An Taisce 75 YEARS 1948-2023
The National Trust for Ireland

Joint Committee on Housing,
Local Government and Heritage
Leinster House
Dublin 2

Sent by email to: jchlgh@oireachtas.ie
FAO: Anne-Marie Lynch, Clerk to the Committee

24th March 2023

Re. Pre-Legislative Scrutiny of the Draft Planning and Development Bill 2022

Dear Ms Lynch,

An Taisce would like to make the following submission on the pre-legislative scrutiny of the Draft Planning and Development Bill 2022, following up on our appearance before the Committee on 28th February as part of the Irish Environmental Network delegation.

Yours sincerely,

Phoebe Duvall
Planning and Environmental Policy Officer
An Taisce – The National Trust for Ireland

Dr. Elaine McGoff
Natural Environment Officer
An Taisce – The National Trust for Ireland

An Taisce Submission on the Pre-Legislative Scrutiny of the Draft Planning and Development Bill 2022

Table of Contents

Introduction	pg. 3
Summary of Recommendations	pg. 3
Overarching Issues	pg. 8
Detailed Considerations by Part	
Part 1 - Preliminary and General	pg. 11
Part 2 - Concept of Development	pg. 11
Part 3 - Plans, Policies & Related Matters	pg. 11
Part 4 - Development Consents	pg. 16
Part 6 - Environmental Assessment	pg. 18
Part 9 - Judicial Review	pg. 20
Part 10 - Architectural Heritage	pg. 26
Part 11 - Enforcement	pg. 31
Part 17 - An Coimisiún Pleanála	pg. 33

Introduction

We would like to thank the Committee for the opportunity to give evidence on the Draft Planning and Development Bill 2022 as part of the Irish Environmental Network delegation. An Taisce wishes to make the following submission following up on several points raised in our session with the Committee and providing a set of our key recommendations. These are very far from exhaustive as we are still in the midst of our review of the Draft Bill given the complexity of the legislation, the lack of supporting and explanatory information, and our own resource constraints. We begin the submission with a summary of our recommendations, followed by the more detailed considerations informing those recommendations.

Summary of Recommendations

Overarching Issues

- Prior to the Bill advancing to the full Houses of the Oireachtas, the following should be required:
    - A period of public consultation be opened on the Bill; and
    - The publication of the following:
        - An accessible explanatory memo for each section of the bill detailing changes proposed against the 2000 Act;
        - The evidence, data and rationale for the proposed changes;
        - Regulatory impact analyses;
        - All reports from the Attorney General's working group.
- An independent review of the bill's compliance with the Aarhus Convention should be carried out. Based on information provided by the Department, by witnesses in pre-legislative scrutiny sessions with the Committee, and by the Minister in the Oireachtas, no such dedicated review has been conducted, which is very concerning.
    - We would refer the Committee to the submission made by the Irish Environmental Network's Environmental Law Officer providing a detailed outline of the Aarhus compliance issues in the Draft Bill and as well as corresponding recommendations.
- Participation, information provision and consultation
    - Require alignment of effective notification periods for the public and when the clock starts for the purposes of participation, appeals, and challenges. All information should be publicly available online and notice provided *prior* to the start of time-limited consultation, appeal and challenge periods.
        - The day of the decision or notification, all public holidays, and the periods between Christmas and New Year should be excluded for the purposes of counting time in all processes.
    - Provide for mandatory electronic information publication across all processes.
        - This issue is particularly acute with regard to An Bord Pleanála's files - many are not available online and require an in-person visit to view. This materially disadvantages people outside of Dublin and those without the ability or means to travel to the Board's offices..

- Provide for notification requirements appropriate to 2023, including the use of social media, effective use of centralised planning portals and notification technologies.
- Require that changes to planning registers and weekly lists be clearly highlighted.
- Provide for more express obligations to consult with prescribed bodies, and that such bodies should include eNGO perspectives.
- Remove requirements that fees be paid to Local Authorities, the Commission or the Office of the Planning Regulator (OPR) for public participation, appeals, access to justice for the public or public engagement with the OPR (see sections 323, 447 and 460). There are no mechanisms to protect people or groups who cannot or who would struggle to afford the fees, and the fees only serve to exclude individuals and groups from public participation exercising their rights under the Aarhus Convention.

Part 1 - Preliminary and General

- Include the equivalent of section 1A in the 2000 Act detailing the EU instruments and international conventions to which the legislation is giving effect, including in particular the Aarhus and Espoo Conventions.

Part 2 - Concept of Development

- Reinstate and explicitly provide for third party rights to request a declaration on development and exempted development under s.8 of the Draft Bill.
- To ensure Aarhus compliance, provide for public participation on any declaration sought under s.8.
- Require public notification of s.8 decisions.
- Provide for the right of appeal in respect of s.8 declaration.
- Remove the exclusion in s.9 on reliance on a s.8 declaration in enforcement proceedings brought by the public.

Part 3 - Plans, Policies and Related Matters

- Delete provisions in s.22 which allow for the continued operation of current s.28 guidelines without limitation.
- Provide detailed circumscription in s.24 on what National Planning Statements are and are not intended to do, how much they can prescribe, and how far their powers can go.
- Provide for improved oversight of the adoption, amendment and revocation of National Planning Statements, at the very minimum involving scrutiny by the Joint Oireachtas Committee on Housing, Local Government and Heritage, but the option of full Oireactas approval should also be considered.
- In s.24(2), *require* the Minister to consult with the public, other ministers, public bodies, other stakeholders on National Planning Statements. Add an explicit requirement for consultation with prescribed bodies.
- Review in-depth the proposals on the change to a 10-12 year Development Plan cycle, taking into account the dynamic nature of the planning and policy landscape and how changes will be accounted for.

- Review in-depth the impacts on local democracy resulting from the change to a 10-12 year Development Plan cycle. Consultation with elected members is key.
- Provide for significantly enhanced public and elected member engagement on interim reviews of Development Plans in s.56. Public consultation and elected member input should be provided for at the beginning of the review period (to be taken into account in the Chief Executive's report), as well as in relation to any proposed variations. This will help identify what is working well with the implementation of the plan and where there are gaps, problems or changes that need to be addressed.
- In s.65 on urgent amendments to Development Plans, establish detailed criteria around what constitutes significant national or strategic implications. Require detailed reasoning and justifications be provided by the Minister. Consider ways by which the elected members can be included.
- Correct potential errors in application of Strategic Environmental Assessment Directive in s.24(4), s.61, and anywhere else they occur where mandatory SEA and the associated public participation requirements should be provided for.
- Provide for the requirements of Article 10 of the Strategic Environmental Assessment Directive on the monitoring of plans and the remediation of any unforeseen impacts.
- Include National Pollinator Plan in s.50(2) on the obligation to prepare strategy for conservation etc. of natural and built heritage.
- Lengthen public consultation periods on Development Plans and the various local plan types, given the increase in length of plan periods.
- Provide for the requirement to facilitate consultation on plans via a wide range of methods (both digital and non-digital) to ensure it is accessible for everyone in our diverse modern society - all ages, people with disabilities, marginalised groups, immigrant groups (including where language is a barrier), etc.
- Explore ways to enhance public engagement at the plan-making stage, including through the use of 3D visualisation technology, and ways the legislation can support this.

Part 4 - Development Consents

- Where new or amended timelines on planning decisions are proposed, detailed justifications and analyses must accompany them to demonstrate that they are realistic (including when assessed against existing and proposed resourcing levels), and will not lead to rushed and therefore potentially flawed decisions.
- Delete proposals for imposing fines on planning authorities in the event of missed timelines.
- Provide clarity and circumscription on the restriction of material contravention (see s. 105and s.120), which should be permitted only in very specific, exceptional circumstances. The criteria proposed in the bill remain broad and will therefore likely lead to challenges.
- Delete requirements in s.97(2)(b) on eligibility for eNGOs to appeal to An Coimisiún Pleanála in cases where environmental impact assessment was needed. A requirement that the organisation be credibly engaged in the protection of the environment should suffice for the purposes of eNGO eligibility.

Part 6 - Environmental Assessment

- Further evaluate the actual sustainability of the types of energy included in the definition of renewable energy as relied upon in the new IROPI provisions. The current science and research strongly calls into question the actual sustainability and climate mitigation potential of some of these energy types, namely biomass and biogas. These also can cause significant indirect environmental impacts.
- Further clarity is needed on the scope of the IROPI provisions.
    - For example, if a fossil gas power plant is proposed (with likely significant effects on a European site) but plans to use a small proportion of biogas as well, which is deemed renewable under the current definition in the Draft Bill, does that entail that the proposed plant could be deemed to fall under the IROPI provisions for renewable energy plants?
- Significantly strengthen the requirements around the Water Framework Directive in s.49(2)(b) on the obligation on Local Authorities to prepare a strategy relating to environmental and climate change.
- Require Water Framework Directive-specific assessments in advance of any works or development being carried out to ensure that a development will not "*cause a deterioration of the status of a body of surface water or … jeopardise[s] the attainment of good surface water status..*" in accordance with Article 4 of the Directive, as per the CJEU ruling in C-461/13, the Weser Case. This must include dredging, drainage, river maintenance and flood protection, and should be supported with comprehensive training and robust enforcement.

Part 9 - Judicial Review

- Delete the entirety of Part 9 as proposed and replicate sections 50, 50A and 50B of the 2000 Act.
- Apply the corrections to the current sections 50, 50A and 50B of the 2000 Act as detailed in the submission from the Irish Environmental Law Officer's submission on the Draft Planning and Development Bill, 2022 and certain compliance issues arising in respect of the Aarhus Convention.

Part 10 - Architectural Heritage

- Clarify s.257(4) as to how architectural heritage protection legislative and regulatory provision as well as Architectural Heritage Protection Guidelines for Planning Authorities in relation to protected structures and Architectural Conservation Areas are to be maintained in converting vacant buildings for residential use.
- Maintaining nationally consistent standards of architectural heritage protection in accordance with the Granada Convention can be achieved by mandating the Commission with relevant safeguarding functions to ensure oversight and accountability when architectural heritage protection may be undermined by the discretion left with individual planning authorities not to accept a Ministerial Recommendation or to delete a protected structure on the bases of active political lobbying by a property owner:
    - The Commission being given the automatic function of determining cases where a planning authority rejects a Ministerial recommendation on the

scheduling of a Protected Structure or Architectural Conservation Area designation.
    - The Minister being provided with the discretionary function of referring a Protected Structure deletion recommendation by a planning authority to the Commission for determination.
- Enhance the definition of endangerment in s.251 to include the leaving of a building empty and vacant without an occupier, use or even proper security provision, leading to failure to maintain roofs gutters and drainage, to take early action on a dry rot outbreak, to theft of lead or copper roof cladding and pipework, to vandalism, to exposure to arson, etc.
- Extend the definition of "occupiers" in s.251 liable to be served notices on endangerment needs to be extended to apply to all those:
    - Legal, professional, or management firms or individuals managing or responsible for a property registered in an offshore company;
    - A financial institution or fund which has taken title to a property as a result of a loan;
    - Administrators, liquidators, or receivers responsible for a property after a loan default or repossession;
    - Parties responsible for the maintenance of a building site or structure which is causing endangerment to an adjoining Protected Structure.
- In order to properly meet a range of UN, EU and Council of Europe Conventions on cultural heritage and landscape as well as the January 2023 Clonliffe Road Judgement specific legislative provision, it is required that zoning and land use policy as well as the determination of application under the development control process give explicit consideration to the impact on the setting of Protected Structures and Architectural Conservation Areas in urban areas, to historic gardens and designed landscapes particularly where providing the setting of major country houses, and to the historic and cultural environment generally.
- Reinsert the current s.203 of the 2000 Act into the Draft Bill.

Part 11 - Enforcement

- Further consideration is required on new, stronger provisions to address ineffective aspects of the current enforcement system, particularly delays in the progress of enforcement cases which can allow highly damaging activities to continue.
- Further consideration is required in relation to new, stricter provisions to prevent the continuance of unauthorised works and activities while there are active court proceedings.
- It is recommended that the Committee request any analysis done as part of the Planning Review on the efficacy of the current enforcement regime and ways in which it could be improved.
- Provide more clarity and detail in s.299 on the nature and composition of the proposed regional authorities; the requirements and mechanisms for efficient and thorough communication between regional authorities and relevant Local Authorities; and the mechanisms for public engagement with a regional authority.

Part 17 - An Coimisiún Pleanála

- Revisit the appointments procedure for Planning Commissioners (including the Chief and Deputy Chief Commissioner) and other issues as raised in An Tasice's previous submission to the Committee on Planning and Development and Foreshore (Amendment) Bill 2022.

Detailed Considerations

Overarching Issues

An Taisce very much welcomes the objectives of the Bill to increase clarity, certainty and efficiency in the planning system and move further towards an effective plan-led approach. Improving the legislative framework to ensure robust and lawful planning decision-making based on a coherent hierarchy of plans and policies is precisely what is needed. However, we submit that the Bill as currently drafted will fail to deliver on those objectives and will instead lead to more dysfunction, delay, costs, and litigation. This is the opposite of what we need in order to address the ongoing crises in housing, climate, energy, biodiversity, etc.

Process of bringing the Bill forward: An Taisce would like to register our serious concerns about the process by which this Bill has been brought forward thus far, which we consider to be very inappropriately rushed. Such a monumental and detailed piece of legislation with profound implications for our communities, environment, infrastructure, housing provision, etc. requires full and detailed scrutiny of every section supported by the relevant evidence base. Rushing the process risks errors remaining in the Bill; unforeseen consequences not being teased out; and issues of non-compliance with national, European and international legal obligations going resolved. All of these issues will exacerbate delays and costs and create more litigation.

The fact that we, and seemingly multiple other groups providing evidence to the Joint Oireachtas Committee, had not yet been able to complete reviews of the entire Bill due to its size and complexity is indicative of the problem. Even with the very substantial amount of time and effort the Committee is clearly putting into scrutinising the draft, we fear that the time allotted for pre-legislative scrutiny is insufficient to cover the entirety of the Bill with the level of detail needed. Furthermore, the lack of an explanatory document detailing the changes in Draft Bill against the provisions of Planning and Development Act 2000 (hereafter referred to as the 2000 Act or PDA 2000) is very disappointing and has made scrutiny of the already enormous Draft Bill even more challenging. We also note that this issue has been raised by multiple groups in the pre-legislative scrutiny sessions. The document comparing sections of the PDA 2000 to sections in Draft Bill was welcome, however it came significantly after the publication of the Draft Bill and only referenced section numbers - it did not provide any detail on changes in the provisions.

All legislation should be underpinned by a strong evidence base, and all the more so in the case of an overhaul of our entire planning code. There have been no published analyses of

what does and does not work well in the current planning system; no published evidence, data and rationale for the proposed changes, and no published regulatory impact analyses. The reports from the Attorney General's working group also have not been published. We consider it unacceptable that the above analyses are not available and/or not undertaken. Moreover, this breaches the Aarhus Convention, which sets out the rights to public participation, access to information, and access to justice in environmental matters. Article 5(7)(a) of the Convention requires the publication of facts and the analysis of those facts relevant to framing major environment policy proposals. As one of the primary instruments through which environmental law and policy is implemented and one of the pieces of legislation with the most impact on both shaping and protecting the environment, this Bill is certainly a major environmental policy proposal and very much falls within the scope of Article 5(7)(a).

An Taisce is represented on the Government's Planning Advisory Forum (PAF), the stakeholder forum formed as part of the Attorney General's review of the planning system. We very much welcomed the opportunity to participate in it, however, we wish to highlight several issues (though by no means an exhaustive list) that we believe seriously hampered PAF's efficacy. The information provided to PAF and the resulting discussions were very much on high level policy issues - very little detail on the actual proposed changes was provided. Indeed, many elements in the Draft Bill have come as a complete surprise. Moreover, PAF was not provided with any detailed analyses, data, justifications or rationale for the issues highlighted for discussion or on the changes proposed (even when such analyses were specifically requested verbally and in writing by An Taisce as well as the Environmental Pillar). To our knowledge, no synthesis or analysis papers on the inputs to PAF were published, and it remains unclear how the various views of Forum members were captured and how they informed the Draft Bill, particularly dissenting views. It is also worth noting that in our submissions to PAF, An Taisce raised multiple points regarding compliance with EU and international environmental law that are not reflected in the Draft Bill.

We also consider that PAF suffered from a significant lack of representation of civil society. Both the An Taisce and Environmental Pillar representatives repeatedly raised this issue, and while a few additional members were added to the forum, the overall issue of adequate representation very much remained. In light of the fact that the Bill and our planning system in general have such a profound impact on all of society, this lack of representation on the Forum is greatly concerning and disappointing.

Public consultation: In light of the lack of public input to the Draft Bill to date and the enormous implications that the Bill will have for shaping our communities and environment, the public should be consulted on it and be facilitated in doing so effectively in line with Article 8 of the Aarhus Convention. We therefore strongly recommend that prior to the Bill advancing to the full Houses of the Oireachtas:

- A period of public consultation be opened on the Bill; and
- The publication of the following:
    - An accessible explanatory memo for each section of the bill detailing changes proposed against the 2000 Act;

    - The evidence, data and rationale for the proposed changes;
    - Regulatory impact analyses;
    - All reports from the Attorney General's working group.

Aarhus Convention compliance: An independent review of the bill's compliance with the Aarhus Convention should be carried out. Based on information provided by the Department, by witnesses in pre-legislative scrutiny sessions with the Committee, and by the Minister in the Oireachtas, no such dedicated review has been conducted, which is very concerning. Given that multiple witnesses from various authoritative groups raised serious questions over the compliance of multiple elements of this Draft Bill with Aarhus, it is imperative to have such an independent review to better inform the consideration of the bill.

We would refer the Committee to the submission made by the Irish Environmental Network's Environmental Law Officer providing a detailed outline of the Aarhus compliance issues in the Draft Bill and as well as corresponding recommendations.

Issues throughout the bill on participation, information provision and consultation: There are multiple ongoing issues around the provisions for public participation and access to information, specifically around the practicalities of *effective* participation and access to information, which are requirements under the Aarhus Convention. We therefore recommend the following be provided for *throughout* the bill:

- Require alignment of effective notification periods for the public and when the clock starts for the purposes of participation, appeals, and challenges. All information should be publicly available online and notice provided *prior* to the start of time-limited consultation, appeal and challenge periods.
    - The day of the decision or notification, all public holidays, and the periods between Christmas and New Year should be excluded for the purposes of counting time in all processes.
- Provide for mandatory electronic information publication across all processes.
    - This issue is particularly acute with regard to An Bord Pleanála's files - many are not available online and require an in-person visit to view. This materially disadvantages people outside of Dublin and those without the ability or means to travel to the Board's offices..
- Provide for notification requirements appropriate to 2023, including the use of social media, effective use of centralised planning portals and notification technologies.
- Require that changes to planning registers and weekly lists be clearly highlighted.
- Provide for more express obligations to consult with prescribed bodies, and that such bodies should include eNGO perspectives.
- Remove requirements that fees be paid to Local Authorities, the Commission or the Office of the Planning Regulator (OPR) for public participation, appeals, access to justice for the public or public engagement with the OPR (see sections 323, 447 and 460). There are no mechanisms to protect people or groups who cannot or who would struggle to afford the fees, and the fees only serve to exclude individuals and groups from public participation exercising their rights under the Aarhus Convention.

For further detail, please see the aforementioned Aarhus compliance submission (made by the Environmental Law Officer), particularly the high level recommendations in the main document and the recommendations in Annex I.

Part 1 - Preliminary and General

Recommendation: Include the equivalent of section 1A in the 2000 Act detailing the EU instruments and international conventions to which the legislation is giving effect, including in particular the Aarhus and Espoo Conventions.

This is needed to provide for transposition obligations, to assist interpretation, and to avoid the inconsistency through the Bill with the limited references made in the interpretation sections for the various Parts.

Part 2 - Concept of Development

Removal of third party rights from s.8: The removal of the third party entitlement to seek what is currently known as a Section 5 declaration from a planning authority and appeal entitlement on any determination or lack of it, is a retrograde diminution of public participation in the planning process. No rationale or data have been provided to justify this change. Section 5/Section 8 declarations are an effective mechanism in driving Local Authorities to act in enforcement matters, and the ability to appeal a declaration decision to An Bord Pleanála is a strong mechanism for holding Local Authorities to account. The removal of the third party entitlements also has significant implications for the ability to manage development affecting the environment, protected structures or Architectural Conservation Areas.

Recommendations:

- Reinstate and explicitly provide for third party rights to request a declaration on development and exempted development under s.8 of the Draft Bill.
- To ensure Aarhus compliance, provide for public participation on any declaration sought under s.8.
- Require public notification of s.8 decisions.
- Provide for the right of appeal in respect of s.8 declaration.
- Remove the exclusion in s.9 on reliance on a s.8 declaration in enforcement proceedings brought by the public.

Part 3 - Plans, Policies and Related Matters

Creating coherence in the hierarchy of plans and planning policies is an important objective of the Bill, however, it requires robust and clear mechanisms and safeguards to achieve this. We consider that the bill as drafted is lacking in this regard and leaves open a great deal of potential for conflicts between levels in the hierarchy of plans. This will likely cause dysfunction, impact planning decisions, and ultimately could lead to litigation and delays.

There is also a significant centralisation of power with the Minister and resulting weakening of local democracy, particularly by way of the increased power given to national level planning policies and guidance in the absence of sufficient safeguards.

See also the following section of this submission on the material contravention provisions in Part 4 of the Bill.

National Planning Statements: National Planning Statements (NPSs) will replace the current s.28 guidelines under the 2000 Act. It should be noted, however, that s.22 of the Draft Bill allows the current s.28 guidelines to continue without limitation, allowing existing conflicts to remain. This provision should be deleted. The new NPSs, which have been given even more power than s.28 guidelines via stricter requirements for lower tier plans to align with them, will represent major changes and additions to national level planning policy. An Taisce considers that there is certainly a place for national policy and guidelines but that it is crucial that adequate safeguards and mechanisms for input and oversight are in place, things which the Bill as drafted lacks. The multiple issues (and indeed litigation) arising from conflicts between certain s.28 guidelines and County Development Plans, particularly in relation to Strategic Housing Developments, should serve as a cautionary tale on the need for robust oversight of NPSs.

New NPSs are to be written and issued by the Minister. The Draft Bill provides little circumscription on their content and the scope of their power. S.24(1) provides a non-exhaustive and broad list of potential topics, but there is little clarity on what these policies are and are not intended to do, how much they can prescribe, and how far their powers can go. Very clear delineation of these things are needed in the Bill.

With regard to oversight, NPSs only require Government approval, not Oireachtas approval or scrutiny in any form. Given that NPSs will constitute significant pieces of national planning policy, we recommend that Oireachtas oversight be provided for. At the very minimum, we suggest this involve scrutiny by the Joint Oireachtas Committee, but the option of full Oireactas approval should also be seriously considered. Amendments and revocation of NPSs, per s.23(2), also require such oversight.

Furthermore, there is no requirement for the Minister to seek input on the NPSs from public authorities, other departments, outside experts, prescribed bodies, the public, etc. S.24(2) states that the Minister *may* consult with:

(a) such other Ministers of the Government as the Minister considers appropriate
(b) such public bodies as the Minister considers appropriate,
(c) any stakeholders or other persons the Minister considers appropriate, and
(d) members of the public.

We recommend making consultation a requirement (replacing 'may' with 'shall') and that a requirement for consultation with prescribed bodies be added.

We would emphasise that the less input and oversight required for NPSs, the more likely it is that unintended consequences and conflicts with lower tier plans will arise.

Development Plans: Under the Draft Bill, Development Plans will now run for 10 years (per s. 41(1)) with an option to extend to 12 years at the discretion of the Minister on foot of a request from the Chief Executive (s.41(5)(b)). We wish to acknowledge at the outset the huge effort that is required of Local Authorities in preparing Development Plans and Local Area Plans. We largely understand the rationale behind longer plan cycles and consider that there would likely be benefits in having a longer-term vision for forward planning. However, the planning and policy landscape is very dynamic, and a great deal of change will take place over the 10-12 year timeframe - laws, demographics, environmental factors, political situations, etc. all fluctuate a great deal over the course of a decade. Specifically with regard to the evolving environmental law and policy landscape, An Taisce believes it will be challenging for 10-year plans to keep pace with this, as it is already a significant challenge during the six-year cycle.

Furthermore, one of local Councillors' most important reserved functions is their role in creating the Development Plan. This change entails that a two-term councillor could potentially never vote on the main substance of a plan. This represents a considerable erosion of local democracy and requires careful scrutiny and consultation.

S.56 provides for interim reviews of Development Plans to be conducted around the five-year mark. The interim review must be as robust, inclusive, and democratic as possible, particularly if Developments Plans do indeed move to a 10-year cycle. As the provision is currently drafted, the Chief Executive prepares a report on foot of which the elected members can propose variations to the plan. There is no provision for public input except where variations are proposed, and there is no provision for elected member input into the Chief Executive's report. This all weakens local democracy and also greatly diminishes the efficacy of the review overall. We recommend that public consultation and elected member input be provided for at the beginning of the review period (to be taken into account in the Chief Executive's report), as well as in relation to any proposed variations. This will help identify what is working well with the implementation of the plan and where there are gaps, problems or changes that need to be addressed.

See the following section for comment on s.61 on expedited amendment of plans on foot of new or amended NPSs.

S.65 gives the Minister the power to require the Chief Executive to amend the Development Plan when a situation of "significant national or strategic implications has occurred or is likely to occur". This currently a very broad provision lacking safeguards as it provides no circumscription around what constitutes significant national or strategic implications. Detailed criteria should be established. There is no provision requiring that detailed reasoning and justifications be provided by the Minister, and there is no role for the elected members.

Application of the Strategic Environmental Assessment Directive: The Draft Bill contains significant potential errors regarding the application of the Strategic Environmental Assessment (SEA) Directive. SEA is automatically required (full SEA, not simply a screening) for the vast majority of plans and programmes relating to forward planning, including those

which contain criteria for development consent processes with likely significant environmental impacts, and triggering Environmental Impact Assessment or Stage 2 Appropriate Assessment. Therefore, all Development Plans will automatically require SEA. Furthermore, SEA must also be required for national-level forward planning and land use plans and programmes with which Development Plans are required to align, including the National Planning Statements as provided for in Chapter 3 of Part 3 of the Draft Bill. In the case of all of the above plans and programmes, the only exemptions from mandatory SEA are minor changes that impact small local areas. These still require screening and then full SEA if significant environmental effects are deemed likely.

Crucially, the SEA requirements include obligations for public participation. Where the Draft Bill erroneously does not provide for mandatory SEA, it is therefore out of compliance with the public participation obligations of the SEA Directive. These errors must be corrected and public participation provided for accordingly.

To highlight a specific instance of the misapplication of the SEA Directive, s.61 of the Draft Bill on expedited amendment of Development Plans on foot of new or amended National Planning Statements (NPSs) provides for *screening* for SEA. Given that NPSs or amendments to NPSs are significant new or changed national-level plans or programmes, amendments to Development Plans resulting from new or amended NPSs are in all likelihood not able to be classed as minor and should progress automatically to mandatory SEA with the corresponding public participation requirements.

Furthermore, s.24(4) on the issuance of NPSs provides for SEA screening for respect of a new NPS. Again, for the reasons above, this should likely trigger mandatory SEA and the associated public participation requirements.

SEA Directive requirement for monitoring:

The Draft Bill does not take adequate account of the requirements of Article 10 of the SEA Directive, which sets out the provisions for the monitoring of a programme subject to SEA and the obligation for remedial action where unforeseen adverse effects arise:

> *"1) Member States shall monitor the significant environmental effects of the implementation of plans and programmes in order, inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action.*
> *2) In order to comply with paragraph 1, existing monitoring arrangements may be used if appropriate, with a view to avoiding duplication of monitoring*."

There is already a systemic failure to adhere to the Article 10 requirements with regard to Development Plans. The monitoring requirement applies equally to National Planning Statements, and this should be provided for in the Bill. We consider that a proper interpretation of Article 10 of the SEA Directive requires that the SEA monitoring process be based on quantitative, audited data and that qualitative data be provided on an ongoing basis during the lifetime of the plan or programme. This is needed to ensure that, following the required baseline assessment in the SEA, ongoing monitoring or auditing can identify

unanticipated changes, allowing remediation to be carried out. Producing monitoring for its own sake would not be an adequate transposition of Article 10(a) of the Directive. It is only by auditing this ongoing monitoring data and clearly measuring any quantitative effects that the measurement of any "unforeseen adverse effects", as defined by Article 10, can be achieved and remediation can begin.

If ongoing monitoring of Development Plans was being carried out in accordance with the provisions of Article 10, it would contribute very significantly to the general availability of environmental data in Ireland, with significant co-benefits for the Environmental Impact Assessment, Appropriate Assessment, and other environmental assessment processes.

Enhancing public participation in Development Plan processes: For a plan-led system to be effective, public participation and *meaningful* engagement is the lynchpin. Positive and in-depth public engagement in the plan making process can significantly reduce conflicts in later stages, particularly with regard to specific planning applications. In our many years of experience speaking with members of the public about planning matters, people have rarely expressed outright opposition to development in principle. Rather, most want to take an active role in shaping their communities and built environment and are more likely to object to specific proposals or elements of proposals when they feel they have not had sufficient input into the plan-making and planning processes.

Yet both our own experience and broader research indicate that people tend to engage more thoroughly with the specific details of plans, particularly around their local area, than with broader, more vague policy statements. Very locally focused consultations where people are active in designing and guiding the future of development in their immediate area could therefore be effective. 3D visualisation technologies could prove very useful in this. Facilitating consultation via a wide range of methods (both digital and non-digital) is also crucial to ensure it is accessible for everyone in our diverse modern society - all ages, people with disabilities, marginalised groups, immigrant groups (including where language is a barrier), etc.

We recommend that the Bill provide for longer periods of public consultation for Development Plans and the various new types of local plans, given the increased length of the plan periods. We also recommend it set out requirements to improve the efficacy and the accessibility of public consultations.

Recommendations:

- Delete provisions in s.22 which allow for the continued operation of current s.28 guidelines without limitation.
- Provide detailed circumscription in s.24 on what National Planning Statements are and are not intended to do, how much they can prescribe, and how far their powers can go.
- Provide for improved oversight of the adoption, amendment and revocation of National Planning Statements, at the very minimum involving scrutiny by the Joint Oireachtas Committee on Housing, Local Government and Heritage, but the option of full Oireactas approval should also be considered.

- In s.24(2), *require* the Minister to consult with the public, other ministers, public bodies, other stakeholders on National Planning Statements. Add an explicit requirement for consultation with prescribed bodies.
- Review in-depth the proposals on the change to a 10-12 year Development Plan cycle, taking into account the dynamic nature of the planning and policy landscape and how changes will be accounted for.
- Review in-depth the impacts on local democracy resulting from the change to a 10-12 year Development Plan cycle. Consultation with elected members is key.
- Provide for significantly enhanced public and elected member engagement on interim reviews of Development Plans in s.56. Public consultation and elected member input should be provided for at the beginning of the review period (to be taken into account in the Chief Executive's report), as well as in relation to any proposed variations. This will help identify what is working well with the implementation of the plan and where there are gaps, problems or changes that need to be addressed.
- In s.65 on urgent amendments to Development Plans, establish detailed criteria around what constitutes significant national or strategic implications. Require detailed reasoning and justifications be provided by the Minister. Consider ways by which the elected members can be included.
- Correct potential errors in application of Strategic Environmental Assessment Directive in s.24(4), s.61, and anywhere else they occur where mandatory SEA and the associated public participation requirements should be provided for.
- Provide for the requirements of Article 10 of the Strategic Environmental Assessment Directive on the monitoring of plans and the remediation of any unforeseen impacts.
- Include National Pollinator Plan in s.50(2) on the obligation to prepare strategy for conservation etc. of natural and built heritage.
- Lengthen public consultation periods on Development Plans and the various local plan types, given the increase in length of plan periods.
- Provide for the requirement to facilitate consultation on plans via a wide range of methods (both digital and non-digital) to ensure it is accessible for everyone in our diverse modern society - all ages, people with disabilities, marginalised groups, immigrant groups (including where language is a barrier), etc.
- Explore ways to enhance public engagement at the plan-making stage, including through the use of 3D visualisation technology, and ways the legislation can support this.

Part 4 - Development Consents

Timelines: If timelines for planning decisions are to be introduced or amended, it must be ensured that they are appropriate to the application type, complexity, etc. Inappropriate or unrealistic timelines could incentivise rushed or poorer quality decision making, thereby increasing the possibility of unlawful decisions. Furthermore, without sufficient resourcing, delivering on decision timelines will not be possible, also increasing the possibility for flawed decision making.

We consider that proposals for fines or financial penalties where the Commission does not deliver a decision in the specified timeframe should be removed. This could further increase the potential for rushed and flawed decisions.

Material contravention: While the Draft Bill proposes some restrictions on material contravention (see proposed sections 105 and 120), many of the issues arising from the 2000 Act in respect of material contravention remain (see specifically s.37(2) of the 2000 Act) and leave the Commission with significant discretion to approve permissions that contravene local development plans.

Per s.105 and s.120 as drafted, granting a permission in material contravention of a Development Plan is still permitted if development is deemed to be of national or strategic importance, if the development plan has conflicting or ambiguous objectives in terms of their application to the proposed development, or if the development is consistent with the National Planning Framework, National Planning Policies and Measures or RSES where the relevant provisions are not reflected in the development plan.

These are ambiguous provisions and lack specific criteria, and are therefore open to potentially wide interpretation and allow wide use of material contravention. Crucially, these draft provisions do not stipulate that material contravention should only be allowed in very specific, exceptional circumstances, one of which being the inconsistency of the Development Plan with a higher level plan.

Given that one of the Bill's primary purposes is to ensure significantly greater consistency through the hierarchy of plans, it appears contradictory that the material contravention provisions remain as open as they are in the Draft Bill. It is also worth highlighting that the more discretion the Commission has in granting permissions in material contravention of development plans, the more likely challenges to those decisions will be.

Restriction on ability to take appeals: Regarding eligibility to appeal to the Commission, s.97(2)(b) of the Draft Bill alters s.37(4) of the 2000 Act on the rights of eNGOs to take an appeal in cases where an Environmental Impact Assessment was required. The current s.37(4)(d & e) had some requirements around the pursuit of environmental aims, etc. and gave the Minister powers to add more requirements, but the new s.9792) now includes the same requirements that the bill proposes around standing for eNGOs in judicial review, including the requirement for incorporation, the 10 member minimum and the need to pass a resolution to take the appeal (see our recommendations around Part 9).

In An Taisce's case, a resolution of the members (which, per our Constitution, means the full membership) requires an Extraordinary General Meeting. This requires 21 days notice, already eating up three weeks of the four week appeal period. Adding on several days for the decision notice on the original application to be sent to us, time to draft ground of appeal for consideration by the membership, and time to finalise the appeal assuming the resolution is passed. As such, these new criteria would make it completely impossible for An Taisce to take an appeal in cases where an EIA was not done.

It appears that these changes are ultimately aimed at limiting access to judicial review by restricting the ability to appeal, as s.249(10)(b) requires the exhaustion of all administrative remedies, of which appeal is one, in order to take a judicial review. These are completely disproportionate restrictions, they lack justification, are contrary to the Aarhus Convention and should be deleted.

A requirement that the organisation be credibly engaged in the protection of the environment should suffice for the purposes of eNGO eligibility.

Recommendations:

- Where new or amended timelines on planning decisions are proposed, detailed justifications and analyses must accompany them to demonstrate that they are realistic (including when assessed against existing and proposed resourcing levels), and will not lead to rushed and therefore potentially flawed decisions.
- Delete proposals for imposing fines on planning authorities in the event of missed timelines.
- Provide clarity and circumscription on the restriction of material contravention (see s. 105and s.120), which should be permitted only in very specific, exceptional circumstances. The criteria proposed in the bill remain broad and will therefore likely lead to challenges.
- Delete requirements in s.97(2)(b) on eligibility for eNGOs to appeal to An Coimisiún Pleanála in cases where environmental impact assessment was needed. A requirement that the organisation be credibly engaged in the protection of the environment should suffice for the purposes of eNGO eligibility.

Part 6 - Environmental Assessment

Appropriate Assessment and IROPI: We note that the Draft Bill contains significant changes to the IROPI (imperative reasons of overriding public interest) procedures for both plans/programmes and projects - see sections 183, 184, 190 and 191. These sections provide that for plans and projects for the construction and operation of plants producing renewable energy, the competent authority shall presume that imperative reasons of overriding public interest exist. It is of course crucial that we bring more renewable energy infrastructure on stream to mitigate the climate crisis. However, the provisions as drafted contain key ambiguities that could compromise the apparent objective around climate mitigation and that could allow for unintended adverse impacts to Natura 2000 sites.

The types of renewable energy developments that would fall under these parts of the IROPI provisions are identified by the definition of renewable energy in the EU Renewable Energy Directive 2018/2001 on the promotion of the use of energy from renewable resource:

> "*energy from renewable non-fossil sources, namely wind, solar (solar thermal and solar photovoltaic) and geothermal energy, ambient energy, tide, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas.*"

We would highlight that while this may be the definition in EU Directive, the science and current research strongly calls into question the actual sustainability and climate mitigation potential of some of these energy types, including biomass and biogas. These also can cause significant indirect environmental impacts. For example, the growing of energy crops (such as grasses or maize) for biogas production can have significant adverse impacts on water quality, climate, biodiversity via the large amounts of nitrogen fertiliser needed. Anaerobic digestion facilities producing biogas often suffer from significant methane leakage, which can greatly reduce the emissions reduction potential of the biogas. An Taisce can provide further information on these issues if needed.

Furthermore, the scope of the IROPI provisions around renewable energy as drafted contain concerning ambiguities. For example, if a fossil gas power plant is proposed (with likely significant effects on a European site) but plans to use a small proportion of biogas as well, which is deemed renewable under the current definition in the Draft Bill, does that entail that the proposed plant could be deemed to fall under the IROPI provisions for renewable energy plants? As it stands, we consider that these provisions remain overly open and non-prescriptive, which ultimately undermine or negate the climate benefits.

Given that IROPI should be used with the utmost care in order to protect our European-designated habitats and species in the midst of the biodiversity loss crisis, and the fact that any plans or projects using renewable energy as a justification for automatic assumption of IROPI need to actually contribute to climate mitigation, the above issues should be thoroughly teased apart and amended to avoid unintended consequences.

Water Quality Protection and the Water Framework Directive: We consider that the Bill as drafted does not adequately take account of, or incorporate, the requirements of the Water Framework Directive 2000/60/EC (WFD), despite the fact that development has the potential to significantly impact water quality. The longer that WFD requirements go unaddressed in planning, the harder it will be for Ireland to come into compliance with the Directive.

The WFD is only mentioned four times in the Draft Bill, two of which are in definitions. s.49(2)(b) on the obligation on Local Authorities to prepare a strategy relating to environmental and climate change requires "*the promotion of compliance with environmental standards in relation to water quality and status, having regard to the Water Framework Directive.*" This is a weak requirement and will not effectively guarantee Development Plan measures ensuring WFD compliance.

S.433(4)(e) states that the Office of the Planning Regulator shall, in performing its functions, have regard to the requirements of the WFD in so far as those requirements relate to planning authorities by virtue of being designated as competent authorities for the purposes of those acts. Yet, there are no other provisions in the Bill about requirements for Local Authorities or the Commission to take WFD compliance into account (apart from s.49(2)(b) above).

With regard to the WFD obligations on relevant authorities, we would highlight that the water quality protection obligations stemming from the WFD are roughly equivalent to the conservation obligations required by the Habitats Directive. Article 4 of the WFD requires WFD-specific assessments in advance of any works or development being carried out to ensure that a development will not "*cause a deterioration of the status of a body of surface water or … jeopardise[s] the attainment of good surface water status..*" as per the CJEU ruling in C-461/13, the Weser Case. This must include dredging, drainage, river maintenance and flood protection, and should be supported with comprehensive training and robust enforcement. However, Local Authorities have not yet been given any guidance on how these WFD requirements are to be incorporated into forward planning policy or included in the evaluation of individual planning applications. The Draft Bill provides no legislative direction on these issues.

Recommendations:

- Further evaluate the actual sustainability of the types of energy included in the definition of renewable energy as relied upon in the new IROPI provisions. The current science and research strongly calls into question the actual sustainability and climate mitigation potential of some of these energy types, namely biomass and biogas. These also can cause significant indirect environmental impacts.
- Further clarity is needed on the scope of the IROPI provisions.
    - For example, if a fossil gas power plant is proposed (with likely significant effects on a European site) but plans to use a small proportion of biogas as well, which is deemed renewable under the current definition in the Draft Bill, does that entail that the proposed plant could be deemed to fall under the IROPI provisions for renewable energy plants?
- Significantly strengthen the requirements around the Water Framework Directive in s.49(2)(b) on the obligation on Local Authorities to prepare a strategy relating to environmental and climate change.
- Require Water Framework Directive-specific assessments in advance of any works or development being carried out to ensure that a development will not "*cause a deterioration of the status of a body of surface water or … jeopardise[s] the attainment of good surface water status..*" in accordance with Article 4 of the Directive, as per the CJEU ruling in C-461/13, the Weser Case. This must include dredging, drainage, river maintenance and flood protection, and should be supported with comprehensive training and robust enforcement.

Part 9 - Judicial Review

Judicial review (JR) has been widely denounced by many as being a primary impediment to delivering housing and infrastructure In 2021, only around 3% of An Bord Pleanála's decisions were subject to judicial review, representing merely 0.25% of the over 30,000 total planning decisions made across the country that year[1]. This. Moreover, the Office of the Planning Regulator has highlighted that the number of successful judicial reviews has increased

[1] https://publications.opr.ie/view-file/117

exponentially in the past three years[2]. This indicates that unlawful decision-making is a serious issue and that the judicial review system is actually doing exactly what it was designed to do, in terms of correcting those flawed decisions. Instead of trying to stop the public and eNGOs challenging unlawful decisions in court, as Part 9 of the Bill clearly intends to do, the focus should be on ensuring lawful decision-making at all levels in the planning process so that decisions do not need to end up in the Courts in the first place.

The new judicial review provisions, individually and collectively, present a web of obstacles making it more difficult to hold public authorities to account in planning and environmental decision-making, compromising the public's right to wide access to justice, and making access to the Courts excessively challenging. An Taisce considers that Part 9 of the Draft Bill is incompatible with the Aarhus Convention and the legal obligations of its implementing European Directives. It has been stated that Aarhus considerations informed the Bill's drafting, but this is not at all demonstrated in the content of the Bill.

Indeed, these numerous issues will lead to significant amounts of satellite litigation, further exacerbating delays and costs. This is entirely contrary to what the Bill is purportedly aimed at addressing. The dysfunction the JR changes will create will have serious adverse impacts on our ability to deliver the development and infrastructure needed to address the crises in climate, housing, energy, biodiversity, etc.

We would highlight that many of the JR provisions in sections 50, 50A and 50B of the 2000 Act, notably those related to standing rights and cost rules, were introduced *specifically* to bring Ireland into compliance with Aarhus and the related Directives. Therefore, An Taisce considers the changes proposed in Part 9 to be highly retrograde and illogical steps that will wind back the clock and bring Ireland further out of compliance with Aarhus and the EU Directives implementing it.

Crucially, there is a complete failure to provide any evidence or analyses supporting the proposed changes. The Programme for Government promised a "*review and reform of Judicial Review*", but no such review has been carried out. The Attorney General's working group report on JR has not been published. No evidence, data or analyses have been presented on what works well and what does not work well in the current JR provisions, nor have analyses on the impacts of the proposed changes. Both An Taisce and the Environmental Pillar representatives on the Planning Advisory Forum explicitly asked for such information on multiple occasions, including in writing, but it was never provided. It is a clear principle of European law that any proposed curtailment of rights must be supported by clear public interest justifications. These have not been provided. The proportionality of the changes and their impacts also remains unjustified.

We note that the potential impacts of the proposed JR changes have been raised by a diverse range of groups beyond the eNGO sector, including by legal professional bodies such as the Planning and Environmental Local Government Bar Association and the Law Society.

[2] https://www.opr.ie/wp-content/uploads/2022/10/OPR-Review-Report-Phase-1-of-ABP-Review-1.pdf

We address a small but key selection of the problems with Part 9 below. For more detailed considerations on Part 9, including specific recommendations and analysis of the incompatibility of the provisions with the Aarhus Convention, please refer to the submission made by the IEN's Environmental Law Officer on the Bill's compliance with Aarhus. Annex II of that submission is dedicated to issues with Part 9 and provides specific recommendations.

Restrictions on standing: The Bill aims to significantly curtail which members of the public may take a legal challenge - s.249(10) places arbitrary and restrictive thresholds on standing to apply for leave to take a case as well as which organisations qualify as environmental NGOs in order to have standing as such. The Aarhus Convention and related CJEU case law have established that national law criteria on access to justice may only determine "who" can take a case but not "what" case can be taken. These criteria cannot exclude entire categories of the public, must meet an objective of public interest and be necessary and proportionate in light of that objective, and cannot be so strict that it would be effectively impossible for environmental associations to take challenges.

Below we highlight *some* of the problems with s.249(10). See the IEN's Environmental Law Officer on the Bill's compliance with Aarhus, specifically Annex II, for more.

The requirement in s.249(10)(b) for the exhaustion of all administrative remedies raises multiple issues of compliance with the Aarhus Convention and EU law (see the IEN Aarhus compliance submission). It is also problematic when taken in conjunction with s.97(2) which would effectively prevent most eNGOs from taking an appeal when an environmental impact assessment was required (see our comments on Part 4 of the Bill above).

Aarhus provides that people have a right to act collectively as part of associations, therefore any restrictions to prevent that (as appears to be the case in S.259(10)(c)(i)) would be contrary to the Convention as it would exclude an entire category of the public. The reason given for preventing associations taking challenges seems to be that an association needs a legal personality in order for a costs order to be enforceable against it. We note, however, that cost orders are not made against JR applicants except in exceptional cases.

With regard to eNGO standing rights in cases where there may be significant environmental impacts, s.249(10)(c)(iii) proposes very limiting restrictions on what groups may qualify as eNGOs. None of these provisions have been justified or have any analyses or information backing them up. It appears there may be some conflation of eNGOs with associations of the public (such as residents' associations). Yet these groups generally seek leave on the basis of prior participation or other basis of standing rather than under the eNGO provisions. That said, there should be no restrictions imposed that unlawfully limit the rights of associations of the public to access justice either.

The proposed eNGO standing restrictions are discussed below.

- s.249(10)(c) Subsection I: "*It is a company (within the meaning of the Companies Act 2014) that has existed for a period of not less than one year prior to the bringing of the application for judicial review*".

    - Per the Companies Act definition, this would require the eNGO to be an Irish-registered company. Incorporation is a large administrative burden, particularly for small organisations. This would also preclude key international environmental groups like ClientEarth from taking cases, as well as eNGOs based in Northern Ireland (this has serious implications for development in the border region with potential transboundary impacts).

- Subsection II: "*the constitution of the company includes objects related to the promotion of environmental protection which are relevant to the matters to which the decision, act or failure to which the proceedings relate and it has pursued those objects for a period of not less than one year prior to the bringing of the application for judicial review*"
    - This is very ambiguous and will likely precipitate significant legal argument over its interpretation. Additionally, if an eNGO were to need to alter its constitution to meet this requirement, this may pose unreasonable administrative burdens.

- Subsection III: "*the company has no fewer than 10 members at the time of bringing the application for judicial review*"
    - This appears to be entirely arbitrary. It also discriminates against non-membership based organisations and small organisations.

- Subsection IV: "*the company has passed a resolution in accordance with its constitution prior to the bringing of the application for judicial review authorising the bringing of the proceedings*"
    - This is an entirely unreasonable provision and a significant encroachment into individual organisations' governance procedures.
    - In An Taisce's case, a resolution of the members requires an Extraordinary General Meeting. This requires 21 days notice, which takes away almost half of the eight week period to apply for leave. This would make applying for leave to take a challenge exceedingly difficult if not impossible when also taking account of the several days for the decision notice to be sent to us, time to seek legal advice, draft grounds for consideration by the membership, and time to finalise the statement of grounds and leave application assuming the resolution is passed.

These restrictions are all unreasonable and unjustified. Far from being further restricted, standing rights for eNGOs should actually be widened. The corresponding provisions in s.50A(3)(b)(ii) of the 2000 Act are too narrow to comply with Aarhus.

s.249(10)(c)(iv) appears to restrict standing to grounds dealing with issues raised in the submission(s) the applicant made to the relevant decision-maker, such as the Commission. This is problematic in that it means elements of the decision itself are excluded even though it is frequently elements of the decision that would not have been possible to raise in previous submissions that require challenge via judicial review. It also requires that the applicant have "legal capacity" to bring proceedings, which could exclude groups such as unincorporated associations.

In general, the provisions in this section are very incoherent and contain multiple ambiguities. This includes vague terminology which in and of itself will cause delays and likely require satellite litigation to solve. For example, terms such as "materially affected" s.249(10)(c)(i) and "substantial basis" and "reasonable prospect of relief being granted" in s.249(10)(a) are ambiguous and will require interpretation.

***Changes to cost rules*:** The current cost rules as laid out in s.50B of the 2000 Act allow were introduced *specifically* to bring Ireland into compliance with its legal obligations under the Aarhus Convention to ensure that individuals and groups seeking to judicially review certain decisions with environmental implications were not exposed to prohibitively expensive costs. This is of particular importance in Ireland, which has the highest legal costs in the EU. Under these current rules, those taking a JR could be awarded their legal costs if they won their case or if the Court granted them their costs on public interest grounds. After 13 years of legal wrangling and litigation on the application of those cost rules, the 2022 judgement in the Heather Hill case finally brought clarity in finding that the existing cost rules in s.50B of the 2000 Act are applicable in full for *all* judicial reviews of decisions which invoke EU environmental law (as listed in s.50B). It is important to note that the s.50B rules also apply across sectors, including forestry, oil and gas, etc., not just in planning.

In what An Taisce considers to be a highly retrograde move, the proposed s.250 of the Draft Bill completely and inexplicably scraps the current s.50B and the newly delivered legal certainty from Heather Hill. s250(1) proposes a system by which each side would bear its own costs - cost recovery for successful applicants or on public grounds as determined by the Court would no longer be possible. This would have a significant chilling effect as it will become much harder for people and groups to hire a legal team without having to significantly finance it themselves. It would also make it impossible to hire lawyers on a "no foal no fee basis", as they would not be able to recoup their fees even if they win. We would highlight that the no foal no fee system is one of the primary means through which NGOs and the public are able to access justice at present. It also has the added benefit that weaker cases are generally weeded out as lawyers are unlikely to take a case they do not believe they can win.

The proposed s.250(2) provides for a very vague, yet to be determined administrative scheme to address costs via legal aid. Critically, it appears to only apply to planning decisions, no longer across sectors as 50B does, thereby hugely increasing financial exposure for those seeking judicial reviews of other types of environmental decisions (for example the Climate Case would not have fallen under this administrative scheme). If a legal aid scheme, or any assistance on costs, is introduced, it should *supplement* the existing cost rules per the current s.50B, not replace them, and must be very carefully designed. Any legal aid scheme would essentially have to replicate the current cost rules to comply with Aarhus - there has to be equity among parties (or equality of arms) in terms of cost exposure and ability to hire legal teams.

Some very serious questions arise in relation to the as yet undeveloped and unspecified "administrative scheme" proposed in s.250(2), including:

- What criteria will be used to determine eligibility?
- Will everyone get legal aid? Who decides? Would it be the Department of Public Expenditure and Reform? Would it be Ministers within DPER?
- Would the decision on who gets aid be a political decision? For groups like An Taisce who were vilified over the Kilkenny Cheese Case, how would the politics interfere with granting legal aid there?
- If everyone gets legal aid, what will the overall cost of the scheme be?
- If everyone gets it, it may prove to be a perverse incentive to take a JR, even if the grounds aren't overly strong, as the legal fees will be covered by the State; and likewise, any restriction on who gets it will likely be challenged in regard to how fair it is. Determining eligibility for legal aid may prove to be a very challenging and fraught task for an administrative body.
- If you need to wait to go through a legal aid application then how does that impact on the eight-week window to bring a JR leave application?
- Given the climate of pushback against those taking JRs in general, how much money would actually be put towards this?
- How would the amount of money available to the scheme be impacted in times of economic downturn?

Ultimately, An Taisce very strongly recommends that s.250 be deleted and the existing cost rules, per the current s.50B as clarified by Heather Hill, be maintained to ensure Aarhus compliance.

Changes to a decision: S.249(5) of the Draft Bill allows a planning authority such as the Commission to amend a decision within eight weeks after that decision has been made to correct any error of fact or law. Contrary to the purported objective of the Bill to increase certainty, this introduces huge uncertainty. It moves the goal posts and entails that a potential litigant applying for leave to take a JR could be bringing a case on a non-final decision - the grounds of the case may change or be rendered irrelevant. This also has significant cost implications for potential litigants.

Ultimately allowing a planning authority to amend their decision after the fact is very poor administration - it incentivises shoddy decision making and could function essentially as a get-out-of-jail-free card.

It is worth noting that there appears to be significant confusion about the type change this provision would allow. It seems to be proposed to allow "non-material" or "minor" corrections, but many of the examples cited, including by the Department, are substantive rather than non-material or minor. An Taisce does not consider that a change in the wording of the proposed s.249(5)a is sufficient - the provision should be deleted.

Leave on notice vs. ex parte: The Draft Bill proposes in s.249(2) that the leave process for taking a JR would be done "on notice" to the opposing party rather than via the current ex parte system. This means that the responding party would now be able to challenge the case at the leave stage - under the ex parte system, only the applicant seeking to take the challenge appears at the leave stage. This change would further block access to justice for the public,

including by increasing the potential cost exposure for those seeking to take a challenge. Additionally, while the Draft Bill purports to *reduce* delays in the planning system, allowing challenges to leave applications could in fact *increase* delays.

No appeal to Court of Appeal: The proposed s.249(15)(a) would remove the possibility of appealing a decision of the Court in a JR to the Court of Appeal. It is unclear what rationale underpin this as appeals of JR determinations to the Court of Appeal are relatively uncommon. It appears to be disproportionate and potentially unconstitutional.

Timelines for judicial review: The timeframes set out for the multiple aspects of the judicial review process must be fair and enable effective participation. We would highlight that the clock for lodging a leave application should only start when the applicant has access to all the relevant information online. We also note that members of the legal profession have questioned how realistic multiple of the timelines proposed in Part 9 are given the time needed to access materials on the decision, expert advice, etc.

Recommendations:

- Delete the entirety of Part 9 as proposed and replicate sections 50, 50A and 50B of the 2000 Act.
- Apply the corrections to the current sections 50, 50A and 50B of the 2000 Act as detailed in the submission from the Irish Environmental Law Officer's submission on the Draft Planning and Development Bill, 2022 and certain compliance issues arising in respect of the Aarhus Convention.

Part 10 - Architectural Heritage

The Architectural Heritage provisions of the Planning and Development Act 2000 have been largely effective in the application of the provision of the Council of Europe Granada Convention, in putting in place a system of Protected Structure and Architectural Conservation Area designation and achieving a major advance in building conservation practice in relation to maintenance of fabric and features and of craft standards and use of materials in buildings across the country. The resourcing of Local Authority Conservation Officers has also played a crucial role in this achievement.

Section 153 on Development Control: One of the major achievements of current Architectural Heritage legislation has been the application of the principle set out in the current s.57(10)(b) of the 2000 Act that *"a planning authority or the Board on appeal shall not grant permission for demolition of a protected structure or proposed protected structure save in exceptional circumstances*". It is very welcome that s.153 of the Draft Bill maintains and augments this principle.

Section 257(4) on exemption for enabling of conversion for residential use: The general regulatory provision to exempt conversion, including subdivision of up to nine units, of vacant buildings for residential use was introduced to address the perceived obstacle of the planning system in relation to urban and village vacancy. This does not resolve the complexity

of Irish building regulations which may be considered as a more significant impediment to utilising and upgrading vacant buildings. The sole criterion on which the current planning exemption is provided for is suitability of the building for residential use. The provisions of the proposed s.257(4) as currently drafted are unclear in how architectural heritage protection legislative and regulatory provision as well as Architectural Heritage Protection Guidelines for Planning Authorities in relation to protected structures and Architectural Conservation Areas are to be maintained.

Delegation of the determination of Ministerial Directions on Protected Structures and Architectural Conservation Area Designation to Planning Authorities: In general the use of the National Inventory of Architectural Heritage as the basis for the Record of Protected Structure (RPS) schedules by individual planning authorities has proved effective. It is also desirable that a system of allowing both addition to and deletion from the Record of Protected Structures continues.

However, a key Granada Convention provision in relation to architectural heritage protection may be undermined by the discretion left with individual planning authorities not to accept a Ministerial recommendation or to delete a protected structure on the basis of active political lobbying by a property owner.

The remedy of this situation and the maintenance of nationally consistent standards of protection can be achieved by mandating the Commission with relevant safeguarding functions to ensure oversight and accountability:

1. The Commission should be given the automatic function of determining cases where a planning authority rejects a Ministerial recommendation on the scheduling of a Protected Structure or Architectural Conservation Area designation.

2. The Minister be provided with the discretionary function of referring a Protected Structure deletion recommendation by a planning authority to the Commission for determination.

Inadequacy of the current legislation to take early action on preventing Protected Structure endangerment: The 2000 Act has been systematically ineffective in preventing significant numbers of important Protected Structures across the country from endangerment. Cases have arisen in every planning authority area of Protected Structures and buildings in Architectural Conservation Areas suffering abandonment; maintenance neglect; loss of major architectural features; and exposure to theft, vandalism, and arson.

The most significant cases relate to major country houses with prominent examples having occurred in counties Cork, Fingal, Longford, Mayo, Tipperary, and Waterford. Most pervasively it applies to rural vernacular, grain store, other industrial buildings as well as vacant religious institutional buildings, such as Convents where significant cases in relation to the latter have arisen in Cork city and county. In urban areas a different situation may arise as endangerment occurring through neglect of an adjoining terraced building outside of the control of the affected property owner or occupier.

There are key definitions in s.251 of the Draft Bill, which are inadequate and require extended application. Failure to do this will render the detailed provisions in the Bill ineffective in relation to action on endangerment.

S.251 Definition of Endangerment

The definition of Endangerment requires significant amplification. The definition is inadequate since it does not properly address the range of causes of endangerment, referencing only "*causing damage to the structure*". Identified cases of property owners causing wilful and significant damage to a Protected Structure are fortunately rare. The major cases where endangerment has arisen have nearly all begun with the leaving of a building empty and vacant without an occupier or use or even proper security provision. This in turn leads to failure to maintain roofs gutters and drainage or to take early action on a dry rot outbreak. The leaving of a building unsecured then leads to theft of lead copper roof cladding and pipework, vandalism and exposure to arson.

S.251 Definition of Occupiers

The current definition of occupiers under the proposed s.251(b) "*any person who is in substantial control of that land or structure*" requires significant amplification to include all persons, entities or agencies having legal title interest or other responsibility over the maintenance or management of a Protected Structure.

Some of the major cases of neglect of significant Protected Structures have occurred when there is a legal dispute, when deeds of a property default to a financial institution, a liquidation arises, or where a building or land is part of larger distressed asset portfolio which may be traded individually or in a bundle between financial institutions.

Situations have occurred where a building is left vacant or neglected and become endangered when an owner, whether Irish registered or otherwise, cannot be contacted, or where any agents in place are not ensuring building maintenance. This is particularly problematic when property is registered with an offshore entity and there are no agents resourced or instructed to ensure maintenance.

A legal dispute or delay in resolving a title, such as a probate issue or the incapacity of an owner who may be a nursing home resident to oversee property maintained may arise.

A "limbo" period may arise between the time when a loan default arises with the title deeds becoming forfeit to a lender and the putting of the property up for sale. This occurred when a major Dublin Protected Structure was left empty and exposed to arson attacks while the bank holding the deeds claimed it had no responsibility and took no action on maintenance.

The role of administrators, liquidators or receivers responsible for a property after a loan default or repossession has been a significant cause of endangerment to a number of major country houses. In some cases the situations are unresolved and ongoing. It occurs when an administrator, liquidator or receiver claims to have no financial resources to protect the building with security to avert theft or vandalism or to carry out repairs. In a number of serious

cases fire damage, uncontrolled dry rot outbreaks, theft of major architectural features, and loss of decorative ceilings has occurred.

Endangerment may also be caused by an adjoining property owner. The current and proposed provisions in the Bill relating to endangerment apply to a narrow definition of the "occupier" of a structure. In an urban terrace location, a well maintained building may be exposed to endangerment by maintenance neglect or building construction negligence on an adjoining property or site. Neglect of an adjoining building may expose a well maintained Protected Structure to water damage or dry rot outbreak. Redevelopment or construction of an adjoining building or site may expose its neighbours to structural movement or subsidence.

The definition of "occupiers" liable to be served notices on endangerment needs to be extended to apply to all those:

1. Legal, professional, or management firms or individuals managing or responsible for a property registered in an offshore company;
2. A financial institution or fund which has taken title to a property as a result of a loan;
3. Administrators, liquidators or receivers responsible for a property after a loan default or repossession; and
4. Parties responsible for the maintenance of a building site or structure which is causing endangerment to an adjoining Protected Structure.

High rise development affecting the setting of Protected Structures and Architectural Conservation Areas, and development affecting historic gardens and designed landscapes, which provide the setting for significant Protected Structures:

High Rise Development in Urban Areas

The setting and urban historic context of a Protected Structure or Architectural Conservation Area is part of its special character.

In 2018, the then Minister for Housing Planning and Local Government Eoghan Murphy initiated the consultation process for new "*Urban Development and Buildings Height Guidelines for Planning Authorities*". The effect of the Guidelines has resulted in significant high rise development proposals being granted by planning authorities and An Bord Pleanála in the historic centres of Dublin, Cork and Limerick, affecting the setting and context of significant Protected Structures and Architectural Conservation Areas. In one significant Dublin City case, a 24 storey tower which had been refused permission on Development Plan grounds, was granted in a re-application with some variations after the implementation of the Guidelines.

A significant High Court judgement in relation to high rise development impact on Protected Structures and the wider historic environment was made by Mr Justice Humphreys in January 2023. This decision quashed the permission by An Bord Pleanála for a unit apartment development at the former Holy Cross seminary at Clonliffe Road, Dublin.

Development affecting Historic Gardens and Designed Landscapes

In parallel to the achievement of the National Inventory of Architectural Heritage (NIAH), the Department has created an Inventory of Historic Parks and Designed Landscapes. This includes historic Ordinance Survey map data and aerial photographs of the current state of the site. The inventory provides an important baseline information tool in informing the design and location impact of development proposals and their evaluation by planning authorities prescribed bodies and the public generally.

The inventory covers locations which have been subsumed into areas of urban expansion, where the main buildings associated with the garden or landscape have been lost and locations where an historic house and associated structures survives. In the case of the latter category, this would cover the most significant country houses in each county. The historic gardens and designed landscapes of country houses, including in many cases vistas extending outside the curtilage and attendant grounds, such as Powerscourt and Russborough in Co. Wicklow, are an essential part of their character and significance. In many locations across the country, the setting of significant county houses has been adversely affected by housing, hotel, golf course or other commercial development. This has also included rezoning of land for business park type development within the walled area of a nationally significant historic designed landscape walled Demesne in Co. Meath, on which An Taisce has sought the intervention of the Planning Regulator.

The protection of historic landscapes is specifically provided for in the European Landscape Convention, in addition to general landscape protection. It was to advance compliance with the Convention that the provision of s.203 of the PDA 2000 for the designation of Landscape Conservation Areas was introduced. The objective was that, in parallel to architectural heritage protection, national landscape guidelines would be introduced, including for the delivery of Landscape Conservation Areas. However, no such guidelines were advanced. The draft legislation now omits the previous s.203 provisions on Landscape Conservation Areas and puts no alternative measures in place.

Recommendations:

- Clarify s.257(4) as to how architectural heritage protection legislative and regulatory provision as well as Architectural Heritage Protection Guidelines for Planning Authorities in relation to protected structures and Architectural Conservation Areas are to be maintained in converting vacant buildings for residential use.
- Maintaining nationally consistent standards of architectural heritage protection in accordance with the Granada Convention can be achieved by mandating the Commission with relevant safeguarding functions to ensure oversight and accountability when architectural heritage protection may be undermined by the discretion left with individual planning authorities not to accept a Ministerial Recommendation or to delete a protected structure on the bases of active political lobbying by a property owner:
    - The Commission being given the automatic function of determining cases where a planning authority rejects a Ministerial recommendation on the scheduling of a Protected Structure or Architectural Conservation Area designation.

    - The Minister being provided with the discretionary function of referring a Protected Structure deletion recommendation by a planning authority to the Commission for determination.
- Enhance the definition of endangerment in s.251 to include the leaving of a building empty and vacant without an occupier, use or even proper security provision, leading to failure to maintain roofs gutters and drainage, to take early action on a dry rot outbreak, to theft of lead or copper roof cladding and pipework, to vandalism, to exposure to arson, etc.
- Extend the definition of "occupiers" in s.251 liable to be served notices on endangerment needs to be extended to apply to all those:
    - Legal, professional, or management firms or individuals managing or responsible for a property registered in an offshore company;
    - A financial institution or fund which has taken title to a property as a result of a loan;
    - Administrators, liquidators, or receivers responsible for a property after a loan default or repossession;
    - Parties responsible for the maintenance of a building site or structure which is causing endangerment to an adjoining Protected Structure.
- In order to properly meet a range of UN, EU and Council of Europe Conventions on cultural heritage and landscape as well as the January 2023 Clonliffe Road Judgement specific legislative provision, it is required that zoning and land use policy as well as the determination of application under the development control process give explicit consideration to the impact on the setting of Protected Structures and Architectural Conservation Areas in urban areas, to historic gardens and designed landscapes particularly where providing the setting of major country houses, and to the historic and cultural environment generally.
- Reinsert the current s.203 of the 2000 Act into the Draft Bill.

Part 11 - Enforcement

Part 11 of the Draft Bill largely reflects the existing enforcement provisions of the 2000 Act. However, the current enforcement regime faces significant issues of effective implementation, one of the primary problems being the lengthy timeframes. Enforcement cases often progress quite slowly, both at Local Authority level and in the Courts, which can allow potentially damaging activities to continue, sometimes past the point of effective mitigation or remediation. Unauthorised development and activities also often continue as enforcement cases proceed through the Courts, thereby increasing the likelihood of irreversible damage in some cases. Stricter measures are needed to prevent this.

Regional Enforcement Authorities: The establishment of new regional enforcement authorities, per the proposed s.299, has the potential to be more effective than the current system with regard to the regulation of certain activities. Unauthorised quarrying and peat extraction in particular face ongoing issues with ineffective enforcement. Given the frequently large scale of these unauthorised activities and the associated environmental impacts, having dedicated specialist teams could be quite beneficial. However, there are several potential

pitfalls of splitting the enforcement system, particularly around communication and integration with Local Authority enforcement procedures. Any issues causing delays in enforcement action increases the risk that unauthorised activities could cause significant or irreparable damage.

It is acknowledged that some of these issues may be dealt with via the Regulations, however, we consider that the following questions are worthy of consideration in the scrutiny of the Draft Bill:

- Integration and collaboration with Local Authority enforcement systems
    - How will information on cases be fed back and forth between the new agencies and local planning departments? What systems would be put in place to accomplish this? How would any new systems integrate with the existing online planning databases?
        - For example, where an operator applies for a new permission, but has previously engaged in or is currently engaging in unauthorised works, s.35 of the PDA 2000 (refusal based on past failures to comply) may be relevant. How will local planners access the information needed on enforcement cases initiated by the regional/national authority?
        - If a member of the public contacts a Local Authority with a complaint on quarrying or peat extraction, how will that be transferred to the new authority?
        - Communication between the new agencies and Local Authorities must be done in a thorough and streamlined manner for a new system to be effective in preventing, stopping and remediating unauthorised activities. If this is not accomplished, the potential for delays, miscommunication, etc. increases the risk that unauthorised activities could cause significant or irreparable damage.
    - There are significant benefits to having the local knowledge that Local Authorities can employ in enforcement cases. How could these benefits be harnessed in a new regional or national system?
- Resourcing of the new authority(ies) must be sufficient. For instance, to be effective, a new regional or national regime would require a substantial number of inspectors who are able to both respond rapidly to reports of unauthorised activities and find cases themselves. This raises issues of location and access to sites. How will this be addressed?
- The current enforcement system relies heavily on members of the public informing Local Authorities of potentially unauthorised development. What mechanisms will be in place to facilitate the lodging of enforcement complaints? How could a new system also decrease reliance on local reporting?

Recommendations:

- Further consideration is required on new, stronger provisions to address ineffective aspects of the current enforcement system, particularly delays in the progress of enforcement cases which can allow highly damaging activities to continue.
- Further consideration is required in relation to new, stricter provisions to prevent the continuance of unauthorised works and activities while there are active court proceedings.

- It is recommended that the Committee request any analysis done as part of the Planning Review on the efficacy of the current enforcement regime and ways in which it could be improved.
- Provide more clarity and detail in s.299 on the nature and composition of the proposed regional authorities; the requirements and mechanisms for efficient and thorough communication between regional authorities and relevant Local Authorities; and the mechanisms for public engagement with a regional authority.

Part 17 - An Coimisiún Pleanála

In our submission to the Joint Oireachtas Committee on the pre-legislative scrutiny of the Planning and Development and Foreshore (Amendment) Bill 2022, An Taisce raised numerous concerns about the changes to the appointments processes for An Bord Pleanála board members and Chair and the ability of those processes to maintain and enhance the Board's independence. These provisions have largely been replicated in Chapter 4 of Part 17 on An Coimisiún Pleanála, and our previous concerns remain.

Recommendation: Revisit the appointments procedure for Planning Commissioners (including the Chief and Deputy Chief Commissioner) and other issues as raised in An Tasice's previous submission to the Committee on Planning and Development and Foreshore (Amendment) Bill 2022.