LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

SUBMISSION ON THE GENERAL SCHEME OF THE HOUSING AND PLANNING AND DEVELOPMENT BILL 2019

DEPARTMENT OF HOUSING, PLANNING AND LOCAL GOVERNMENT

JANUARY 2020

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 regulatory body of the solicitors' profession in Ireland. This submission is based on the views of members of the Law Society's Human Rights and 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 opportunity to contribute to the public consultation 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 introduce special legal costs rules. This submission reflects the Society's recommendations in its examination of the General Scheme of the Bill.

1.3. The Society wishes to commend the approach of the Department in consulting with relevant stakeholders to inform the Department's consideration of the Bill and any amendments going forward. However, it is concerned that the proposed reforms will add restrictive requirements which risk being found in breach of 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. It is also in danger of breaching rights under the EU Charter of Fundamental Rights and the European Convention on Human Rights. It could further be seen 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. The Society is concerned that, at a time when the Dáil has 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 seek access to justice when environmental rights are under threat.

2. Executive Summary

2.1 The Society is concerned that the cumulative effect of all 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 European Convention on Human Rights. This also raises concerns around equality of arms between the State and all the resources at their disposal as against members of the public. The Society recommends that the Department 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 Department should reconsider its 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 Department 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 citizens - a fundamental element of a robust democracy.

2.3 The Department should consider how the proposed costs changes would act to deter judicial review challenges. This should be done, particularly in light of the findings in the CJEU North East Pylon case and the EU Commission's 2019 Report, both of which have called upon 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 specifically to implement relevant articles of the Aarhus Convention into Irish law and ensure its compliance with same. The Bill will also introduce a requirement that they 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 Pleanala 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 have the effect of excluding any newly established environmental NGOs with environmental concerns from bringing any challenges. Given that applicants are frequently local community groups 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 about a proposed development and therefore would be limited from forming an organisation to challenge it.

3.4 Further requirements include a minimum of 100 affiliated members and that NGOs 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". The cumulative effect of all of the above 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 European Convention on Human Rights.

Law Society Recommendation: The Society is concerned that the cumulative effect of all 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 European Convention on Human Rights. This also raises concerns around equality of arms between the State and all the resources at their disposal as against members of the public. The Society recommends that the Department 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 back to pre-existing provisions which were removed in 2010, providing that judicial review leave applications be made by "motion on notice". This would allow the notice party to contest a leave application where the application is considered frivolous or lacking in substance, the aim being to avoid unnecessary judicial reviews and the involved costs. This will add at a minimum, an extra four days to the eight week timeframe for bringing the leave application. In light of the new practice direction HC 74, which was issued last year for Strategic Infrastructure cases requiring early filing of documents, further significant pressure will be placed on the legal teams seeking to challenge these types of decisions. 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 Department's attempts to save court time and unnecessary expense, it is concerned that these amendments will impede the public's access to the courts and ability to challenge environmental decisions. It also calls into question again the equality of arms argument whereby the State with considerable resources and expertise has even greater power over challenges being taken against environmental decisions. This raises in particular concerns over compliance with the Aarhus Convention. If the pre-leave hearing becomes the norm, then it may be that the suggested saving of court time and expense is illusory and the reduction in cases going to full hearing may not be set off 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 as well as strengthen access for citizens to participate meaningfully in environmental decision-making that affects them and their surroundings. Notably, in the EU Commission's Environmental Implementation Review Report 2019 it found that in Ireland "[a]ccess to justice in environmental matters remains an issue. The Commission is concerned about the cost of bringing an environmental legal action in Ireland." Such proposed changes would do little to assuage the Commission's concerns in this regard.

Law Society Recommendation: The Department should reconsider its 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 Department 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 - 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, as well as €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. Most NGOs will not have a surplus of €10,000 to risk losing through litigation, as it may jeopardise the very existence of the group by initiating the judicial review application. This compares with the current costs regime, which allows for each side to bear their own costs and for successful litigants to be awarded certain costs if they are successful. Lawyers can be engaged on a 'no foal, no fee' basis, making it much more likely for interested parties to bring challenges.

5.2 In C-470/16 - 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 its 2019 Priority Actions for Ireland was to "[e]nsure that individuals and environmental NGOs can bring environmental challenges without facing prohibitive costs, including in nature and air quality cases."

Law Society Recommendation: The Department should consider how the proposed costs changes would act to deter judicial review challenges. This should be done, particularly in light of the findings in the CJEU North East Pylon case and the EU Commission's 2019 Report, both of which have called upon the State to take steps to ensure that challenges can be taken without individuals or environmental NGOs facing prohibitive costs.

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