An Taisce
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

7th November 2022

Re. Pre-Legislative Scrutiny of the General Scheme of the Planning and Development and Foreshore (Amendment) Bill 2022

Dear Ms Lynch,

Thank you very much for inviting comments from An Taisce on the General Scheme of the Planning and Development and Foreshore (Amendment) Bill 2022. We would like to make the following submission.

Yours sincerely,

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

An Taisce Submission to the Pre-Legislative Scrutiny of the General Scheme of the Planning and Development and Foreshore (Amendment) Bill 2022

Thank you for inviting a submission from An Taisce on the General Scheme of the Planning and Development and Foreshore (Amendment) Bill 2022. We very much welcome the opportunity to engage with the Committee on this Bill as the appointments process for members of the Board of An Bord Pleanála is crucial for maintaining and enhancing the organisation's cornerstone role in the planning system as well as addressing the current crises facing the Board. We also very much appreciate the Committee's recognition of An Taisce as an important stakeholder in the planning system.

We begin our submission with preliminary comments on the context for the bill and broad recommendations. We then make specific recommendations on Heads 1, 3, 4, 5, 6, 7 and 9.

Overarching Comments

Historically, An Bord Pleanála was the pinnacle of the Irish planning system and was very widely lauded for the expertise and independence with which it made planning decisions. It hardly needs said that public confidence in the Board has been very seriously undermined by the numerous allegations which have recently come to light, some of which have undergone investigation. Yet, public confidence in An Bord Pleanála was declining prior to the crises of recent months, in large part due to growing problems with the quality of decision making by the Board. Indeed, the increasing number of unlawful decisions has been highlighted by the Office of the Planning Regulator (OPR) in the first phase of their review of An Bord Pleanála[1] and by the Board itself[2].

Facilitating and enhancing the ability of the Board to make robust, lawful and independent decisions should be the key considerations underpinning all proposed legislative changes to the structure and functioning of An Bord Pleanála, including the ordinary Board member appointments process. All reforms regarding the composition of the Board must ensure that the Board contains a broad and deep range of expertise and diversity of representation. Accountability and transparency are crucial in all processes, as is the ability of the Board to function independently and maintain the highest standards of governance. The appointments process for ordinary members has significant bearing on all of these issues.

We fully recognise the very serious capacity problems currently facing the Board and the need to appoint new members in a timely manner given the heavy caseload. This load will

[1] Office of the Planning Regulator, Phase 1 report of their review of An Bord Pleanála (pg. 48): "*it is clear that the number of legal challenges which are successful has increased exponentially in the last three years".*

[2] An Bord Pleanála Annual Report 2020: "*A large proportion of the increasing caseload of judicial reviews relating to An Bord Pleanála decisions concern complex matters of procedure and interpretation relating to the EU environmental directives and procedures to do with handling of Strategic Housing Development applications. It is accepted that recent judicial review outcomes have seen a greater number of such cases conceded or lost and this is an outcome of the increasing complexity of those European law issues and novel issues relating to the new strategic housing process*."

only increase as the new marine planning regime commences and as the country continues to grapple with the housing crisis, energy crisis, climate crisis, etc. Yet it is also absolutely crucial that the Board appointments process is reformed, improved and updated in a very well-considered manner that helps restore public confidence in An Bord Pleanála and facilitates the highest standards in planning decision making. However, we consider that the approach proposed in the Heads of Bill accomplishes neither of these crucial things. We would also note the current context regarding the OPR's Review of An Bord Pleanála and the fact that this legislation is being advanced prior to the second phase of the OPR review being completed.

In carrying out its function to ensure proper planning and sustainable development and uphold the public interest as the State planning body, An Bord Pleanála must be independent, both in its composition and its actions, from any one interest, including Government (the Department, the Minister, other members of Government, etc.). We consider the distinction between the State and Government to be an important one here.

As a key part of this independence, An Bord Pleanála must be empowered (including through the legislation), prepared and willing to challenge or seek clarity on, including through the courts, Government policies where it feels there may be discrepancies with EU law or national law or national laws it believes to be in conflict with EU law. An Bord Pleanála's independence from Government is crucial for it to be able to effectively do this. Independence from Government is also therefore also needed in the Board appointments process.

Very concerningly, the overriding effect of many of the proposed legislative changes in this General Scheme is to give the Minister unchecked powers with regard to appointments to the Board. There is little, if any, provision for safeguards and Oireachtas oversight. Giving the Minister a hugely disproportionate and largely unrestrained amount of power in the Board appointments process will not, in our opinion, facilitate the independence that is fundamental to the work of An Bord Pleanála, work to restore confidence in the Board or improve the quality of decision making, all of which are very much needed at present.

Specific Recommendations on the Heads of Bill

Head 1 - Short title, construction, collective citation and commencement

It is entirely unclear why it is necessary to give the Minister complete discretion on the commencement of the legislation, as proposed in Head 1(4), and what criteria the Minister will use in determining when to commence some or all of the provisions. The unchecked power of the Minister in this regard is concerning. We recommend that the Committee seek further detail on the reasons for this and amend Head 1(4) to provide more clarity on how the legislation will be commenced as well as on the criteria for commencing it.

Head 3 - Regulations [if required]

Similarly to Head 1(4), Head 3(1) would give the Minister complete discretion on introducing regulations related to any part of the proposed legislation. This is again deeply concerning, and the reasoning behind this is not provided in the General Scheme. We recommend that Head 3(1) be removed. Clarity and specificity is also needed on the content of the regulations.

Head 4 - Amendment of Section 104 of the Principal Act

In the first instance, we recommend the Committee seek clarity on why the figure of "*up to 14 ordinary members"* has been proposed in Head 4(1). What evidence and data have informed this proposal, including on current and projected future caseloads and capacity constraints?

Here again in this Head, the Minister is given complete discretion on increasing the number of ordinary Board members. Moreover, the oversight power of the Oireachtas in this regard has been removed via the deletion of the current Section 104(3). We would strongly challenge the assertion in the Explanatory Note that expressing the possibility for an increase in the number of Board members as "up to" obviates the need for the current Section 104(3), and we recommend that 104(3) be retained. It is also problematic that the Head does not provide for decreases in the number of ordinary Board members, for any clarity on how long the potential increases in the membership of the Board will last, or for any review mechanism. We recommend that Head 4 be amended to provide for these.

Furthermore, the proposed criteria that would inform the Minister's decisions regarding an increase in the number of ordinary members include the "nature" of applications, which is extremely vague. We consider that this requires clarification and greater circumscription. Notably, the criteria also do not include consideration of maintaining diversity of expertise and representation on the Board. We recommend that the Head should be amended accordingly.

Additionally, with respect to potential other ways in which the current Section 104 could be amended and improved, we would endorse the recommendations made by the Irish Environmental Network in their written submission to the Committee under the section entitled "Omissions from Head 4 on further changes required for s.104" (see pages 9-10 of their submission).

Head 5 - Amendments to Section 106 of the Principal Act

Head 5(2)

Head 5(2)(a) states the following regarding the expertise requirements for the ordinary members of the Board to be appointed by the Minister:

> "...*among those members are persons who in the opinion of the Minister have satisfactory experience and a good mix of experience or knowledge of infrastructure delivery, housing, physical planning, sustainable development, architecture, heritage, community and social affairs and corporate governance.*"

We consider this list to be insufficient. One of the Board's fundamental functions is its role as a competent authority for the purposes of Environmental Impact Assessment and Appropriate Assessment, and this list fails to reference any form of environmental knowledge or experience beyond "sustainable development", a very vague term that does not sufficiently address the Board's role in environmental protection. There is no provision for climate expertise despite the worsening climate crisis and the Board's obligations under Section 15 of the Climate Action and Low Carbon Development (Amendment) Act 2021. There is no provision for ecological or hydrological expertise despite our biodiversity and water quality crises and the need to meet our European legal obligations in these areas. There is also no provision for legal expertise, despite the general recognition that it is needed, particularly in light of the complex case law environment and the increasing number of unlawful decisions made by the Board. We recommend that Head 5(2)(a) be amended to include these things.

With regard to Head 5(2)(b), we recommend that the language be changed to reflect an equitable balance across genders rather than "between men and women". The need for diversity on the Board goes far beyond gender, however. We recommend that Head 5(2)(b) be updated accordingly to ensure that the Board and its decision making reflects the ever-evolving nature of Irish society, including a range of perspectives from across ethnicities, socio-economic backgrounds, rural and urban areas, etc., as these perspectives are critical to An Bord Pleanála's role in upholding the public interest in planning.

Heads 5(3), 5(4) and 5(5)

These Heads, like most of those preceding them, give unchecked power and complete discretion to the Minister with regard to the proposed new Board appointments system.

An Taisce strongly recommends against the provision for the establishment of a "committee" per Head 5(3), which reads as follows:

> "*The Minister shall establish a committee ("the committee"), or other suitable independent, objective and transparent procedure for the purposes of advising him/her on appointments under section (2).*"

There is no circumscription of the membership of the committee other than that the Minister "*may make regulations pertaining to the membership of a committee*", per Head 5(4). Indeed, that leaves the composition of the committee entirely at the discretion of one person, the Minister, which we consider to be highly concerning.

Per Head 5(3), the role of the committee is to advise the Minister on appointments - the Minister therefore retains complete discretion on who is eventually appointed to the Board

from the committee's panel (Head 5(5)(iv)). We consider this to be deeply problematic, including because there is no provision requiring the Minister to provide reasoned conclusions and justifications for their final selections. There is also no requirement for the final selection to be a balanced representation of the albeit deficient criteria set out in the Head 5(2) or, similarly, for the final selection to be balanced with the expertise of existing Board members.

Furthermore, it is entirely unclear what the "other suitable independent, objective and procedure" could be. This is extremely vague with no criteria proposed as to what constitutes "suitable", "independent" or "objective", and as such leaves the door wide open for interpretation and Ministerial discretion without any provision for oversight or safeguards.

Moreover, there is no rationale or evidence given in the General Scheme to support scrapping the current panel system. We recommend that the Committee seek further detailed information on what evidence, data and reasoning led to the decision to end that system and implement the proposed system. It should also be established how the range of views on the Board appointments system captured in the various strands of the overall planning legislation review have informed these Heads.

We do not consider that the appointments system proposed here, giving the Minister almost complete control over the process with no provisions for safeguards or Oireachtas oversight, will restore public confidence in the Board or facilitate its independent decision making. We therefore recommend that Heads 5(3), 5(4) and 5(5) be removed and that the current panel system be updated and enhanced. We provide some overarching recommendations for this below.

Head 5(6)

With regard to the potential engagement of the Public Appointments Service (PAS), we would highlight that by the nature of the PAS, it is very closely tied to Government and Government Departments. This is by no means a criticism of it or the work it does, it is simply how the PAS functions. As a result of its close ties to Government and Government Departments, we do not consider that the PAS would deliver the level of independence needed for the Board (see our comments in the first section of this submission on the need for An Bord Pleanála to remain independent of Government interests). Furthermore, Head 5(6) provides no circumscription of or detail on the potential role of the PAS in Board appointments. We recommend that Head 5(6) be removed.

Broad Recommendations for an Improved Panel Approach

An Taisce considers that the appointment process for Board members does indeed need to be revised but that the procedure proposed in the Heads of Bill will in *no way* deliver the level of independence needed for the proper and full functioning of the Board. In the interest of enhancing and maintaining the organisation's independence and decision making ability, An Taisce submits that An Bord Pleanála would be best served by a revised

procedure (independent from both the Minister and the Public Appointments Service) that utilises an updated and enhanced panel approach. We make several broad recommendations for such an approach below.

There are many significant benefits to the current panel approach, notably that it facilitates input from people representing various fields and civil society groups and that are quite separate from Government. We consider that the perspectives and expertise provided by the overall panel approach is a great benefit to An Bord Pleanála and should be retained. As the public are key stakeholders in the planning process and the Board's role is ultimately to uphold the public interest, the role civil society plays via the panel approach is a very important one.

The panels as they are currently laid out require updating, however, to reflect recent societal and policy changes. First, groups that are no longer in existence should be removed. We would specifically recommend the addition of a standalone group on environmental considerations (to be broken out from the current panel provided for under Section 106(2)(d)). We consider this to be critical for the following reasons:

- The ever-increasing recognition of the importance of environmental protection, particularly in light of the current climate and biodiversity emergencies;
- The very significant statutory role An Bord Pleanála plays in upholding and applying national, European and international environmental law;
- The complexity of environmental law, the constantly evolving state of case law and the consequent impacts on planning decision making (this was acknowledged by ABP itself in its 2020 Annual Report - see footnote 2).

The panels should also be updated to reflect the increasing diversity of society in Ireland, including the voices of younger generations, marginalised communities, etc. We therefore recommend that the panel currently constituted under Section 106(2)(d) be split up further to best capture the wide variety of perspectives provided for there.

In An Taisce's considered opinion, the current powers of the Minister with regard to appointment of members from candidates selected in the first phase of the panel process undermines the independence of the Board. We also consider that there can be a lack of transparency and accountability in this part of the process, as the Minister is not required to provide detailed reasoning on the final selection of Board members. We recommend that this aspect of the panel approach be changed to better ensure the independence of the Board from Ministerial discretion and Government more broadly.

Head 6: Amendment of Section 108 of the Principal Act

The deletion of Sections 108(A)-(D) for the removal of the two-member quorum is welcome.

Head 7: Amendments to section 110 of the Principal Act

An Taisce submits that Head 7(1) should be amended to *require* the Chair to act when they receive a complaint or consider that the conduct of an ordinary member may bring the Board into disrepute or may have been prejudicial to the effective performance by the Board. Similarly, Head 7(2) should also require the Minister to act. In light of the current crises facing the Board, we consider it crucial to the restoration of confidence in the Board that the Chair and Minister be obliged to act in cases of complaints or potentially problematic conduct, rather than merely having the discretion to act.

Head 9: Amendment of section 1 of the Foreshore Act 1933

The reasons for amending the definition of the foreshore, as proposed in Head 9, are not laid out in the General Scheme. Given the extent of the proposed expanded definition to include subsoils, the water column and airspace, all of which amounts to a very significant spatial area, the potential ramifications and unforeseen consequences of the proposed changes should be fully understood and addressed. To begin to tease these out, we recommend that clarity and further detail be sought on what issue(s) the proposed changes seek to address (what has "come to light" per the Head 9 Explanatory Note) and the rationale behind the proposed new definition.