

# Bill Digest

## Planning and Development, Heritage and Broadcasting (Amendment) Bill 2021

No. 47 of 2021

Rebecca Halpin, Legal Researcher

Hari Gupta, Senior Legal Researcher

26 April 2021

### Abstract

The [Planning and Development, Heritage and Broadcasting \(Amendment\) Bill 2021](#) is a technical Bill which proposes to amend legislation to allow for the transfer of functions relating to heritage under a number of enactments to the Minister for Housing, Local Government and Heritage. The Bill provides for the transfer of certain heritage functions that may not be transferred by way of secondary legislation due to the ruling of the Supreme Court in *Mulcreavy v Minister for Environment, Heritage and Local Government*.



## Contents

Contents .....	1
Background.....	2
Pre-legislative Scrutiny.....	2
Table of Provisions .....	3
Policy Context.....	10
The Mulcreevy case .....	10
Mulcreevy problems .....	12
Functions relating to Planning and Development and Heritage .....	14
Principal provisions of the Bill .....	15
Possible amendments in the Oireachtas? .....	20

**This L&RS Bill Digest may be cited as:**

Oireachtas Library & Research Service, 2021, *L&RS Bill Digest: Planning and Development, Heritage and Broadcasting (Amendment) Bill 2021*

## Legal Disclaimer

No liability is accepted to any person arising out of any reliance on the contents of this paper. Nothing herein constitutes professional advice of any kind. This document contains a general summary of developments and is not complete or definitive. It has been prepared for distribution to Members to aid them in their parliamentary duties. Some papers, such as Bill Digests are prepared at very short notice. They are produced in the time available between the publication of a Bill and its scheduling for second stage debate. Authors are available to discuss the contents of these papers with Members and their staff but not with members of the general public.

## Background

The Planning and Development and Nature Conservation (Heritage) Functions Bill was listed on the Government's [Legislation Programme: Spring Session 2021](#). Since the publication of the Spring Programme, the name of the Bill has been changed. The [Planning and Development, Heritage and Broadcasting \(Amendment\) Bill 2021](#) (the Bill) together with the accompanying [Explanatory Memorandum](#), was published on 16 April 2021.

The [Explanatory Memorandum](#) represents the Bill as a technical Bill “necessary to allow for the transfer of functions relating to heritage under a number of enactments to the Minister for Housing, Local Government and Heritage.” The [Explanatory Memorandum](#) explains that a number of powers and functions in relation to heritage have already transferred to the Minister for Housing, Local Government and Heritage under the [Heritage \(Transfer of Departmental Administration and Ministerial Functions\) Order 2020](#) (S.I. No 339 of 2020). However, the Order could not transfer all heritage functions to the Minister. If enacted, the Bill would transfer of the remaining functions by:

- amending [section 30 of the Planning and Development Act 2000](#) to allow the Minister for Housing, Local Government and Heritage to deal with planning applications and draft development plans from a heritage perspective; and
- amending various provisions of the Planning and Development Act 2000 to consolidate powers and functions in the Minister for Housing, Local Government and Heritage that were originally divided between two separate authorities.

## Pre-legislative Scrutiny

The Bill has not undergone any pre-legislative scrutiny. Although, the Heads of the Bill were approved on 28 October 2020, they were not published. According to the Government's [Legislation Programme: Spring Session 2021](#) the relevant committee agreed to waive pre-legislative scrutiny of the Bill.

## Table of Provisions

Section	Title	Effect
<b>PART 1: Preliminary and General</b>		
<b>1</b>	<b>Short title, collective citations, construction and commencement</b>	<p>This Act can be cited as the <i>Planning and Development, Heritage and Broadcasting (Amendment) Act 2021</i>, and part two of the Act can be commenced at different times by the Minister. As the commencement provision is silent as to the rest of the Act, it will commence on enactment.</p> <p>Chapters 2 and 5 or Part 2 and the <a href="#">Planning and Development Acts 2000 to 2020</a> may be cited and read together as the <i>Planning and Development Acts 2000 to 2021</i>.</p> <p>Chapter 3 of Part 2 and the <i>Wildlife Acts 1976 to 2018</i> may be cited and read together as the <i>Wildlife Acts 1976 to 2021</i>.</p> <p>Chapter 4 of Part 2 and the <i>European Communities (Birds and Natural Habitats) Regulations 2011 to 2015</i> may be cited and read together as the <i>European Communities (Birds and Natural Habitats) Regulations 2011 to 2021</i>.</p>
<b>2</b>	<b>Expenses</b>	<p>This is a standard provision that allows expenses incurred in the administration of the Act to be paid out of monies provided by the Oireachtas, to such extent as may be sanctioned by the Minister for Public Expenditure and Reform.</p>
<b>PART 2: Provisions relating to Heritage</b>		
<b>Chapter 1: Definitions</b>		
<b>3</b>	<b>Definitions</b>	<p>A reference to ‘Act of 2000’ is to be taken as a reference to the <a href="#">Planning and Development Act 2000</a> and the term ‘Minister’ means the Minister for Housing, Local Government and Heritage.</p>
<b>Chapter 2: Amendment of Act of 2000</b>		

4	<b>Amendment of section 13 of Act of 2000</b>	This is a technical amendment to <a href="#">section 13(2)(a) and 13(8)(c) of the Act of 2000</a> that would replace references to 'the Minister for Arts, Heritage and the Gaeltacht' with 'the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media'.
5	<b>Amendment of section 30 of Act of 2000</b>	<p>This would substitute a new subsection for <a href="#">section 30(2) into the Act of 2000</a>. The new subsection would allow an exception to the rule that the Minister is prohibited from exercising any power or control in relation to any case that is being dealt with by a planning authority or An Bord Pleanála.</p> <p>Under the new subsection, the Minister may perform any function transferred by:</p> <ul style="list-style-type: none"> <li>the <a href="#">Heritage (Transfer of Departmental Administration and Ministerial Functions) Order 2020</a> (S.I. No 339 of 2020), or</li> <li>an order made under <a href="#">section 6(1) of the Ministers and Secretaries (Amendment) Act 1939</a>, from the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media, irrespective of when the order was made.</li> </ul>
6	<b>Amendment of section 51 of Act of 2000</b>	The proposed amendment would substitute a new subsection for <a href="#">section 51(2) of the Act of 2000</a> . The proposed subsection would allow the Minister to prescribe the form of a record of protected structures without any need for consultation.
7	<b>Amendment of section 52 of Act of 2000</b>	This would substitute a new subsection for <a href="#">section 52(1) of the Act of 2000</a> . The proposed subsection would allow, without any need for consultation, the Minister to issue Guidelines to planning authorities in relation to protected structures and their inclusion in the record of protected structures. Any guidelines issued under the original subsection, prior to the commencement of the section, would continue to have effect

		after the section has commenced and may be revoked or amended by the Minister.
<b>8</b>	<b>Amendment of section 177X of Act of 2000</b>	<p>This section contemplates a number of amendments to <a href="#">section 177X of the Act of 2000</a>, including the removal of references to the Minister for Arts, Heritage and the Gaeltacht.</p> <p>Where the Minister contemplates that imperative reasons of overriding public interest may exist, the Minister may consider whether the relevant compensatory measures in Natura 2000 would apply, without the need to seek the views of another person. To assist in the consideration, the Minister may enter into consultations with the competent authority, which may submit modified compensatory measures.</p> <p>The Minister must, as soon as possible after considering the relevant compensatory measures, form an opinion as to whether the compensatory measures (or modified compensatory measures, where the compensatory authority was consulted) would be sufficient to ensure that the overall coherence of the Natura 2000 network is protected. When forming his or her opinion the Minister may reconsider whether imperative reasons of overriding public interest exist and must form an opinion on this before he or she issues a notice under the section.</p> <p>The Minister may form an opinion on these matters without seeking the opinion of another person or body.</p>
<b>9</b>	<b>Amendment of section 177Y of Act of 2000</b>	<p>This section is almost identical to section 8 of the Bill, the difference being that while section 8 seeks to amend <a href="#">section 177X of the Act of 2000</a>, covering sites that do not host a priority habitat type or priority species, this section would amend <a href="#">section 177Y of the Act</a></p>

		<p><a href="#">of 2000</a>, covering a European site that hosts a priority habitat type or priority species.</p> <p>As with the proposed section 8 of the Bill, this section would remove references to the Minister for Arts, Heritage and the Gaeltacht. It would also allow the Minister to consider matters and form opinions form on matters without seeking the views or opinion of another person or body.</p>
10	<b>Amendment of section 177AB of Act of 2000</b>	<p>This section is very similar to sections 8 and 9 of the Bill.</p> <p>The section proposes amendments to <a href="#">section 177AB of the Act of 2000</a>, covering situations where the Minister receives a statement of case relating to a European site that does not host a priority habitat type or priority species.</p> <p>The proposed section would remove references to the Minister for Arts, Heritage and the Gaeltacht and allow the Minister for Housing, Local Government and Heritage to make considerations, enter into ongoing consultations with the competent authority, and form or furnish opinions without the need to seek the views or follow the opinion of another person or body.</p> <p>The section also includes a small technical amendment to section 177AB(1)(c), to include reference to both modified and alternative compensatory measures proposed by the competent authority, not just the reference to alternative proposed compensatory measures.</p>
11	<b>Amendment of section 177AC of Act of 2000</b>	<p>This section is very similar to the previous three sections of the Bill.</p> <p>The section proposes amendments to <a href="#">section 177AC of the Act of 2000</a>, covering situations where the Minister receives a statement of case relating to a European site that hosts a priority habitat type or priority species.</p> <p>The proposed section would remove references to the Minister for Arts, Heritage</p>

		<p>and the Gaeltacht and, with the exception of the requirement in subsection (2), allow the Minister for Housing, Local Government and Heritage to make considerations, enter into ongoing consultations with the competent authority, and form or furnish opinions without the need to seek the views or follow the opinion of another Minister.</p> <p>Section 177AC(2) would not be amended. It would continue to provide that where the Minister considers that the imperative reasons of overriding public interest comprise or include an reason that is not included in the legislation and the Minister proposes not to seek the opinion of the Commission on the matter, as soon as possible, the Minister must consult such other Minister of the Government as the Minister considers appropriate on the matter, requesting that Minister to furnish his or her view, and the Minister must consider those views before forming his or her opinion on the matter.</p> <p>Section 11 of the Bill proposes two technical amendments. First, the section would amend section 177AB(5)(c), to include reference to both modified and alternative compensatory measures proposed by the competent authority, not just the reference to alternative proposed compensatory measures.</p> <p>Secondly, the section would amend section 177AB(8), to ensure that the references to relevant subsections covering the giving of notices are accurate.</p>
<b>Chapter 3: Amendment of Wildlife Acts</b>		
<b>12</b>	<b>Amendment of section 59 of Wildlife Act 1976</b>	<p>This section proposes to amend <a href="#">section 59(3)</a> of the <a href="#">Wildlife Act 1976</a>, which provides for the regulation by the Minister of access to, or use of, the foreshore for nature conservation purposes. It is proposed to amend the provision to provide that those regulations shall be made (i) following consultation with the Commissioners of Public Works, (ii) with</p>



		the consent of the Minister for Public Expenditure and Reform and (iii), where the regulations relate to foreshore in relation to which functions are vested in a Minister of the Government, other than the Minister for Housing, Local Government and Heritage, with the consent of that other Minister of the Government
13	<b>Amendment of section 16 of Wildlife (Amendment) Act 2000</b>	Section 13 proposes to amend <a href="#">section 16(2)(a)</a> of the <a href="#">Wildlife (Amendment) Act 2000</a> . The section relates to the designation of natural heritage areas by the Minister. Section 13 of the Bill proposes to remove reference to the specific Ministers with whom the Minister for Housing must consult when designating natural heritage areas and will instead refer to such other Minister of the Government as the Minister considers appropriate in the circumstances. The section retains reference to the Commissioners of Public Works and relevant planning authorities, who must also be consulted.

#### **Chapter 4: Amendment of European Communities (Birds and Natural Habitats) Regulations 2011**

14	<b>Amendment of European Communities (Birds and Natural Habitats) Regulations 2011</b>	This section proposes to amend certain designation and direction provisions of the <a href="#">European Communities (Birds and Natural Habitats) Regulations 2011</a> by removing references to specific Ministers with whom the Minister must communicate. It is proposed to replace these with reference to the Minister or Ministers that the Minister deems appropriate.
----	----------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

#### **Chapter 5: Planning matters in relation to heritage**

15	<b>Planning matters in relation to heritage</b>	<p>This section would ensure that section 30(1) of the Act of 2000 could not be read in such a way so as to prevent the Minister from doing any of the following (or a related act) when performing a relevant function:</p> <ul style="list-style-type: none"> <li>• making a planning application to a planning authority;</li> <li>• making an appeal; and</li> </ul>
----	-------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

		<ul style="list-style-type: none"> <li>making a request for a declaration, a referral for a decision or applying for a determination,</li> </ul> <p>if done in accordance with the relevant provisions of the Act of 2000.</p> <p>A relevant function would be any function transferred by:</p> <ul style="list-style-type: none"> <li>the <a href="#">Heritage (Transfer of Departmental Administration and Ministerial Functions) Order 2020</a> (S.I. No 339 of 2020), or</li> <li>an order made under <a href="#">section 6(1) of the Ministers and Secretaries (Amendment) Act 1939</a>, from the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media, irrespective of when the order was made.</li> </ul>
<b>PART 3: Amendment of Broadcasting Act 2009</b>		
<b>16</b>	<b>Amendment of section 127 of Broadcasting Act 2009</b>	This would delete the phrase ‘the Minister for Arts, Sport and Tourism’ from <a href="#">section 127(6) of the Broadcasting Act 2009</a> .
<b>17</b>	<b>Amendment of section 162 of Broadcasting Act 2009</b>	In <a href="#">section 162(5) of the Broadcasting Act 2009</a> , this section would replace the term ‘the Minister for Arts, Sport and Tourism’ with ‘such Minister or Ministers of the Government as he or she considers appropriate’.

## Policy Context

### The Mulcreevy case

In [\*Mulcreevy v Minister for Environment, Heritage and Local Government\*](#)<sup>1</sup> the Supreme Court ruled that the intent of primary legislation cannot be changed by way of secondary legislation.<sup>2</sup>

### Relevant legislation

The case concerned the [\*National Monuments Act 1930\*](#) (1930 Act), which provides for a statutory scheme for the protection and preservation of national monuments and archaeological objects. Under [section 14 of the 1930 Act](#) it is unlawful for any person to demolish, remove, disfigure or interfere with any national monument without appropriate consent. In this regard, the 1930 Act gave two bodies - the local authority and the Commissioners of Public Works – the power, to be exercised by joint written consent, to authorise a person to carry out works on a national monument, whenever the authorities thought it expedient in the interests of archaeology or for any other reason.

[\*Section 15 of the National Monuments \(Amendment\) Act 1994\*](#) (the 1994 Act) introduced new controls on the consent process by providing that joint consent could only be granted where it would be in the interests of archaeology to do so. In any other case such the joint consent would need to be approved by the Minister for Arts, Culture and the Gaeltacht, making it a three-pronged system of consent, requiring the approval of three entirely distinct and independent bodies with different remits.

The [\*Heritage \(Transfer of Functions of Commissioners of Public Works\) Order 1996 \(S.I. No 61 of 1996\)\*](#) (1996 Order) provided for the transfer of functions of the Commissioners of Public Works set out in the schedule of the order to the Minister for Arts, Culture and the Gaeltacht. And, subsequently, the [\*Heritage \(Transfer of Departmental Administration and Ministerial Functions\) Order 2002 \(S.I. No 356 of 2002\)\*](#) (2002 Order) provided for the vesting of the same functions in the Minister for Environment, Heritage and Local Government.

The 1996 Order had the effect of removing the Commissioners of Public Works from the consent process, making redundant the three-pronged system of consent and effectively substituting a two-tiered system of consent – joint consent of the local authority with the Minister for Arts, Culture and the Gaeltacht, to be approved by the Minister for Arts, Culture and the Gaeltacht. The 2002 Order continued the two-tiered system, substituting in the Minister for the Environment and Local Government.

---

<sup>1</sup> [2004] IESC 5; [2004] 1 IR 72.

<sup>2</sup> For a discussion of the difference between primary and secondary legislation, how secondary legislation is made and levels of scrutiny see Oireachtas Library & Research Service, 2020, [L&RS Note: Making and Scrutiny of Secondary Legislation](#).

## The facts

The Carrickmines Castle ruin, a national monument protected under the National Monuments Acts, was located along the planned route of the South-Eastern Motorway in Dublin (the M50). Plans for the construction of a part of the motorway required works to be completed on and near the ruin. The Minister for the Environment and Local Government had authorised the road project and the local authority had been granted an excavation licence prior to commencing works.

The works were controversial and became the subject of injunctive proceedings in the High Court where the plaintiffs sought to restrain the local authority from removing parts of the monument.<sup>3</sup> The Court refused the relief even though the local authority conceded that they had not sought the express consent of the Minister for the Environment and Local Government before commencing works.

The local authority subsequently sought the consent of the Minister for Environment, Heritage and Local Government, which was issued on 3 July 2003 with a reference to the 1994 Act. The Minister then signed the *National Monuments (Approval of Joint Consent) Order 2003* which stated that the public interest in the construction of the South Eastern Motorway along the approved route justified the carrying out of works impacting the archaeology at the Carrickmines Castle site.

## The claims

A claim in Judicial Review followed in which the applicant claimed, among other things:

- The 2003 approval order was beyond the power of the National Monuments Acts and that the public interest ground cited by the Minister for Environment in making the approval was not a lawful basis for the order; and
- The 1996 and 2002 Orders were also beyond the powers of the National Monuments Acts.

The claim was rejected by the High Court, on grounds that the action had not been brought sufficiently promptly and the applicants appealed to the Supreme Court.

## Relevant findings

The Supreme Court allowed the appeal, holding:

“Delegated legislation cannot make, repeal or amend any law and to the extent that a parent Act purports to confer such a power it will be constitutionally invalid. The effect of the 1996 order is to substitute the statutory regime requiring the consent of three distinct and independent statutory bodies in order to interfere with a national monument with a regime requiring the consent of only two such bodies. The Oireachtas had plainly considered it appropriate that the body giving the ultimate decision should be different than the two bodies which had jointly authorised the interference initially. Contrary to this intention the statutory body now authorised to issue the ultimate approval (the Minister for the Environment) is the same body that had jointly authorised the interference with the national monument in the first instance. It is an inescapable conclusion that the 1996 Order purports

---

<sup>3</sup> [Dunne v Dun Laoghaire-Rathdown County Council](#) [2003] 1 IR 567.

to amend s. 15 of the 1994 Act and that s. 9(2) of the 1924 Act cannot be interpreted as conferring a power on the government having that effect. *Cooke v Walsh* [1984] IR 710; [1984] ILRM 208, *Harvey v Minister for Social Welfare* [1990] 2 IR 232 followed.”<sup>4</sup>

## Mulcreevy problems

The type of issue that arose in the Mulcreevy case (i.e. a ‘Mulcreevy problem’) was caused by the transfer of statutory functions via secondary legislation, leading to a consolidation of a joint consent function into a single authority. This led to a situation where, the secondary legislation affected the intention of the Oireachtas as expressed in the primary legislation. It also meant, to satisfy the requirements of the primary legislation, the Minister would be required to consult with him or herself (wearing different ‘hats’). The only way to rectify the issue would be to enact primary legislation transferring the powers that would cause a Mulcreevy problem.<sup>5</sup>

## Transfer of functions

The transfer of functions refers to the allocation of functions and responsibilities between Departments and Ministers. According to the [Transfer of Functions Guidelines and Best Practice Handbook](#):

“The Taoiseach, as head of Government (Article 13 of the Constitution), is responsible for the allocation of functions between Ministers, and for the overall organisation of the government. The structure of Government Departments changes to reflect the allocation of functions to Ministers. These changes generally occur immediately after a general election, but they may be instigated by the Taoiseach at any time. Departments must continue to carry out their existing functions while such reallocations are taking place.”<sup>6</sup>

The power to transfer functions from one Minister or Department to another and to rename Departments is vested in the Government under section 6 of the [Ministers and Secretaries \(Amendment\) Act 1939](#). The government can transfer functions from one Minister or Department to another by a Transfer of Functions Order (under subsections 6(1)(c) and 6(1)(d)) and can change the name and titles of Ministers and Departments (under subsections 6(1)(a) and 6(1)(b)), also by Order.

A Transfer of Function/General Order is a Statutory Instrument signed by the Taoiseach on foot of a Government decision. A senior member of the Management Board of the Department of Public Expenditure and Reform has been identified as the Central Coordinator for the implementation of the Transfer of Functions.

---

<sup>4</sup> *Ibid.* - Westlaw 2004

<sup>5</sup> A recent example of legislation that has been enacted to overcome the Mulcreevy Problem is the [Radiological Protection \(Amendment\) Act 2018](#).

<sup>6</sup> Department of Public Expenditure and Reform [Transfer of functions: Guidelines and Best Practice Handbook](#), last updated 29 June 2020, p. 2.

The Handbook sets out the preliminary work which all Departments should put in place prior to an election and this includes preparing a full list of the Ministers statutory functions in both primary and secondary legislation and also a history of transfer of functions in relation to its Department.

The Handbook further sets out how to prepare Transfer of Function Order(s) which among other things highlights the Mulcreevy judgment. This is detailed in Textbox 1, Preparation of Transfer of Functions Order(s):

#### **Text Box 1: Preparation of Transfer of Functions Order(s)**

The draft Transfer of Functions Orders are prepared by the transferring Department, and progress on the Orders is coordinated by the Central Coordinator, D/PER. Each Order requires fully comprehensive input from the Department from which functions are transferring, to ensure that all relevant functions are included in the Order. In particular, the Department concerned must provide a comprehensive list of all Acts, provisions of Acts and Regulations governing or impacting on the functions being transferred. These will have to appear in the Schedule to the Transfer of Functions Order.

If any change is to be made in the nature or manner of exercise of the power in question, amendment of the relevant legislation will be required and should be processed in the same way as any legislative proposal.

It is important to ensure that the terms of a Transfer of Functions Order do not fall foul of the 'Mulcreevy Judgment'. This refers to a Supreme Court judgment which ruled, in essence, that secondary legislation cannot alter the intent of the relevant primary legislation – for example by reducing the number of Ministers or bodies that have to be consulted before a decision is made. Departments should raise any doubts they may have on this, or on any other legal issues, with the Advisory Counsel in the Office of the Attorney General. If it is found that any element of a draft Order fails the 'Mulcreevy test', amending legislation may be required.

**Source:** Department of Public Expenditure and Reform [\*Transfer of functions: Guidelines and Best Practice Handbook\*](#), February 2020.

## Functions relating to Planning and Development and Heritage

Since the Planning and Development Act 2000 was first introduced the powers and functions related to heritage and to planning and development have moved between Ministers. The following Chart provides a timeline of the respective functions.

	 Minister charged with <b>Heritage</b> function	 Minister charged with <b>Planning and</b> <b>Development</b> function
<b>July 1997</b>	Minister for Arts, Heritage, Gaeltacht and the Islands	Minister for the Environment and Local Government
<b>June 2002</b>	Minister of Community, Rural and Gaeltacht Affairs	Minister for the Environment, Heritage and Local Government
<b>10 July 2002</b>		Minister for the Environment and Local Government
<b>10 July 2003</b>		Minister for the Environment, Heritage and Local Government
<b>1 May 2011</b>		Minister for the Environment, Community and Local Government
<b>10 June 2011</b>	Minister for Arts, Heritage and the Gaeltacht	Minister for the Environment, Community and Local Government
<b>1 May 2016</b>	Minister for Arts, Heritage, Regional, Rural and Gaeltacht Affairs	
<b>23 July 2016</b>		Minister for Housing, Planning, Community and Local Government
<b>7 July 2017</b>	Minister for Culture, Heritage and the Gaeltacht	
<b>1 August 2017</b>		Minister for Housing, Planning and Local Government
<b>30 September 2020</b>		Minister for Housing, Local Government and Heritage

Source: Department of Housing Local Government and Heritage, '[History of the Department](#)', 21 December 2020

## Principal provisions of the Bill

This section will not treat every section of the Bill. It will only examine the principal provisions, dealing with similar provisions in a collective manner.

### Section 4

Section 4 of the Bill would amend [section 13\(2\)\(a\) and 13\(8\)\(c\) of the Act of 2000](#) to replace references to ‘the Minister for Arts, Heritage and the Gaeltacht’ with ‘the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media’.

[Section 13 of the Act of 2000](#) allows for variation of a development plan by a planning authority. Under the current legislation, where the planning authority proposes a variation, and when it makes a variation to a development plan, it must send notice of those actions to the Minister, the Minister (formerly) for Arts, Heritage and the Gaeltacht, and other specified bodies. As the legislation stands, as the [Heritage \(Transfer of Departmental Administration and Ministerial Functions\) Order 2020](#) (S.I. No 339 of 2020) transferred the heritage functions of the former Minister for Arts, Heritage and the Gaeltacht to the Minister, the planning authority would only need to notify one minister, not two as was originally envisioned by the section. This would cause a Mulcreavy problem. To overcome this issue, section 4 of the Bill proposes to designate the second minister as the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media. These amendments would seem to adequately address the issue.

### Sections 5 and 15

Section 5 of the Bill would amend [section 30\(2\) of the Act of 2000](#) to allow for an exception to the rule that the Minister is generally prohibited from exercising any power or control in relation to any case that is being dealt with by a planning authority or An Bord Pleanála.

Under the new subsection, the Minister may perform any function transferred by:

- the [Heritage \(Transfer of Departmental Administration and Ministerial Functions\) Order 2020](#) (S.I. No 339 of 2020), or
- an order made under [section 6\(1\) of the Ministers and Secretaries \(Amendment\) Act 1939](#), from the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media, irrespective of when the order was made.

Under the current legislation, the exception relates to functions transferred from the former Minister for Community, Rural and Gaeltacht Affairs.

This amendment would allow the Minister to exercise specified functions that are transferred or proposed to be transferred to him or her. This would involve functions related to heritage, culture and Gaeltacht affairs. For example, this may include expressing views on planning applications or draft development plans from a heritage perspective.



Section 15 of the Bill is similar in that it qualifies that [section 30\(1\) of the Act of 2000](#) must not be read in such a way so as to prevent the Minister, when performing a specified function that has been transferred to him or her, from doing any of the following (or a related act):

- making a planning application to a planning authority;
- making an appeal; and
- making a request for a declaration, a referral for a decision or applying for a determination,

if the relevant act is performed in accordance with the relevant provisions of the Act of 2000.

Neither section 5 nor section 15 add any new functions to the Minister. They simply ensure that the Minister is not prohibited from performing his or her functions that stem from a different (non-planning) capacity.

## Section 6

The proposed section would amend [section 51\(2\) of the Act of 2000](#), allowing the Minister to prescribe the form of a record of protected structures without any need for consultation. The provision as it currently stands would require the Minister to consult with the Minister (formerly) for Arts, Heritage, Gaeltacht and the Islands before prescribing the form of protected structures. As the heritage functions of the former minister have been transferred to the Minister under the [Heritage \(Transfer of Departmental Administration and Ministerial Functions\) Order 2020](#) (S.I. No 339 of 2020), the current provision would have the Minister consult with him or herself. Again, this would create a Mulcreevy problem. That said, by amending the section, the two-tiered protection would be undone, allowing the Minister to act without consultation. The amendment could have also overcome the Mulcreevy problem by requiring the Minister to consult with a different minister, for example, the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media, which would have retained the two-tiered requirement.

## Section 7

This section would amend [section 52\(1\) of the Act of 2000](#) allowing, without any need for consultation, the Minister to issue Guidelines to planning authorities in relation to protected structures and their inclusion in the record of protected structures. The section would also ensure that any Guidelines issued under the original subsection, prior to the commencement of the section, would continue to have effect after the section has commenced and may be revoked or amended by the Minister, retrospectively validating Guidelines issued and ensuring continuity.

As it stands, the section would require the Minister for Arts, Heritage, Gaeltacht and the Islands to issue the Guidelines, after consulting with the Minister. As with section 6 of the Bill, this creates a Mulcreevy problem, requiring the Minister to consult with him or herself. It follows in the same vein that the Mulcreevy problem could also be solved by requiring the Minister to consult with another Minister, ensuring the two-tiered protection remains in place.

## Sections 8, 9, 10 and 11

These four sections of the Bill are very similar and will be dealt with together. The contemplated amendments to [sections 177X](#), [177Y](#), [177AB](#) and [177AC of the Act of 2000](#) would remove

references to the Minister for Arts, Heritage and the Gaeltacht (former minister) and provide for the consolidation of the consultation functions into the Minister to avoid a Mulcreevy problem, where the Minister is required to consult with him or herself.

Currently, all four sections deal with European sites in the Natura 2000 network. Section 177X and 177AB deal with sites that do not host a priority habitat type or species, while sections 177Y and 177AC deal with sites that host a priority habitat type or species. As stated in the [Explanatory Memorandum](#) to the Bill, the four sections currently provide for consultation by the Minister with the Minister for Arts, Heritage and the Gaeltacht (former minister):

“... as to whether the compensatory measures specified by a competent authority in an imperative reasons of overriding public interest case are sufficient to ensure that the overall coherence of the Natura 2000 network (European sites - Special Areas of Conservation and Special Protection Areas) is protected, where the making of certain land use plans specified in the Act or the granting of consent for a proposed development under the Act would adversely affect the ecological integrity of a European site, but it is proposed that it should still go ahead for imperative reasons of overriding public interest.”

The proposed amendments would allow the Minister to make considerations, enter into ongoing consultations with the competent authority, and form or furnish opinions without the need to seek the views or follow the opinion of another Minister. The exception being the requirement in section 177AC(2), that the relevant section of the Bill does not propose to amend. It would continue to require the Minister to consult “such other Minister of the Government as the Minister considers appropriate on the matter, requesting that Minister to furnish his or her view, and the Minister must consider those views before forming his or her opinion on the matter.” Although, the proposed amendments would appear to overcome the Mulcreevy problem in these sections, it appears that the problem could also be overcome by looking to section 177AC(2), and requiring the Minister to consult such other Minister of the Government as the Minister considers appropriate on the matter, ensuring the continuity of a multi-tiered process.

## Section 12

This section proposes to amend [section 59\(3\)](#) of the [Wildlife Act 1976](#), which provides for the regulation by the Minister of access to, or use of, the foreshore for nature conservation purposes.

The section currently provides that Regulations regulating the access to, or use of, foreshore shall regulate access to an extent that the Minister considers necessary for the conservation of wildlife, and will be made only by the Minister with consent of the Minister for the Marine and Natural Resources. In the event of regulations relating to foreshore that is not held by the Minister, these regulations are to be made only after consultation with either the Commissioners (if foreshore is held by the Commissioners) or the Minister of the Government by whom the foreshore is held.

It is proposed that the section be amended to require:

- a) Consultation with the Commissioner of Public Works
- b) Consent of the Minister for Public Expenditure and Reform; and

- c) where the regulations relate to foreshore in relation to which functions are vested in a Minister of the Government, other than the Minister, with the consent of that other Minister of the Government.

The proposed amendment introduces a new requirement for the consent of the Minister for Public Expenditure and Reform, which is not necessary under the current provision.

The element of section 59 that relates to the foreshore is the only provision of the 1976 Act to which the [Heritage \(Transfer of Departmental Administration and Ministerial Functions\) Order 2020](#) did not apply. As it is proposed that the number of bodies that must be consulted under section 59(3) is to be altered, it is necessary to amend the provision through primary legislation to avoid the Mulcreavy problem.

### Section 13

Section 13 proposes to amend [section 16\(2\)\(a\)](#) of the [Wildlife \(Amendment\) Act 2000](#). The section relates to the designation of natural heritage areas by the Minister. The current section 16(2)(a) sets out the bodies and Ministers from whom the Minister must seek observations before designating natural heritage areas. These include “the Minister for Agriculture, Food and Rural Development, the Minister for the Environment and Local Government, the Minister for Public Enterprise, the Minister for the Marine and Natural Resources, and such other Minister of the Government as the Minister considers appropriate in the circumstances, the Commissioners and any planning authority in whose functional area the land is situate”.

Section 13 of the Bill proposes to remove reference to the specific Ministers with whom the Minister for Housing must consult when designating natural heritage areas and will instead refer to such other Minister of the Government as the Minister considers appropriate in the circumstances. The section retains reference to the Commissioners of Public Works and relevant planning authorities, who must also be consulted. As noted in the [Explanatory Memorandum](#), this approach will eliminate the need to amend the section in future should heritage functions be vested in another Minister at a later date.

The [Heritage \(Transfer of Departmental Administration and Ministerial Functions\) Order 2020](#) did not apply to section 16 of the 2000 Act. The list of Ministers with whom the Minister must consult, if unamended, would require the Minister to consult with themselves. It is also proposed to remove the explicit requirement that the Minister consult with specific Ministers, listed above. As it is proposed that the Ministers with whom the Minister must consult are to be amended, this must be done through primary legislation.

The proposed amendment does permit continuity of the current system of consultation with other Ministers, the Commissioner and relevant local authorities, while removing the requirement to seek the observations of specific Ministers.

## Section 14

Section 14 proposes to amend the [\*European Communities \(Birds and Natural Habitats\) Regulations 2011\*](#) (S.I. No. 477 of 2011), which transposes the [\*EU Birds Directive\*](#) and the [\*EU Habitats Directive\*](#) into national law. The 2011 Regulations seek to conserve species of wild birds and require the designation of a network of habitats for birds, based on scientific criteria. These designated sites are known as Special Protected Areas (SPAs). The 2011 Regulations also require the designation of Special Areas of Conservation (SACs) for the protection of certain habitats and species of plants and animals (other than birds).

Section 14 of the Bill proposes to amend the following regulations relating to the designation of sites as SACs and SPAs, and direction provisions:

- 12(1) - Notification regarding candidate sites of Community importance;
- 14(2)(a) and 14(3) - Designation, amendment and de-designation of special areas of conservation;
- 15(4) - Identification and notification regarding particulars of candidate special protection areas;
- 16(6) - Notification regarding particulars of special protection areas;
- 18(3) and 18(6) - Designation, amendment and de-designation of special protection areas; and
- 28(3) - Ministerial Directions in respect of activities requiring consent.

It is proposed that each of the above regulations are to be amended in a similar manner, with the deletion of a list of Ministers who must be notified during the designation or direction process, to be replaced with reference to “such other Minister or Ministers” as the Minister considers appropriate. As noted in the [\*Explanatory Memorandum\*](#), the Ministers who are to be communicated with would depend of the functions of those Ministers (which may vary over time) e.g. (i) the Minister with responsibility for agriculture, food and the marine, (ii) the environment, climate and communications and (iii) rural and community development. The amendment would also allow for the amended regulations within the Regulations of 2011 to function without further amendment.

## Section 16

Under the [\*Broadcasting \(Transfer of Departmental Administration and Ministerial Functions\) Order 2020\*](#) (S.I. 372 of 2020) the Minister for the purposes of [\*section 2 of the Broadcasting Act 2009\*](#) was the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media. This means that under the current version of [\*section 127\(6\) of the Broadcasting Act 2009\*](#) the Irish Film Channel would need to seek the consent of both Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media and the ‘Minister for Arts, Sport and Tourism’ and also consult with the Broadcasting Authority of Ireland before fixing the total daily time for broadcasting advertisements, and the maximum period given to advertisements in any three-hour period. The ‘Minister for Arts, Sport and Tourism’ no longer exists. The [\*Tourism and Sport \(Transfer of Departmental Administration and Ministerial Functions\) Order 2020\*](#) (S.I. No 356 of 2020) transfers the functions associated with tourism and sport to the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media. It follows that under the current

section, the Irish Film Channel would need to seek the consent of the same minister twice, creating a Mulcreevy problem.

The proposed section would delete the phrase ‘the Minister for Arts, Sport and Tourism’ from [section 127\(6\) of the Broadcasting Act 2009](#), removing the need to consult with the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media. However, this would also remove one tier from the consent process. As with the proposed amendments in sections 6 and 7 of the Bill, the replacement of ‘the Minister for Arts, Sport and Tourism’ with another relevant Minister could also solve the Mulcreevy problem, while maintaining the same number of tiers of protection.

## Section 17

[Section 162\(5\) of the Broadcasting Act 2009](#) as it currently stands requires the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media to consult with ‘the Minister for Arts, Sport and Tourism’ before making, revoking or amending an order under the relevant section. The [Tourism and Sport \(Transfer of Departmental Administration and Ministerial Functions\) Order 2020](#) (S.I. No 356 of 2020) would result in the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media needing to consult with him or herself, creating a Mulcreevy problem. Section 17 of the Bill would replace the term ‘the Minister for Arts, Sport and Tourism’ with ‘such Minister or Ministers of the Government as he or she considers appropriate’. This proposal would appear to retain a multi-tiered approach while fixing the Mulcreevy problem.

The only question that would arise is what would happen if no Minister or Ministers of the Government are considered appropriate? It could be argued that this has the potential to remove one tier of protection from this subsection as the requirement to consult could be seen to be tied to the condition that one or more Ministers of the Government are considered to be appropriate.

## Proposed Monuments Legislation

Although the relevant Department has stated that there is **no** intention to include provision(s) in this Bill relating to establishing a new Register of Monuments, it must be noted that the Government’s [Legislation Programme: Spring Session 2021](#) includes a proposed bill referred to as the Monuments & Archaeological Heritage Bill. That Bill has been described as a Bill to replace and modernise the [National Monuments Act 1930](#) and related enactments going back to the 19th century, to establish a new Register of Monuments to replace multiple systems for monument protection and to establish an integrated and streamlined licensing system for activities regulated under the Bill.

## Contact:

Houses of the Oireachtas  
Leinster House  
Kildare Street  
Dublin 2  
D02 XR20

[www.oireachtas.ie](http://www.oireachtas.ie)

Tel: +353 (0)1 6183000 or 076 1001700

Twitter: @OireachtasNews

Library & Research Service

Tel: +353 (0)1 6184701

Email: [library.and.research@oireachtas.ie](mailto:library.and.research@oireachtas.ie)

