher, even for experienced

[1] Independent Review Group, *Organisational Review of An Bord Pleanála* (February 2016).

practitioners. The current impenetrable state of planning law creates an unnecessary degree of complexity, delay and cost for everyone who engages with the planning system. The need for a review is clear. The underlying legislative framework must be solid and accessible to facilitate the effective operation of the planning system.

[4] Beyond the basic legislative framework, an essential part of any effective system of environmental governance is that the public authorities tasked with making complex decisions have the expertise and resources to enable them to fulfil their statutory mandates. Any review of the system must acknowledge this fundamental element and work to improve the overall quality and timeliness of decision-making at first instance. Given the current state of play in terms of limited capacity within public authorities, including *An Bord Pleanála*, this has enormous resource implications. Furthermore, the system must take full account of the rights of participation and challenge guaranteed under international and European Union (EU) law.

[5] The urgent need to deliver housing and renewable energy infrastructure at scale is clear. At the same time, however, it must be recognised that we also have a biodiversity crisis. Implementation and enforcement of nature protection law is essential if we are to avoid further unnecessary damage to sensitive ecological systems. Given the scale of the climate and biodiversity crisis, there are no easy solutions. Difficult choices must be made which are guaranteed to generate controversy.

[6] On a related point, it will be interesting to see how the Government responds to the forthcoming report of the Citizens' Assembly on Biodiversity Loss. It will be recalled that the Assembly endorsed a recommendation that the State 'has comprehensively failed in relation to biodiversity' and recommended a radical overhaul of the national approach to biodiversity loss.[2] As regards some of the more specific recommendations, the Assembly voted overwhelmingly in favour of a referendum on an amendment to the Constitution to protect biodiversity. It also recommended that the proposed constitutional amendment should include 'a range of protections for substantive and

[2] 'Citizens' Assembly recommends constitutional amendment to protect biodiversity', Press Release, 27 November 2022.

procedural environmental rights for both people and nature.'[3] The reference to 'procedural environmental rights' here explicitly includes the rights to information, participation and access to justice in environmental matters guaranteed under the Aarhus Convention.[4]

Lack of explanatory notes

[7] The draft Bill is by far the most significant development in the field of planning law in Ireland in over 20 years. The draft Bill runs to over 700 pages. It contains 21 Parts, 467 Heads and seven Schedules. No explanatory notes or background material have been published in association with the draft Bill. This makes it difficult, if not impossible, to identify the specific reasoning behind the proposed amendments. The *Outline of the proposed Planning and Development Bill 2022* published in December 2022 provides limited information.[5] Essentially, it sets out an overview of the contents of the draft Bill in very general terms.

[8] As things stand, therefore, the Heads of an extensive draft Bill have been presented for pre-legislative scrutiny without any substantive explanatory documentation. In particular, we currently lack any detail on the evidence used to justify particular proposals in the draft Bill, for example, the proposals to amend the rules governing standing to bring judicial review proceedings (Head 249(10)(c)) and the rules on costs (Draft Head 250). It is disappointing and unhelpful that this essential background documentation has not been published to date to enable informed discussion and analysis of the draft Bill from the outset. This information is essential to underpin a robust, evidence-based approach to any review of law and policy in this area.

[3] 'Citizens' Assembly recommends constitutional amendment to protect biodiversity', Press Release, 27 November 2022.
[4] *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* 25 June 1998, 2161 UNTS 447 (the 'Aarhus Convention').
[5] Department of Housing, Local Government and Heritage, *Outline of the proposed Planning and Development Bill 2022* (December 2022).

Public participation in law-making

[9] Public participation in law-making is an important aspect of the overall scope of the Aarhus Convention. Article 8 of the Convention governs public participation during the preparation of executive regulations and / or generally applicable legally binding normative instruments.

[10] In ACCC/C/2014/120 (Slovakia) the Aarhus Convention Compliance Committee made it clear that Article 8 applies to the preparation of legislation by executive bodies to be adopted by national parliaments.[6] The Compliance Committee further determined that public authorities, including Governments, do not act in a legislative capacity when engaged in preparing laws until the point when the draft law is submitted to the body or institution that adopts the legislation.[7]

[11] Where Article 8 applies, Parties to the Convention are required to:

> [S]trive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:
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> (a) Time-frames sufficient for effective participation should be fixed;
> (b) Draft rules should be published or otherwise made publicly available; and
> (c) The public should be given the opportunity to comment, directly or through representative consultative bodies.
>
> The result of the public participation shall be taken into account as far as possible.

The Aarhus Convention Implementation Guide provides further guidance on implementation of the obligations set down in Article 8.[8]

[6] ACCC/C/2014/120 (Slovakia) ECE/MP.PP/C.1/2021/19 paras 95-97.
[7] ACCC/C/2014/120 (Slovakia) ECE/MP.PP/C.1/2021/19 paras 98-100.
[8] *The Aarhus Convention: An Implementation Guide*, (2nd ed) (UNECE, 2014) pp.181-185.

Judicial review of planning decisions

[12] The proposals in Part 9 of the draft Bill concerning judicial review have attracted significant attention and commentary, including during the pre-legislative scrutiny process.[9] This is not surprising given the nature and extent of the amendments that are proposed here, and especially as regards the rules governing standing and costs in judicial review of planning decisions. The draft provisions set out in Head 249(10)(c) (standing) and Draft Head 250 (costs) indicate significant regression from the current position. I will not comment further on specific provisions of the draft Bill in this brief submission. However, the following general observations may be of assistance to the Committee.

[13] The purpose of judicial review is to ensure lawful decision-making by public authorities. How public authorities execute their decision-making functions in planning and environmental matters is an area of enormous public interest and importance. As O'Donnell J (as he then was) observed in the Supreme Court in *Balz v An Bord Pleanála*:

> It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live.[10]

[14] The Aarhus Convention (to which Ireland and the European Union are Parties) establishes the rights of access to information, participation in decision-making and access to justice in environmental matters. The preamble to the Convention recognises

[9] See, for example, *Statement for the Irish Environmental Network (IEN) on the Draft Planning and Development Bill 2022*, Pre-Legislative Scrutiny Hearing, 28 February 2023; *Opening Statement*, Environmental and Planning Law Committee of the Law Society of Ireland, Pre-Legislative Scrutiny Hearing, 2 March 2023; and *Opening Statement*, Planning, Environmental and Local Government Bar Association, Pre-Legislative Scrutiny Hearing, 2 March 2023.
[10] *Balz v An Bord Pleanála* [2019] IESC 90 para 57 (emphasis added).

that effective judicial mechanisms should be accessible to the public, including non-governmental organisations (NGOs), so that its legitimate interests are protected and the law is enforced.[11] This is an important acknowledgement of the overarching public interest in environmental protection and the rule of law. It resonates powerfully with Article 1 of the Convention which recognises the right of every person of present and future generations to live in an environment adequate to their health and wellbeing.

[15] The Aarhus Convention and EU law set minimum standards governing access to justice in environmental matters, including as regards standing rules and rules governing costs. These requirements impose significant limits on a State's discretion to restrict access to justice. In particular, standing rules must deliver 'wide access to justice' and the cost of environmental litigation must not be 'prohibitively expensive'. The Convention (which is part of EU law) also recognises explicitly the special position of environmental NGOs in enforcing the law in the public interest.

[16] It is also important to recall Article 47 of the Charter of Fundamental Rights of the EU. Article 47 guarantees the right to an effective remedy for breach of EU law rights, including the right to legal aid where necessary to ensure effective access to justice.

[17] The Court of Justice of the European Union (CJEU) generally adopts a robust approach to access to justice in environmental matters. It insists that the Aarhus rights (which form part of EU law) are implemented effectively in the Member States.[12]

[18] Apart at all from Ireland's obligations under international and EU law, there is a constitutional right of access to the courts.

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[11] Aarhus Convention, preambular paragraph 18.

[12] See for example Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125 paras 49-51; Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* EU:C:2017:987 paras 45-57; Case C-470/16 *North East Pylon Pressure Campaign Ltd v An Bord Pleanála* EU:C:2018:185 paras 56-57; Case C-873/19 *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland* ECLI:EU:C:2022:857 paras 75-81 and Case C-432/21 *Commission v Poland* EU:C:2023:19 paras 174-177.

[19] In the context of the climate and biodiversity crisis, and relentless environmental degradation, it is more important than ever that there is effective judicial oversight of planning and environmental decision-making to ensure that the law is applied correctly by public authorities.

Risk of unintended consequences

[20] As mentioned above, the absence of any explanatory notes to accompany the draft Bill means that it is difficult to identify the rationale behind specific proposed amendments. It is not clear, for example, what purpose the proposed changes to the 'sufficient interest' test for standing in Head 249(10)(c) is intended to serve. Furthermore, the drafting in this particular provision is difficult to decipher. It is unclear, for example, how the different elements of the provisions in Head 249(10)(c)(i)-(iv) are intended to interact with each other.

[21] As things stand, the current law on 'sufficient interest' is relatively stable following the decision of the Supreme Court in *Grace and Sweetman v An Bord Pleanála* [2017] IESC 10.[13] There is an obvious danger here that interfering with the current definition of 'sufficient interest' will trigger further uncertainty and, inevitably, further litigation. It will be recalled that when a more restrictive standing test (a 'substantial interest') was introduced under the Planning and Development Act 2000,[14] as part of a series of measures enacted at that time to curtail judicial review of planning decisions, the result was a significant amount of satellite litigation until the matter eventually reached the Supreme Court in 2008 in *Harding v Cork County Council*.[15] It is important to be alert to the risk of unintended consequences. It is also notable that the 'substantial interest' test was subsequently abandoned in 2011,[16] presumably because there were doubts about its compatibility with international and EU law obligations.[17]

[13] *Grace and Sweetman v An Bord Pleanála* [2017] IESC 10.
[14] Planning and Development Act 2000 section 50(4)(b).
[15] *Harding v Cork County Council* [2008] IESC 27.
[16] Environment (Miscellaneous Provisions) Act 2011 section 20 reinstated the 'sufficient interest' test.
[17] See on this point *Grace and Sweetman v An Bord Pleanála* [2017] IESC 10 para 6.1.

Importance of 'clear and well worked out' legislation

[22] Amending planning legislation on a regular basis is not conducive to legal certainty. This point was highlighted by the then Chief Justice, Mr Justice Frank Clarke, in remarks delivered at a seminar to mark the launch of the Planning, Environmental and Local Government Bar Association (PELGBA) in July 2018 (emphasis added):

> If we keep amending legislation, as we have been doing a lot in recent times, then we create constant and shifting uncertainty. It is almost inevitable that there will be some issues of interpretation with any new model. If we keep changing the model then we perpetuate the period during which the interpretation of the existing model has not settled down.
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> *If there is a political demand for greater speed in the resolution of environmental cases then a significant part of the solution lies in the production of clear and well worked out legislation both at the European and National level*. If that does not happen then there will continue to be cases which will not be clear cut and which, under the *CILFIT* jurisprudence of the CJEU, may have to be referred to the European Court and there will continue to be projects which, even though they may successfully clear all hurdles at the end of the day, may suffer by being held up for too long. The solution to that problem is not just one to be found within the planning decision makers or the Courts but, to quite a significant extent, in legislators (emphasis added).[18]

The fundamental objective of 'clear and well worked out legislation' in this context should be to the fore when the Committee is preparing its pre-legislative scrutiny report. Designing legislation that is fit for purpose is the first step in addressing complexity in the planning process and reducing the scope for delay.

[18] Introductory Remarks of Mr Justice Frank Clarke, Chief Justice, at the launch of the Planning, Environmental and Local Government Bar Association, Dublin, 10 July 2018.

CONCLUSION

[23] Measures aimed at reducing unnecessary complexity and delay in decision-making are to be welcomed. But any such proposed measures must take full account of the State's obligations under international and EU law. The Aarhus Convention (which is part of EU law) recognises that better quality decisions are achieved by guaranteeing the public the opportunity to provide its comments and requiring public authorities to take account of those comments in the decision-making process. By setting minimum standards for access to justice in environmental matters, the Convention seeks to ensure that the public can take action to enforce the law where necessary. Without access to justice, the law can quickly be undermined, with potentially devastating consequences for the environment. Rights-based environmental decision-making has never been as important as it is now given the scale of the challenges facing society.

[24] It is essential that any proposed amendments to planning legislation are evidence-based and take full account of the practical insights offered by those who are most familiar with the day-to-day operation of the planning system, including the judicial review process.

[25] Considerable attention will also need to be paid to what are bound to be detailed and highly complex transitional arrangements.

[26] In the absence of detailed, careful examination and analysis, proposed new measures aimed at bringing 'greater clarity, consistency and certainty in planning'[19] may well end up having the opposite effect.

8 March 2023

[19] Department of Housing, Local Government & Heritage, Press Release 'Greater clarity, consistency and certainty in planning to be delivered with new legislation' 13 December 2022.