LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

GENERAL SCHEME OF THE HOUSING AND PLANNING AND DEVELOPMENT BILL 2019

JOINT COMMITTEE ON HOUSING, PLANNING AND LOCAL GOVERNMENT

JANUARY 2022

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Introduction

1.1. The Law Society ('the **Society'**) is the educational, representative and co-regulatory body for the solicitors' profession in Ireland. This submission is based on the views of members of the Society's Human Rights & Equality Committee which is comprised of solicitors with experience and expertise in national and international human rights, as well as environmental law.

1.2. The Society welcomes the invitation from the Joint Committee on Housing, Planning and Local Government ('the **Committee'**) to make a submission on the General Scheme of the Housing and Planning and Development Bill 2019, which includes proposals to reform standing rights to bring judicial review proceedings in planning cases and to introduce special legal costs rules. This submission reflects the Society's recommendations arising from its examination of the General Scheme of the Bill and is an update of a previous submission to the Department of Housing, Planning and Local Government in January 2020.

1.3. The Society commends the Committee for consulting with relevant stakeholders to inform its consideration of the Bill and any amendments going forward. However, we are concerned that the proposed reforms will create restrictive requirements which risk breaching the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the **Aarhus Convention'**) and its implementing Directives. Proposed reforms may also breach rights under the EU Charter of Fundamental Rights and the European Convention on Human Rights (**ECHR**) and further, could be found to breach the EU principles of effectiveness and equivalence, through the creation of a more onerous procedure for the judicial review of planning decisions relating to EU environmental law.

1.4. We concerned that, at a time when the Dáil has already recognised that Ireland is facing a 'climate and biodiversity emergency', the introduction of the legislative proposals outlined in the Bill will endanger the progress made in enabling citizens to participate meaningfully, and to seek access to justice, when environmental rights are threatened.

2. Executive Summary

2.1 The Society is concerned that the cumulative effect of the outlined changes will be to severely restrict access to justice, a right which is recognised as a fundamental personal right guaranteed under Article 40.3 of the Constitution as well as Articles 6 and 13 of the ECHR. This also raises concerns around equality of arms between the State and members of the public. The Society recommends that the Committee reviews these proposals to ensure that they are compatible with the protections around access to justice and meaningful public participation afforded under relevant European Conventions and the Irish Constitution.

2.2 The Committee should reconsider the proposal to revert to its pre-2011 "motion on notice" system in relation to judicial review leave applications. The Society considers that any potential reduction in judicial review hearings and associated costs will be negated by a more protracted and complex pre-leave process. In particular, the Committee should consider the impact this would have on citizens' rights of access to justice, which are protected by the Aarhus Convention, and the need to ensure equality of arms between the State and its citizens, which is a fundamental element of a robust democracy.

2.3 The Committee should also consider how the proposed costs changes could act to deter judicial review challenges. This should be done in light of the findings in the Case C-470/16 *North East Pylon Pressure Campaign and Sheehy* and the EU Commission's Environmental Implementation Review Report 2019, both of which have called on the State to take steps to ensure that challenges can be taken without individuals or environmental NGOs facing prohibitive costs.

3. Standing Rights

3.1 Head 4 of the Bill deals with standing rights in the bringing of judicial review proceedings. It proposes that any applicants seeking to be granted leave to apply for judicial review must have a ""substantial interest", not merely a "sufficient interest" as currently required. The "sufficient interest" test was introduced by section 20 of the Environment (Miscellaneous Provisions) Act 2011 in order to implement relevant articles of the Aarhus Convention in Irish law and to ensure compliance with same. The Bill also proposes to introduce a requirement that applicants must be "directly affected by a proposed development" and "in a way which is peculiar or personal".

3.2 There is an additional requirement that the applicant must have had prior participation in the planning process. The explanatory note proposes that these changes are "aimed at minimising situations where persons can 'at the last minute' lodge a judicial review application without having had any previous involvement in the planning case in question, either at local planning authority or An Bord Pleanála level, without good reason."

3.3 The Bill also proposes changes to the 'automatic standing rights' for NGOs extending the minimum time an NGO must be in existence from twelve months to three years. This will prohibit newly established NGOs with environmental concerns from bringing judicial review challenges. Given that applicants are frequently local community groups, which have formed specifically in response to a proposed development, these requirements will have the effect of assuming a degree of foresight among interested parties which is both unreasonable and unrealistic. Many communities will not have three years' notice of proposed developments in their areas.

3.4 Further requirements include a minimum of 100 affiliated members of such groups which must be pursuing the objective of protection of the environment for non-profit concerns. The explanatory note states that these are "fairly standard minimum requirements in most other jurisdictions".

3.5 The cumulative effect of these proposed changes will be to severely restrict access to justice, a right which is recognised as a fundamental personal right guaranteed under Article 40.3 of the Constitution and Articles 6 and 13 of the European Convention on Human Rights.

Recommendation

The Society recommends that the Committee review these proposals to ensure that they are compatible with the protections around access to justice and meaningful public participation afforded under relevant European Conventions and the Irish Constitution.

4. Leave for Judicial Review

4.1 Subsection 1 of Head 4 of the Bill proposes to revert to provisions which were removed in 2010, which provided that judicial review leave applications were made by "motion on notice". This allowed the notice party to contest a leave application where the application was considered frivolous or lacking in substance, the aim being to avoid unnecessary judicial reviews and the involved costs. This adds, at a minimum, an extra four days to the eight week timeframe for bringing the leave application. In the highly probable situation of such an application being contested, this will result in further costs and delay, effectively fighting the merits of the case at both stages.

4.2 While the Society appreciates the Committee's attempts to save court time and unnecessary expense, we are concerned that these amendments will impede the public's access to the courts and people's ability to challenge environmental decisions. It again calls into question the equality of arms argument whereby the State, with its considerable resources and expertise, has even greater power over challenges being taken against environmental decisions. This raises particular concerns around compliance with the Aarhus Convention. If the pre-leave hearing becomes the norm, it may be that the expected saving of court time and expense is illusory and the reduction in cases going to full hearing may not be offset by the number of cases where hearing time is increased by an additional hearing, before all evidence is filed.

4.3 The focus instead should perhaps be on enhancing the quality of decisions rather than restricting challenges. This, in turn, would reduce applications for judicial review and strengthen access for citizens to participate meaningfully in environmental decision-making that affects them and their surroundings. Notably, the EU Commission's Environmental Implementation Review Report 2019 found that in Ireland "access to justice in environmental matters remains an issue. The Commission is concerned about the cost of bringing an environmental legal action in Ireland." These proposed changes will do little to assuage the Commission's concerns in this regard.

Recommendation

The Committee should reconsider the proposal to revert to the pre-2011 "motion on notice" system in relation to judicial review leave applications on the basis that any potential reduction in judicial review hearings and associated costs will be negated by a more protracted and complex pre-leave process.

In particular, the Committee should consider the impact this would have on citizens' rights of access to justice as protected under the Aarhus Convention as well as guaranteeing equality of arms between the State and its citizen, which is a fundamental element of a robust democracy.

5. Special Legal Costs Rules

5.1 The new proposals seek to impose a cost cap of €5,000 for individuals, €10,000 for groups, and €40,000 for defendants. This would make it prohibitively expensive (as well as unpredictable) for the public and environmental NGOs to take legal cases and would act as a significant deterrent in bringing such challenges. It is not clear whether these caps apply to the entirety of the proceedings or just at first instance with additional exposure accruing in the event of an appeal. Currently, NGOs are not entitled to legal aid per the decision in *Friends of the Irish Environment v Legal Aid Board* [2020] IEHC 454, which is currently under appeal. Most NGOs will not have €10,000 to risk losing in litigation. In the way, the very existence of such groups may be threatened by initiating a judicial review. The current costs regime allows each side to bear its own costs and for successful litigants to be awarded certain costs. Lawyers can be engaged on a 'no foal, no fee' basis, making it much more likely that interested parties will bring challenges where necessary.

5.2 In *North East Pylon Pressure Campaign and Sheehy*, the Court of Justice ruled that the requirement that costs not be prohibitively expensive applied to environmental litigation in general. However, as observed in the EU Commission's Environmental Implementation Review Report 2019, "Ireland has yet to create a system that ensures that environmental litigants are not exposed to unreasonable costs.". Further, included in the Commission's 2019 Priority Actions for Ireland was the need to "ensure that individuals and environmental NGOs can bring environmental challenges without facing prohibitive costs, including in nature and air quality cases."

5.3 The CJEU, in *Edwards v Environmental Agency*, set out detailed guidance on the concept of "prohibitively expensive". These factors are subject to the overarching aim "to ensure wide access to justice and to contribute to the improvement of environmental protection". For instance, the possibility that a successful applicant might not recover their costs, or might even be required to pay the unsuccessful party's costs, on a discretionary basis was found by the CJEU not to satisfy the requirement that access to justice is not "prohibitively expensive" (C-427/07 *Commission v Ireland*).

5.4 Significantly, rules surrounding costs in legal proceedings must be clear, precise and predictable in their effect, particularly when they may have a negative effect on individuals (Case C-167/17 *Volkmar Klohn v An Bord Pleanála*, at para 50). The possibility that these caps could be varied or removed on the basis set out in the Bill potentially exposes applicants to full and unquantifiable costs risks, which may have a chilling effect and is entirely incompatible with the decision in *Klohn*.

5.5 It is unlikely that this proposal would be considered compatible with the Not Prohibitively Expensive Rule under the Aarhus Convention and related EU Directives. It also curbs the 'wide access to justice' that both demand.

Recommendation

The Committee should consider how the proposed costs changes could act to deter judicial review challenges.

This should be done in light of the findings in the CJEU North East Pylon case and the EU Commission's Environmental Implementation Review Report 2019, both of which have called on the State to take steps to ensure that challenges can be taken without individuals or environmental NGOs facing prohibitive costs.

6. Conclusion

We hope that the Committee finds these observations and recommendations to be helpful and will be glad to engage further on any of the matters raised.

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