Environmental Pillar
working for a sustainable future

Submission to the public consultation on:

The general scheme of the:

Housing and Planning and Development Bill, 2019

Version: Final

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The Environmental Pillar

The Environmental Pillar is comprised of national environmental NGOs, who work together to represent the views of the Irish environmental sector.

The main aim is to create and promote policies that advance sustainable development & provide a channel for Government and Social Partners to engage with the environmental sector.

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This submission was developed using the Environmental Pillar processes but is not necessarily the policy of each member group in the pillar.

Environmental Pillar members:

An Taisce, Bat Conservation Ireland, Birdwatch Ireland, Celt, Centre for Environmental Living and Training, Coastwatch, Coomhola Salmon Trust, Eco Advocacy, Eco-Unesco, Feasta, Forest Friends, Friends of the Earth, Gluaiseacht, Good Energies Alliance Ireland, Global Action Plan, Green Economy Foundation, Green Foundation Ireland, Hedge Laying Association of Ireland, Irish Peatlands Conservation Council, Irish Seed Savers Association, Irish Whale and Dolphin Group, Irish Wildlife Trust, Leave No Trace, Native Woodland Trust, Sonairte, Sustainable Ireland Co-operative (Cultivate), Sustainable Projects Ireland (The Village), The Vincent Wildlife Trust, The Organic Centre, Voice, Wildlife Rehabilitation Ireland, Zero Waste Alliance Ireland,

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1 Introduction and context for the changes proposed.

The Environmental Pillar welcomes the opportunity to make comment on the General Scheme of Planning and Development Bill, 2019, or "the Heads" of the proposed Bill. That is albeit this arises in the context of what we consider to be a purported public consultation which has been highly compromised, by:

- The timing, duration, and manner in which it was orchestrated by the Government and the Department of Housing Planning and Local Government over the Christmas and New Year traditional holiday period[1], and also by
- The impact of the dissolution of the 32nd Dáil, and the calling of a general election, which will invariably impact the level of public engagement and response.

At the outset, we wish to make clear the issues raised by the proposals in this Heads of Bill are in our view probably of unparalleled public importance, and impact on every person on this island, and indeed beyond.

While many may on first glance consider that legislative changes concerned with the matter of court challenges and are not something that they are likely to be involved in or concerned about – the impacts for everyone are in fact breath-taking. If public authorities can't be held to account particularly before the Courts – the quality of decision making of public authorities is at risk. For those marching on the streets or raising consciousness about the failures of Government and Public Authorities in respect of climate change and biodiversity loss - the potential for further degradation in the quality of decision-making – makes that risk truly alarming, and indeed unacceptable.

While these proposed changes are to be applied to a piece of Planning legislation[2] – certain of these radical changes will impact across multiple sectors – far beyond planning decisions[3]. **Notwithstanding that we consider the legality legislation if formulated as currently proposed in these Heads will ultimately be found to be incompatible with Ireland's wider**

[1] The original consultation period was from December 9th 2019 to January 13th 2020, only following pressure did the Minister agree to extend it to 27th January 2020. The Environmental Law Officer of the IEN had sought an extension to February 9th to allow for the Christmas & New Year period.
[2] The Planning and Development Act, 2000, as amended
[3] Given the sections of the Planning and Development Act to which certain of the changes apply e.g. to section 50B, and how those sections were originally introduced to comply with wider EU law and Aarhus Convention obligations and how they have been interpreted by the Courts – they apply to proceedings involving a number of specific EU Directives across multiple sectors. So the changes proposed to radically alter the rules go way beyond planning decisions.

legal obligations - all of the following types of matters will be made much more difficult to challenge in any intervening period if these proposals are passed and enacted:

- Major energy, transport and agriculture programmes and plans subject to Strategic Environmental Assessment – and which many concerned with climate change will be concerned with;

- Individual oil and gas consents, or forestry or aquaculture, or transport projects;

- Decisions by the EPA on licences and permits impacting on water and air quality;

- Decisions by any public authority and Government Minister which impacts on Natura 2000 sites.

In summary, the changes constrain significantly who will be entitled to be able to take a challenge in the future, or make an appeal in certain circumstances, and add significantly to the difficulty of pursuing such a case, and the associated burdens, uncertainties delays and costs which will pertain for all with such proceedings.

Additionally, it will make it more difficult in practice to be able to pursue a challenge in all court cases where decisions involve key EU Directives which govern much of Ireland's environmental decision-making including the: Environmental Impact Assessment, Strategic Environmental Impact Assessment, Industrial Emissions Directive, Appropriate Assessment considerations under the Habitats Directive. This is not at all clear from the General Scheme or Heads document put out for public consultation, as the different sectoral decisions which will be impacted go far beyond the Planning sphere into: climate, energy, forestry, transport, aquaculture etc. Such a significant omission in the public consultation information is deeply disturbing. The wording on the Department's website is arguably very misleading in this regard particularly for ordinary members of the public seeking to understand the scope and impact of the changes. As only planning cases are referred to in the following excerpt from the page on the Department's website for the consultation on the Heads[4]:

> **"**The General Scheme of the Bill includes proposed legislative reforms to the judicial review provisions in the Planning and Development Act 2000, as amended, including reforms of the standing rights to bring judicial review proceedings in planning cases and also the special legal costs rules relating to such judicial review challenges."

[4] https://www.housing.gov.ie/housing/public-consultation-general-scheme-housing-and-planning-and-development-bill-2019 accessed 21/02/2020.

While the Minister and the Department may seek to argue otherwise – the effect of the wording is, we submit, fairly obvious and the much wider implications of these changes for across multiple sectors will not be at all clear to most people or groups.

These proposals not only propose restriction of access to the Courts, but also add further to the Government's agenda advanced through its administration to curtail access to administrative appeal to An Bord Pleanála in certain circumstances - a right many national and local environmental organisations value significantly.

The Heads in particular propose a truly alarming and significant curtailment of the practical ability to seek recourse and justice before the Courts on environmental decisions, and for the consequential ability of the courts to scrutinise acts, omissions and decisions of Government and Public Authorities. They also exclude specifically a whole range of decisions and acts of public authorities from scrutiny by the Courts.

They represent a major regression in the current system and level of access to justice in environmental decision-making. No evidence and supporting analysis has been provided to identify issues, and these changes have not been justified as a proportionate response.

If Government and Public Authorities cannot be held to account, then it is not unreasonable to say that the fundamentals of the Rule of Law are being undermined in Ireland. As indicated in the Communication[5] from the European Commission, (emphasis added)

> *"*The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the founding values of the Union. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. **The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review** [3] **including respect for fundamental rights; separation of powers; and equality before the law.**[4] **These principles have been recognised by the European Court of Justice and the European Court of Human Rights.**[5]
>
> [3] Article 19 of the Treaty on European Union establishes an obligation for Member States to ensure effective judicial protection. As set out by the Court of Justice, the very existence of effective judicial protection "is of the essence of the rule of law", Case C-72/15 *Rosneft*.
>
> [4] Communication from the Commission to the European Parliament and the Council *A new EU Framework to strengthen the Rule of Law* of 11.3.2014, COM(2014) 158 final

[5] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL Further strengthening the Rule of Law within the Union State of play and possible next steps Brussels, 3.4.2019 COM(2019) 163 final

[5]Annex to the Communication from the Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law of 11.3.2014, COM(2014) 158 final, and recent case law of the European Court of Justice, Case C-64/16, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas; case C- 216/18 PPU, LM, case C-619/18, Commission v Poland (order of 17 December 2018).”

The Heads concern changes to matters, rights and principles governed *by inter alia:*

- The Irish Constitution, in particular in respect of access to the courts and the supervisory role of the Courts, Article 37 and the right to freedom of association under Article 40;

- The Treaty of the European Union, (“TEU”) in particular Articles 2, 3 and 19;

- The Charter of Fundamental Rights of the European Union, (“The Charter”), in particular Article 47, the obligations under Article 51;

- The European Convention on Human Rights, in particular Articles 6, 11 and 13;

- A number of Directives of the European Union including Directive 2003/35/EC[6], (“the Public Participation Directive”), and;

- The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark,on 25 June 1998, (“The Aarhus Convention”), in particular Article 9.

They also touch on a major body of associated jurisprudence from the National Courts, the Court of Justice of the European Union, The European Court of Human Rights, and the Compliance Committee of the Aarhus Convention.

The submission below:

- Highlights a shocking deficit in the data and analysis provided by the Government and the Department to accompany and justify these proposals; and

- Sets out how the proposed changes and curtailment of rights has not been justified as required under the EU Charter of Fundamental Rights; and also

- Sets out how the proposed changes will invariably:

[6] DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

- Consume scare court resources;
- Increase court costs and delays;
- Be bad for both business and environmental interests;

- Highlights how the Government and the Department have not provided one proposal to address the quality of environmental decision-making – in circumstances where the procedural and substantive legality of decisions, acts and omissions of public authorities is central to the focus of judicial and administrative review;

- Contends the proposed restrictions will be found to be an unacceptable extent in an Irish context, and where that local context will be of central concern to the Courts and ultimately the EU Court of Justice in examining the legality of what is proposed, if these proposals are advanced to enactment.

Failures by the State to adhere to the law:

The extent to which the current Government and administration has already exhibited an alarming disregard for EU law has to be highlighted in the context of these Heads. At time of writing, the State's failure to comply with the Court of Justice's ruling in case c-215/06[7] in respect of the second complaint pertaining to the Derrybrien Windfarm back in 3 July 2008, has resulted in a further ruling from the Court of Justice in November 2019 against Ireland. A lump sum penalty was imposed by the Court of €5 Million. The additional daily penalty payment of €15,000 imposed from this further until the original judgment has been complied with will have amounted to a further €1,155,000[8] over the ensuing 77 days from the November judgement to today's deadline for making this submission[9]. And of course tt will continue to increase on a daily basis until such a time as the judgment is complied with. So currently the penalty incurred will be at the very least in excess of €6 Million. This is of course on top of the issues suffered by the local community by the original and ongoing failures to assess and address the impacts of the project properly and in accordance with EU law. The Court of Justice additionally highlighted the matter of State Liability, and the potential for the State to be sued for losses and issues arising from its failures to transpose and implement EU Law.[10]

Yet despite such salutary warnings from the Court of Justice on state liability, the tendency of the Irish Government to simply ignore the requirements of European Environmental Law can be readily seen in the context of the delay and failures to transpose in time the new

[7] Judgment of the Court, 3 July 2008, Commission v Ireland, case C-215/06 EU:C:2008:380
[8] The further Judgement of the Court, in case c-261/18 EU:C:2019:955 was on 12 November 2019 – so the daily penalty from that further judgement will have amounted on 27th January 2020 to some 77 days of failure to comply with the original judgement of 3 July 2008 in c-215/06
[9] The 77 days was calculated on the basis of the deadline for submissions, Jan 27th 2020
[10] Judgment of the Court, 12 November 2019, case C-261/18, Commission v Ireland, EU:C:2019:955, para. 96.

requirements of the Environmental Impact Assessment Directive, 2014/92/EU. To put this in context, the Directive is central to the legislation governing consents on large scale developments and developments with likely significant effects on the environment. Ireland had 3 years to address the transposition in time for the deadline of 16 May 2017. However, the 200 pages of a Statutory Instrument[11] implementing the changes for the Planning Sector, was only published in Iris Oifigiúil on 31 July 2018, so well over a year late. These regulations remain incomplete and/or incorrect in significant respects, as is the case of the provisions for required to give effect to the amended Directive across multiple other sectors. We understand the EU Commission is in the process of pursuing action against Ireland for "non-communication" of the transposition of the 2014/52/EU Directive, one of the most fundamental failures for a Member State in respect of its duties to implement EU law.

The resulting or consequential uncertainty on the status and correctness of such a significant element of Irish legislation presents serious issues for business wishing to advance significant developments in Ireland, and is also of issue to those concerned with the protection of the environment. Recourse to the Courts is not only rendered more likely in the context of such failures, but is also essential in the context. The homogeneity of market conditions and effective operation of the single market are critically dependent on oversight at national level.

The very belated consultation document[12] which issued from the then Department of Housing, Planning, Community, and Local Government on the transposition, a few weeks before the deadline, included the following telling statement in respect of the legislative lacunae and uncertainty which arose:

> "174. It will be a matter for the developer to decide whether to submit an application for development consent which requires screening, or to request scoping, or to submit an application accompanied by an EIS, in any interregnum between 16 May 2017 and the making of the transposing Regulations, if later."

Bearing in mind that Ireland was trying to effect an economic recovery over the period in which this Directive should have been transposed, and was subject daily to the mantra of "Keep the recovery going" – the chilling warning implicit in the above statement to developers to risk submitting an application at their peril, or hold off until some uncertain time when the new provisions were in place, says it all in terms of the failure, across successive governments in power from:

- the period in 2014 when the Directive was finalised,
- to the deadline for its transposition in May 2017,
- to the publication finally of the amended Planning regulations in July 2018.

[11] http://www.irishstatutebook.ie/eli/2018/si/296/made/en/print

[12] https://www.housing.gov.ie/sites/default/files/publications/files/key_issues_in_transposition_of_2014_eia_directive_-_stakeholder_consultation_document_02may2017.pdf

This delay of over a year must also be seen in the context of the Environmental Pillar highlighting to the Department the legal uncertainty which would arise, after which the Department issued circular PL 1/2017 to public authorities to try and mitigate the risk. However the Pillar highlighted to the Department that it had no legal effect and a number of deficiencies in it and the Government's approach to dealing with the transposition failure.

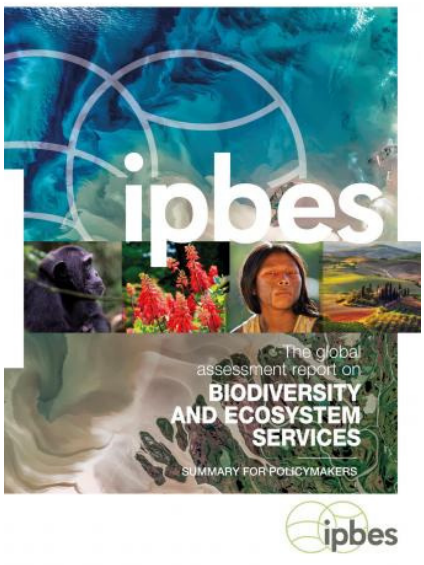
So despite creating this massive legal uncertainty, and acknowledging the potential for this to delay even the making of various applications for development – the Department is proposing to limit access to justice to challenge bad decisions – asserting this delays projects.

Even more recently the Government and current administration's attempted to suspend the application of the EIA Directive in respect of industrial peat extraction via the (i) the EU (Environmental Impact Assessment) (Peat Extraction) Regulations 2019 (S.I. No. 4 of 2019), and (ii) the Planning and Development Act 2000 (Exempted Development) Regulations 2019 (S.I. No. 12 of 2019). This effort was restrained by the Irish High Court on the application of an environmental NGO. A number of the proposed measures seek to lessen the opportunities for citizens and environmental NGOs to be able to bring proceedings in respect of failures by the Government and public authorities to adhere to EU law.

The environmental context:

It must also be recollected that these new Heads of Bill were tabled by the Government in November 2019, before the Joint Oireachtas Committee for Housing Planning and Local Government. 2019, was a year which saw an unprecedented level of information and awareness about the extent of the biodiversity crisis and climate crisis we are facing not just here in Ireland but globally.

The publication of the Global Assessment Report on Biodiversity and Ecosystem Services, by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), (more usually referred to simply as the IPBES report), created a new level of understanding and appreciation of the extent of crisis facing biodiversity on the planet and the implications this has for life on earth.



"The biosphere, upon which humanity as a whole depends, is being altered to an unparalleled degree across all spatial scales. Biodiversity – the diversity within species, between species and of ecosystems – is declining faster than at any time in human

history."[13]

Speaking about the impact of the Global Assessment Report, IPBES Chair (and a further article produced by core authors to that IPBES report), Ana Maria Hernandez said[14]:

> "The world is more aware now than ever before of the devastating impacts of human activities on nature but also of the severe declines in nature's ability to support people and our well-being. The power of the Global Assessment Report is the comprehensiveness of its evidence and the unanimity with which Governments accepted its findings. "
>
> "…. we need profound, system-wide change and that this requires urgent action from policymakers, business, communities and every individual. Working in tandem with other knowledge systems, such as Indigenous and local knowledge, science has spoken, and nobody can say that they did not know. There is literally no time to waste."

Some of the key findings detailed in figure SPM2 from the summary for policy makers of the IPBES report highlight that:

- Natural ecosystems have declined by 47 per cent on average, relative to their earliest estimated states.
- Approximately 25 per cent of species are already threatened with extinction in most animal and plant groups studied.
- Biotic integrity—the abundance of naturally-present species—has declined by 23 per cent on average in terrestrial communities.* since prehistory
- The global biomass of wild mammals has fallen by 82 per cent.* Indicators of vertebrate abundance have declined rapidly since 1970
- 72 per cent of indicators developed by indigenous peoples and local communities show ongoing deterioration of elements of nature important to them

The report also reflected:

> "Human actions threaten more species with global extinction now than ever before. An average of around 25 per cent of species in assessed animal and plant 12 groups are threatened (Figure SPM.3), suggesting that around 1 million species already face extinction, many within decades, unless action is taken to reduce the intensity of drivers of biodiversity loss. Without such action, there will be a further acceleration

[13] IPBES summary for policy makers is available here: https://ipbes.net/sites/default/files/inline/files/ipbes_global_assessment_report_summary_for_policymakers.pdf

[14] https://ipbes.net/news/new-article-science-ipbes-global-assessment-authors

in the global rate of species extinction, which is already at least tens to hundreds of times higher than it has averaged over the past 10 million years (Figure SPM.4)."

The failure of political and policy governance, and environmental stewardship of the planet on which we depend is clear. The obligation on us all to 'step up' and act has never been clearer.

While the IPBES report made clear for all to see the role of climate change as a direct contribution to biodiversity loss, and in exacerbating many of the effects of other human effects and impacts - equally in the sphere of climate change, the level of certainty and awareness of the reality of climate crisis also transformed in 2018 and 2019.

The publication of the IPCC's Climate Change and Land Report[15] set out the stark reality of scientifically based findings in respect of climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems. This followed on from the IPCC's clarion call for action in the context of the refinement of National Greenhouse Gas Inventories[16].

At a seminar[17] in Dublin in December 2019 on the topic of: *'What does climate change really have to do with human rights?"*, Mr John Kenny, BL, from the Human Rights Committee of the Bar of Ireland reflected how in the last few decades we have come from a situation where the rhetoric and language of scientists around climate change has moved from language such as 'possible' and 'potential' to: 'will happen', to: 'is happening', as levels of certainty around climate change and its effects have increased. Mr Kenny's address is specifically reflected upon here in the context of this submission on access to justice because it highlighted powerfully the role of environmental lawyers in both environmental advocacy and environmental litigation.

Mr Kenny observed:

1. The increased level of scientific certainty on the need to tackle greenhouse gas emissions and the ever shorter timeframes available to us to it.
2. The increasing urgency with which we must therefore address greenhouse gas emissions.
3. The increased understanding of the breadth of effects which will impact each and every one of us consequent on climate change, both directly and indirectly.
4. The severity of effects which can now be predicted with significant certainty – where an increase of 2 degrees of pre-industrial levels will result in the wipe out of all coral

[15] https://www.ipcc.ch/srccl/
[16] https://www.ipcc.ch/report/2019-refinement-to-the-2006-ipcc-guidelines-for-national-greenhouse-gas-inventories/
[17] Hosted by the Irish Centre for Human Rights, the Ryan Institute (NUI Galway), and the Human Rights Committee, Bar of Ireland on Dec 19th 2019 in Dublin

reefs, will leave 100-400 million people at risk of hunger, and will leave 1-2 billion people without adequate water supply.

5. The changes resulting from climate change which in recent decades we referred to as "may happen" are happening today.

He continued to reflect on the reluctance and failure by Governments and the Executive to deal with the challenge, observing that: they know these effects are happening, they know the effects which will result, yet they are failing to react to appropriately restrain those emissions. He noted that Ireland's latest National Climate Mitigation Plan of 2017 actually approved a 10% increase in emissions over the lifetime of the plan. He reflected on some a number of dysfunctional examples including:

- The target to increase the national dairy herd by 50%,
- The efforts by the 95% State owned ESB Company to continue to burn peat and biomass from unspecified sources out to 2027,
- The States position of support in respect of the proposed Shannon LNG terminal despite the evidence submitted to a Joint Oireachtas Committee regarding how the emissions from gas for the LNG plant which comes from fracked gas in the US will be 50% more carbon intensive than the coal equivalent.

In the context of the changes and limitations to challenge decisions, acts and omissions, proposed in these Heads of Bill if enacted – will render challenges in the courts against each of the above 3 examples much more difficult. That is at least in the very near term, or until the inevitable judgements and determinations flow about how problematic these provisions are in terms of Ireland's wider legal obligations. The consequential implications for remedying failures in flawed decisions and the additional issues of state liability, and legal will create major issues into the longer term, as Ireland cannot avoid its legal obligations just by stopping people challenging decisions, as was set out forcefully by the EU Court of Justice in the recent further judgement on the Derrybrien Windfarm, Case C-261/18[18].

However to put this in further context, we would highlight that the proposals in these Heads of Bill propose a requirement for environmental groups to have automatic standing rights to take a challenge, they have to meet with a number of new requirements including that they have been in operation for 3 years. This will mean many new groups concerned with addressing climate change or the biodiversity crisis, or existing groups which have to reconstitute themselves in order to comply with multiple new requirements specified in these Heads, will be effectively neutralised from taking court action for 3 years. In the context of the window in which we have to act to address climate change – and what must be done within the next 10 years, this is a huge issue. The justification for such proposed curtailment of access to justice thus requires the most particular scrutiny.

[18] Judgment of the Court, 12 November 2019, Case C-261/18, EU:C:2019:955, para 92-96.

Mr Kenny's address was particularly resonant as it followed on from the address of Professor Philip Alston, UN Special Rapporteur on Extreme Poverty and Human Rights, whose 2019 report[19] to the 41st session of the UN Human Rights Council which reflected:

> "Governments, and too many in the human rights community, have failed to seriously address climate change for decades. Sombre speeches by government officials have not led to meaningful action and too many countries continue taking short-sighted steps in the wrong direction. States are giving only marginal attention to human rights in the conversation on climate change.
>
> Although climate change has been on the human rights agenda for well over a decade, it remains a marginal concern for most actors. Yet it represents an emergency without precedent and requires bold and creative thinking from the human rights community, and a radically more robust, detailed, and coordinated approach."

In his address in Dublin in December 2019, Professor Alston challenged each and every one of us as he reflected: *"Climate change is a matter for all of us – we cannot leave it to others"*. In particular he reflected on the role of the courts in the face of failures by Government and Executives. He was naturally sensitive to the matter of Court deference and the separation of powers, but he raised interesting challenges and reflections on the opportunities and obligations for all to step up to the challenge of addressing climate change, and the quite extraordinary imperatives pertaining, and that extraordinary situations require extraordinary responses.

The seminar, preceded by one day the monumentally significant decision of the Dutch Court in the Urgenda[20] case, in which issues of: policy being the preserve of the Executive; causation, evidence and standing were in focus – all the delicate and sensitive issues which fall to be considered when balancing the role of courts, the role of the executive and the rights of citizens. The Dutch Urgenda case, and the further recent judgement in the case of 20th December 2019[21], presents an outstanding example of how we can recalibrate our approach constructively to address the defining challenges of our time. In stark contrast, the current Irish Government and current administration, seek to move in entirely the opposite direction with these proposed Heads of Bill.

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[19] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/218/66/PDF/G1921866.pdf?OpenElement
[20] https://www.urgenda.nl/en/themas/climate-case/
[21] The Supreme Court ruled in favour of Urgenda on 20 December 2019.
Urgenda's press release here:
https://news.smart.pr/urgenda/media-release-climate-case-nl
The press release of the Supreme Court here: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Nieuws/Paginas/Dutch-State-to-reduce-greenhouse-gas-emissions-by-25-by-the-end-of-2020.aspx
An explanation of the case by the press Justice to the Supreme Court here:
https://www.youtube.com/watch?v=hCFcyNcYklQ&feature=emb_logo

It is this real world context, a context in which it has failed, and continues to fail to deliver on its environmental governance and environmental law obligations in so many instances, that the current administration and Government has moved these Heads of Bill to drive new legislation to curtail the right of access to the Courts to execute scrutiny of them and Public Authorities. Could anything be more inappropriate and chilling?

2 Summary overview of the proposals:

2.1 The effect:

Put simply, the proposed legislation if enacted:

- Will make it **harder for ordinary people, their organisations, and environmental groups, to qualify** to get into the Court to take a challenge in the first place,

- **Cuts down on the types of things you can challenge and subject to the scrutiny of the Courts**;

- **Makes the court process more difficult, lengthy and complex, and significantly raises the bar which you will need to pass in order to be able to proceed** with a challenge;

- **Provides for chilling uncertainty on the nature of costs you might be exposed to** in taking a challenge;

- **Leaves even successful court applicants with the prospect of huge legal bills and other fees to have to deal with** – given the cap on awards to successful applicants.

2.1 The likely impact:

While the precise formulation of the legislation is not yet clear, as no Bill has as yet been drafted, the detail provided in the Heads raises the very clear prospect that the consequential impacts of the proposed legislation will be to:

- Invariably consume valuable Court time and resources with the inevitable satellite litigation which these proposals will spawn which will be necessary to clarify them, and assess their legality. In the context of the EU law questions and issue which will arise the making of preliminary references to the EU Court of Justice under Art 267 of the Treaty of the Functioning of the EU, "TFEU, are likely to be necessitated.

- Cause delays in the Courts through the nature of the provisions and the complexity of the processes proposed. This will thus also negatively impact upon all concerned seeking timely and effective remedies and review in the Courts, which are both important for the environment and for business and wider society.

- Increase the likelihood that Developers will challenge in the Courts decisions made by An Bord Pleanála which have overturned their projects, as the cost risk is "petty

cash" compared with the benefit of being able to proceed with their project. Yet because no fair and equitable basis is provided to those who appealed such decisions in the first instance to engage to support defence of the decision and their interest in it, and fairness and equity in the review is a fundamental requirement under the public participation directive, and Article 9(4) of the Aarhus Convention, so this is likely to be challenged and the scrutiny of the EU Commission, and the Compliance Committee of the Aarhus Convention is likely to be invoked – creating huge uncertainty on the legality of decisions made;

- Leave tax payers open to the prospect of having to foot the bill when Companies sue the Government given the doctrine State Liability for the delays and issues occasioned for the failure to institute a regime which is legally compliant. This is particularly in respect of failures in Ireland's EU law obligations, which encompasses the Aarhus Convention as an integral part of the EU legal Order[22].

In short on balance there is no real up-side to these proposals for either commercial enterprises seeking to advance project proposals, or for concerned individuals and community groups seeking to protect their interests of their local environment, or for environmental groups concerned with the protection of the environment. It will create a climate of uncertainty, and will inevitably drive strategic challenges, complicate litigation, tie up court resources and cause significant delays for all concerned, and leave the State open to claims and fines, which ultimately fall at the door of the taxpayer.

Bizarrely, while the Explanatory Notes in the Heads indicates the proposals are to avoid delay and cost – the inevitable result will be to backfire, and cause delay and uncertainty, and further cost on balance for all concerned, except perhaps in a few anomalous outside cases.

Most importantly it will compromise the proper administration of justice in our Courts - by compromising the right of access, and the proper focus of Court time and resources.

The Irish Times in July 2018, carried a report[23] of comments made by Chief Justice, Mr Justice Frank Clarke speaking at the launch of the Planning, Environmental and Local Government Bar Association in which he reflected on legislators in both in Europe and

[22] Ireland is of course a party to the Aarhus Convention in its own right, but obligations also fall to Ireland as a consequence of the EU's ratification of the Convention also, and the EU Court of Justice has clarified "The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union …." – Judgment of the Court of 8 March 2011, Case c-240/09, Lesoochranárske zoskupenie VLK, EU:C:2011:125, paragraph 30.

[23] https://www.irishtimes.com/news/environment/lack-of-enforcement-of-environmental-laws-a-national-scandal-1.3566653

in Leinster House producing *"unclear or unduly complex legislation issues"* . The report on the Chief Justice's remarks continues as follows:

> "As long as that remains the case then projects are going to be held up," he added. "This is a cry which is not based on a complaint that the policy behind any particular piece of legislation is wrong. That is not a judge's business. It is a cry for clearer legislation which will make the resolution of environmental litigation easier and therefore quicker."
>
> Mr Justice Clarke said: "If there is a political demand for greater speed in the resolution of environmental cases then a significant part of the solution lies in the production of clear and well worked out legislation."
>
> "If there is a political demand for greater speed in the resolution of environmental cases then a significant part of the solution lies in the production of clear and well worked out legislation.""

These Heads of Bill do not provide any confidence that that clear and well worked out legislation is the direction of travel we are heading in. While the bill is not yet drafted, the potential need for significant satellite litigation arising from these proposals, and which will beset surrounding substantive proceedings, seems clear. Without question significant issues of Constitutional and EU law and International Law will arise, and invariably the obligation of the Irish Courts to refer matters to the EU Court of Justice in accordance with Article 267 of the Treaty of the Functioning of the EU will arise, and arise and arise consequent on these provisions. A climate of uncertainties, delay and costs will ensue consequent on all of the above.

2.3 What is proposed in summary:

The proposed Irish legislation limits the right to an effective judicial remedy by amongst other things:

a. Limiting the right to challenge to a final decision by An Bord Pleanála, and thus excludes a whole range of other matters, and introduces delay in access to remedy;
b. Limiting judicial remedies to those who have participated in the administrative procedure and who can establish they are also directly affected in a way which is personal or peculiar by the decision, the legal implications of this test constitute an extraordinarily high and limiting bar, particularly in the context of environmental decisions;

c. Limiting eNGO access to judicial remedies to those with more than 100 affiliated members, and who have been in operation for 3 years, and which have a legal personality and where their environmental mission is directly related to the grounds of appeal or court challenge;
d. Imposing procedural preconditions (to obtain leave from a judge to bring a challenge, to allow respondents and developer notice parties to oppose the grant of that leave as the standard approach, to require the applicant to show a likelihood of success before leave is granted, and to require the applicant to identify exhaust administrative remedies, including in circumstances where the applicant must identify "un-intentional" errors of the Board;
e. Increasing the costs of litigation for applicants (by making the first stage longer and more difficult, and reducing the costs they can recover if they succeed to an amount significantly less than the costs frequently incurred); and
f. Increasing uncertainty in relation to their costs exposure if they are unsuccessful, or successful.

3 Failure to justify the proposed curtailment of rights

What is most disturbing, and indeed shocking, is that these radical proposals arise in the context of only 12 pages of paper[24], setting out the General Scheme or Heads for the proposed changes. That is the sole information provided by: Minister Eoghan Murphy; the Department of Housing Planning and Local Government, and indeed the Government and current administration have provided in order to justify these proposals. In many instances within the Heads, there is no explanation of any supporting rationale for specific changes within the individual heads of bill, and where there is – there is no supporting data or compelling evidence provided or referenced. We submit, that anecdote and assertion is not a proper basis for legislation.

No Regulatory Impact Assessment has been provided by Minister Murphy, or the Department of Housing Planning and Local Government which would provide a proper framework for the consideration of the issues, and the legislative and non-legislative options relevant to addressing them. This begs the question of why has one not been prepared and/or provided?

Neither has there been any clarification on what exactly constitutes the alleged "vexatious" challenges taken before An Bord Pleanála or the Courts, to which the Heads refer in passing and to which the Taoiseach has referred to in his public utterances and commitments to advance changes to the legislation governing judicial review[25].

Irish Times Wed, Oct 2, 2019, 10:18

Varadkar to block 'vexatious' planning challenges

BARRY O'HALLORAN

New laws will tackle "vexatious" court challenges to housing and other building projects, Taoiseach Leo Varadkar warned yesterday.

Mr Varadkar told the Construction Industry Federation annual conference in Croke Park that the Government would publish a new planning Bill shortly.

He acknowledged that it was frustrating for builders and planners to see good projects end up facing sometimes "vexatious" judicial reviews in the High Court. "That's something, in my view, that's going to have to change and this Bill will change it," the Taoiseach pledged.

Over the last year, large housing projects approved by An Bord Pleanála under a fast-track planning scheme have faced court challenges. These include a judicial review of developer Marlet's plan to build more than 500 homes in Raheny, Dublin.

The company made a fresh application for the project earlier this year.

The controversial fast-track planning scheme, which applies to all projects involving 100 or more new homes, allows developers seek permission direct from An Bord Pleanála rather than going through local councils.

Although the board's decisions cannot be appealed, interested parties can ask High Court judges to review them to ensure planners have followed procedures properly.

Mr Varadkar also confirmed that the Government intended increasing spending on public construction projects by €900 million next year.

"It will happen, [Brexit] deal or no deal," he added, referring to fears that the Government will rein in spending if the UK crashes out of the EU without an agreement at the end of this month.

Strategic infrastructure planning laws expected: page 2

Pinsent Masons

[24] https://www.housing.gov.ie/housing/public-consultation-general-scheme-housing-and-planning-and-development-bill-2019

[25] https://www.irishtimes.com/business/construction/varadkar-promises-law-to-block-vexatious-planning-challenges-1.4037415

It is interesting to note that proposals to change the current regime, first came to the fore and to public attention in the context of the Apple Data Centre.[26] It is therefore important to note how the national courts under the current system were able to deal with Standing issues for certain applicants who sought to challenge the decision, and the Courts determined a particular applicant did not have *locus standi* to challenge[27]. It is equally important to question and answer what will the proposed Heads of Bill actually contribute to the situation which arose in the Apple case which led the Cabinet to reflect on February 6th 2018 on "measures that would make it more difficult to delay or block" certain developments. Finally, it is important to reflect these cabinet deliberations arose in the context of a case and considerations which the Supreme Court of Ireland determined warranted its examination.[28]

Most critically in respect of these Head of Bill, there is no detailed justification for the curtailment of rights and changes proposed, and there is no weighing of the proportionality of the response in conformance with the obligations of Article 51(2) of the Charter of Fundamental Rights. Given that procedural limits on the exercise of fundamental rights must be objectively justified (as clarified by the EU Court of Justice in Case C-664/15 *Protect Natur*, para 90[29]), the explanatory notes to the General Scheme of the proposed Bill do not in our view provide sufficient justification, for the purposes of Article 52(1) of the Charter, of the proposed limitations on the right of access to an effective remedy before a Court guaranteed by Article 47 of the Charter. In particular we submit the notes fail to establish as is required that the proposed measures:

a. genuinely meet objectives of the public interest recognised by the EU or the need to protect the rights and freedoms of others;

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[26] https://www.irishtimes.com/news/politics/proposed-rules-aim-to-limit-court-challenges-to-building-projects-1.3382773?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fpolitics%2Fproposed-rules-aim-to-limit-court-challenges-to-building-projects-1.3382773

[27] McDonagh v An Bord Pleanala & Ors Neutral Citation [2017] IEHC 586

[28] By a determination given on 26 April 2018: [2018] IESCDET 61, the Supreme Court granted leave to the appellants to appeal from the decision of the High Court.

[29] Judgment of the Court, 20 December 2017, case c-664/15, EU:C:2017:987, para 90
"In such circumstances, the rule imposing a time limit may — notwithstanding the fact that it constitutes, as a precondition for bringing judicial proceedings, a limitation on the right to an effective remedy before a court within the meaning of Article 47 of the Charter — be justified, in accordance with Article 52(1) of the Charter, to the extent that it is provided for by law, it respects the essence of that law, it is necessary, subject to the principle of proportionality, and it genuinely meets objectives of the public interest recognised by the EU or the need to protect the rights and freedoms of others (see, by analogy, judgment of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraphs 61 to 71)."

See also Communication from the Commission to the European Parliament, the European Council and the Council *Further strengthening the Rule of Law within the Union State of play and possible next steps* COM(2019) 163 final (Brussels, 3.4.2019)

b. respect the essence of the right of access to a judicial remedy;
c. effectively achieve public interest objectives;
d. are strictly necessary (i.e. that there are no less restrictive ways of achieving the same objective.

Ireland has instituted the current system to comply with its European and International Law obligations. Therefore, any departure from this as proposed in the Heads for this new Bill will need to be weighed and justified very carefully.

Thus prior to moving to a more detailed commentary on the individual heads of Bill, it may be useful to provide some overall context of the current system, and how in particular it reflected a sea-change in the approach to the matter of challenges to development, and why Ireland was obligated to implement that sea-change from which it now proposes to significantly retrench.

But first given how inadequate the approach to these proposed changes have been, we wish to highlight some basic recommendations.

4 Basic recommendations:

In the first instance – it is not clear that these Heads of Bill are really about dealing with any particular problem. It seems clear they are in fact simply about limiting the ability to challenge bad decisions in the Courts and appeal bad decisions before An Bord Pleanála. No evidence in respect of specific problems with the current system has been presented, and Ireland has obligations in respect of providing for Access to Justice, under the Irish Constitution and EU and International Law as set out variously above.

Making recommendations in such a context is therefore clearly problematic.

If the intention is to limit the extent of Judicial Review occurring in Ireland – the appropriate starting point is to of course to:

- **Improve the quality of decision making in the first instance,** and thereby:

  a) Dispense with the imperative for interested and concerned members of the public and environmental groups in seeking to review bad decisions;
  b) Limit the vulnerability of decisions to challenge.

  Yet no proposals are evident in the Heads which make any contribution in this regard. In fact on the contrary, the proposals will serve to potentially compound and exacerbate the extent of bad decisions, with a further layer of non-compliant decision in respect of access to justice requirements.

- **Ensure key EU Directives and other legal obligations in particular are properly transposed and implemented, and that legislation is clear and uncomplicated,** as has been highlighted earlier with the remarks made by the Chief Justice.

- **Provide proper and adequate resourcing at public authority level and the Board, with training and indeed ongoing training and support by properly expert trainers to keep pace with new legislation and the often rapid pace of far-reaching jurisprudence.**

- **Provide for a timely legislative response to the emerging jurisprudence of the EU Court of Justice and that of the Compliance Committee of the Aarhus Convention in particular.**
  The delays in Ireland's response to judgements involving Ireland, or with implications for Ireland's legislation are frequently quite extraordinary, and glacial in their pace. Changes necessitated by the judgement of the EU Court of

Justice for example in c-243/15 in November 2016, were only partially implemented in mid 2018 with further delays then to their commencement until late 2018. At the same time changes necessitated by clarifications from the Court of Justice in case c-470/16 in a judgment of 15 March 2018 which could have been addressed at the same time, have been left outstanding. These are but a few examples.

- **Avoid the use of Statutory Instruments where possible to give effect to EU law and provide for proper oversight by the Oireachtas in legislative decision making by addressing the changes required through primary legislation. Provide for adequate time for the engagement of the Oireachtas in the making of such legislation.**

Turning then the assessment of the current system:

- **Provide for meaningful statistics and data on the conduct and extent of judicial review, and use this to inform appropriate responses to the system and any legislative and non-legislative changes**

- **Ensure any such proposals are subject to robust regulatory impact assessment, and appropriate and balanced engagement with stakeholders**

- **Afford early and properly consideration of proposals in terms of their compatibility with**:

  - The Irish Constitution, in particular in respect of access to the courts and the supervisory role of the Courts, Article 37 and the right to freedom of association under Article 40.

  - The Treaty of the European Union, ("TEU") in particular Articles 2, 3 and 19

  - The Charter of Fundamental Rights of the European Union, ("The Charter"), in particular Article 47, the obligations under Article 51

  - The European Convention on Human Rights, in particular Articles 6, 11 and 13

  - Directives of the European Union including Directive 2003/35/EC[30], ("the Public Participation Directive"), and

[30] DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment

- The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark,on 25 June 1998, ("The Aarhus Convention"), in particular Article 9
- The major body of associated jurisprudence from the National Courts, the Court of Justice of the European Union, The European Court of Human Rights, and the Compliance Committee of the Aarhus Convention.

In particular in respect of Article 47 of the EU Charter of Fundamental Rights on effective judicial protection, any proposals either individually and collectively with other legislative considerations and processes cannot operate in such a way as to make upholding EU law rights excessively difficult. It will additionally need to establish as is required by Article 52(1) of the Charter that the proposed measures:

- genuinely meet objectives of the public interest recognised by the EU or the need to protect the rights and freedoms of others
- respect the essence of the right of access to a judicial remedy
- effectively achieve public interest objectives
- are strictly necessary? (i.e. that there are no less restrictive ways of achieving the same objective)

In the event that a future Government and administration proposes to still contend issues of delay and a problem with the nature of litigation being pursued, it will need to:

- **Objectively and empirically identify and assess the extent to which development decisions are subject to: a) appeal to An Bord Pleanála, b) Judicial review .**
  - This will of course need to properly identify the extent of Developer originated appeals, and the significant proportion of Judicial Review which are taken by Developers availing of the current rules, to challenge refusals of their projects.

- **Objectively and empirically identify those developments which are subject to Judicial Review, and the extent of "delay" which resulted, and nature of those delays** in other words what delays arose, and why, including include for example:

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and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

- The extent to which delay in the court process are contributed to by the failure of the State Parties and bodies like An Bord Pleanála to adhere to the time frames prescribed in the rules of the Superior Courts for the filing of their Statements of Opposition and supporting Affidavits, and the extent to which the Courts permit this, and delays encountered in cases which are later conceded.

- The amount of delay occasioned and court time and resources which was consumed by satellite litigation which was initially spawned to clarify the provisions in:

    - Section 50B in particular of the Planning and Development Act, in 2010; and/or

    - Part 2 Section 3-8 of The Environment and Miscellaneous Provisions Act, 2011

➢ **Provide specific clarifications and data in respect of the allegations and assertions around "vexatious" litigation in the Heads and by the current Government,** including to:

- Explicitly identify what type of litigant and litigation the Taoiseach meant to encompass when he referred to "vexatious" litigation
- Clarify the nature and extent of litigation meeting that criteria of "vexatious"
- Identify specifically the cases taken in the last 10 years which fall to be considered under the Taoiseach's definition of vexatious
- Identify the impacts of such cases both positive and negative in ensuring adherence to environmental law
- Identify the extent to which the existing jurisprudence and legislation limits the Courts in dealing with such cases.
- Identify the amount of environmental cases in Ireland where the Court found an applicant to have acted in a "frivolous" or "vexatious" manner – given:
    - the current jurisiprudence on such terms and given
    - the legislation in both
        - s.50B(3) of the Planning and Development Act, 2000 and
        - Part 2, Section 3(3) of the Environment and Miscellaneous Provisions Act

    make explicit provisions in respect of dealing with such applicants, and/or to also deal with issues of conduct by any party in the proceedings, and/or for contempt of court.

We submit ultimately:

- **The only tenable approach for any future Government which might be minded to return to consider the legislative provisions governing judicial review is to ensure it is first informed by: a proper analysis of the existing system, and proper consideration of the various legal obligations with which it must comply, <u>before</u> proposing any changes.**

5 The current system and its evolution.

5.1 The previous historic deference to development from which Ireland had to depart.

2010 and 2011 saw the introduction of changes around Judicial Review of environmental decisions and which were necessary to comply with our EU law obligations and to facilitate ratification of the Aarhus Convention. However prior to this the Irish courts had identified a clear legislative policy to restrict access to justice in respect of planning matters.

As explained by the Supreme Court in K.S.K. Enterprises Ltd. v An Bord Pleanála [1994] 2 I.R. 128 in considering time limits - *" …it is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities".* That approach was re-iterated in Harding v Cork County Council [2008] 4 I.R. 318 which was expressly concerned with standing: *"The Act of 2000 may thus be seen as expressly underscoring the public and community interest in having duly authorised development projects completed as expeditiously as possible".*

The clear policy imperative identified by the Supreme Court was that if a project had been granted planning permission, the public interest lay in the completion of the project rather than facilitating a challenge to the underpinning decision.

However all of that was clearly seen as having to change by virtue of the 'Access to Justice' provisions in the Aarhus Convention and the Public Participation Directive, Rather than adopting a restrictive approach, the policy behind the Directive is 'Wide Access to Justice", indeed the "broadest possible" access to justice as per Case C-137/14, *Commission v Germany*[31].

The necessary balance between the expeditious completion of development and the right of access to judicial review has been re-cast at European level - see Case C-72/12, *Gemeinde Altrip*[32], at para.45 where the Court clarified:

> "Although it is true that that extension may have the effect, in practice, of delaying the completion of the projects involved, a disadvantage of that kind is inherent in the review of the legality of decisions, acts or omissions falling within the scope of Directive 85/337, a review in which the legislature of the European Union has, in accordance with the objectives of the Århus Convention, sought to involve members

[31] Judgment of the Court, 15 October 2015, Commission v Germany, Case C-137/14, EU:C:2015:683
[32] Judgment of the Court, 7 November 2013, Gemeinde Altrip Case C-72/12, EU:C:2013:712

of the public concerned having a sufficient interest in bringing proceedings or maintaining the impairment of a right, with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health."

This approach has been complemented by an ever more clear and expansive set of jurisprudence from the EU Court of Justice which is looking ever more frequently in its purposive approach in its various judgments and clarifications to also:

- the obligations of environmental protection under the Treaties;
- the rights for effective judicial protection under Article 47 of the Charter; and in
- the rigour of the tests required under Art 51(2) of the Charter in assessing the proportionality of the response of Member States.[33]

However, the decision of the Irish Government to bring back through these Heads an approach more akin to the old regime, supplemented with yet even further endeavours to restrict access to justice - seems to represent an attempt to return to the old balance designed to restrict challenges, and is regardless of the requirements of European law, and International Human Rights law which now pertain to such environmental decisions.

5.2 The sea-change introduced in 2010 and 2011 necessary to comply with Ireland's EU Law obligations and to facilitate ratification of the Aarhus Convention.

Ireland introduced a number of significant changes to the provisions relating to judicial review in environmental cases in 2010 and 2011. This was in a belated but important move to comply with certain EU law requirements, of which the one most notably in focus was the Public Participation Directive, and also a desire to finally ratify the Aarhus Convention, particularly in the lead up to Ireland's Presidency of the EU in 2013.

The Directive and Convention require not only that decisions can be reviewed, but importantly specify characteristics for that review so as to make it both feasible for people to seek it, and meaningful. These characteristics reflected in the Directive are set out in Article 9(4) of the Convention and require that the system of reviews provided: *" … shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive"*

For each party to the Convention or Member State of the European Union, meeting each of these characteristics and the further requirements in respect of the scope of review

[33] For example: Judgment of the Court, 20 December 2017, case c-664/15, EU:C:2017:987, para 90 and the case law cited.

and affording special standing rights to individuals and environmental groups to pursue challenges presented their own issues. For Ireland at the time, the key challenge in focus was how taking a case in Ireland could be provided without it being prohibitively expensive.

The general rule and principle which applied to litigation was that of costs follow the event – in other words if you lose a case, you are exposed to having to pay the costs of the other side. In the context of the Irish jurisdiction, such costs can be very significant. In a recent judgment in a case which came before the EU Court of Justice, the costs of the leave application alone were in excess of €500,000.[34] Such costs are quite unparalleled across the other parties and Member States, probably with the exception of the UK.

The reasons for this have been highlighted on a number of occasions by the Chief Justice in particular by explaining the nature of our common law system and the burden which falls to applicants and their lawyers. Mr Conor Dignam SC Vice Chairman of The Bar of Ireland reflected on this in his opening address[35] to the Joint Oireachtas Committee during its enquiry into Access to Justice and Legal Costs – explaining:

> "5.1.2 It has been estimated that the total cost to the tax payer of providing a court system in a country which operates a broadly common law courts process is approximately one quarter to one third of the costs applicable in a civil law jurisdiction. Clarke J (as he then was), speaking extra-judicially in 2016, explained the reason for this as follows:
>
> > "In the common law world, we place a much greater onus on the parties in relation to the fact finding and legal determination aspects of the court's work. In civil law countries a much greater part of that burden is undertaken by the court itself coupled with research and assistance provided from the court's own resources. That is why a civil law courts system costs an awful lot more. The saving achieved in the common law world for the taxpayer is at the expense of the transference of a significant part of the burden onto the parties and, in particular, onto those representing them." "

Ireland introduced in fairness a rather elegant, if imperfectly implemented, solution, which was to depart from "the loser pays" or "costs follow the event" rule for certain environmental cases. Instead, each side was to bear its own costs. However in recognition of the burden presented by "own costs" the rules were further modified to

[34] Judgment of the Court, 15 March 2018, Case C-470/16, EU:C:2018:185 para 24

[35] https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/submissions/2019/2019-11-27_opening-statement-conor-dignam-sc-vice-chairman-the-bar-of-ireland_en.pdf

allow for a successful applicant to be awarded certain of their costs if they were successful in some of the reliefs sought, i.e. if you were successful in some of the arguments and grounds of challenges made. The provisions also provided for discretion for judges to make an award in *"a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so"*[36] A provision which is wholly lacking in the new proposals.

The protection however is also not absolute[37], and can be forfeit if: "*the claim or counter-claim is frivolous or vexatious"* , (bearing in mind these terms have specific meaning in the context of previously established case law), or "*because of the manner in which the party has conducted the proceedings",* or *"where a party is in contempt of court".*[38]

In summary, these "special cost rules" as they are often referred to, were set out in section 50B of the Planning and Development Act and in Part 2, sections 3-8 of the Environment (Miscellaneous Provisions) Act 2011, reflecting amongst other things, their application to different types of environmental decisions or acts or omissions.

Their introduction was however far from seamless. The complexity and lack of clarity and precision in the provisions, coupled possibly with the significant cultural departure in the principle on costs,meant that many challenges seeking to rely on them ended up spawning an additional layer of legal proceedings. Such proceedings are often referred to as 'satellite litigation'. In this context these satellite proceedings were concerned solely with the matter of interpreting the provisions, and were conducted on top of the proceedings concerned with the substantive issue subject to challenge.

Various proceedings therefore considered the types of decisions to which these special cost rules applied, when they kicked in, whether all of the proceeding or arguments were covered, or whether only specific aspects of them were, whether some of the restrictions and limits to the rules were compatible with EU law and the Convention[39] and so on. At times efforts to restrict and narrow the interpretation of the special cost rules were arguably employed to deter applicants from pursuing otherwise meritorious challenges.

[36] Section 50B(4) Planning and Development Act, 2000, and Section 3(4) of the Environment (Miscellaneous Provisions) Act, 2011

[37] Section 50B(3) and Section 3(3) of the Environment (Miscellaneous Provisions) Act, 2011

[38] Judgment of the Court, 15 March 2018, Case C-470/16, EU:C:2018:185, para 65
In summary the Court clarified that the level of penalty in such instances still had to fall within the safety net of not being prohibitively expensive

[39] Ibid para 64-65 In summary the additional test Ireland requires be satisfied under s.4 of the Environment (Miscellaneous Provisions) Act, 2011 is unlawful and not consistent with the Aarhus Convention.

Over time, however greater clarity and certainty has been afforded, through the emergent case law of the Irish Courts, and the jurisprudence of the EU Court of Justice, and additionally through the efforts of some remarkable lawyers and brave applicants, and in particular through the important preliminary reference procedure.

However the failure by Ireland to correct gaps in the scope of application of the rules, and to eliminate certain limitations to their application which have been found to be incompatible with either EU law of the Convention, has continued to make 'the going somewhat tough' for prospective applicants, and operated to create barriers to justice for some potential applicants to the courts.

Turning back to the overall costs, the one way cost shifting regime, enabled the operation of a 'no foal no fee' model of engagement between lawyers and applicants. In summary if a legal team felt that a case was strong they might be persuaded to take it on without fee, or on subject to some conditional fee arrangement, on the basis that if they won, they would be paid from the award. This has been very important in enabling eNGOs to pursue cases, where they would find it impossible otherwise to do so given the practicalities of the very limited operational resources of such organisations. In effect it is therefore an essential element of Ireland's current solution.

Additionally, for communities faced with some development impacting upon their environment, the situation can be very variable. Some developments can be very controversial and an action will attract support, however there are huge variables in terms of the size of communities, their ability to pay legal fees etc. For remote areas which can often be of significant environmental importance, the ability to take challenges could be significantly compromised, together with the environmental protection and access to justice rights.

The no foal no fee model has in fact operated as a sort of filter on the merits of environmental litigation. A legal team needs to be convinced of the case in the first instance if they are to take it on, commit their time and expertise to it, and suffer the associated opportunity cost from other work not undertaken as a consequence. Environmental law and environmental and the specific ecological considerations which need to be considered can be particularly complex and onerous. Endless adjournments by State Parties serve to prolong the period of required investment so to speak for the applicant's legal team. One downside to the no foal no fee model is the fact more marginal cases where the outcomes are less clear, but even where the environmental consequences can be of great import – may be less likely to be advanced. But the new proposals offer nothing in that regard, and simply will make cases more difficult to pursue particularly for environmental groups.

The one way cost shifting model of the current rules was also extended equally to Developers, who have been quick to avail of it in seeking to overturn refusals of their projects, or elements of the conditions to a consent granted.

The system has operated to enable a level of environmental litigation. It must be remembered that the experience prior to the introduction of the current roles was in fact the anomalous one, with litigation open only to the rich who could afford it, or the poor who had no assets to seize if they were unsuccessful, and which was ultimately incompatible with Ireland's EU law and International law obligations to provide for access to justice in environmental decision making.

Additionally, the ongoing development in the jurisprudence of the EU Court of Justice and the Compliance Committee of the Aarhus Convention, coupled with the failure of Irish legislation and decision-making to keep pace with this, and together with a greater awareness of these discrepancies, has invariably led to more cases being taken because of the flawed nature of environmental-decision making in Ireland.

The EU Commission in its Communication on Access to Justice in environmental matters[40], reflected more favourably on the merits and compatibility of the Irish system in dealing with compared to the UK system. Yet the Heads of Bill propose a lock stock and barrel remove to the UK system and the abandonment of the Irish special cost rules.

It is against this and other factors that the radical change in the special cost rules set out in Head 6 of the Heads of Bill must be viewed, and to which we turn now in the context of our high-level commentary on the individual heads of Bill.

[40] COMMUNICATION FROM THE COMMISSION of 28.4.2017 Commission Notice on Access to Justice in Environmental Matters, Brussels, 28.4.2017 C(2017) 2616 final, para 192.

6 Highlevel Commentary on the individual Heads of Bill

6.1 Over-arching reflection.

The Heads of Bill as stated previously are poorly justified at every level.

Quite apart from the overall deficit in data and analysis to support the overall thrust of the proposed changes which are to significantly curtail access to justice - within each of the explanatory notes for each of the 6 Heads of Bill proposed, very limited rationales are provided for each of the specific proposed changes within each Head.

For many of the proposed changes – infact:

- no actual rationale for the change is provided,
- no problem is properly identified which a specific change is supposedly intended to solve.

In the few instances what can best be described allegations or assertions are made about dealing with certain situations, because in each and every instance in the changes proposed no supporting data is provided or referenced.

There is no consideration of their compatibility with the wider framework of obligations in which they must sit, such as the Irish Constitution, the EU Treaties, the European Convention on Human Rights, the EU Charter of Fundamental Rights and various EU Directives and the jurisprudence of the EU Court of Justice and the Compliance Committee of the Aarhus Convention.

What thus becomes clear is that the Heads are about creating barriers to access justice, and curtailing rights – by stopping the ability to Judicially Review, rather than properly identifying any problems and analysing them and identifying appropriate responses. Anecdote, bias and specific interest are no basis for legislative changes with such profound implications for the curtailment of Constitutional rights, fundamental rights and Human Rights.

Given the extent of issue with the public consultation as noted various throughout this submission, our commentary is necessarily limited, and should not be construed as being the entirety of our argument or objection to the proposed Heads of Bill.

We submit that the only tenable approach for any future Government which might be minded to return to consider the legislative provisions governing judicial review is to ensure it is first informed by a proper analysis of the existing system, and proper consideration of

the various legal obligations which it must comply with in proposing any changes. Therefore given we consider there is no sound basis on which these proposals can be advanced in meaningful way, and given the calling of a General Election which means the current Government and administration cannot advance these heads following the dissolution of the 32nd Dáil, our commentary is accordingly limited.

The following is a commentary on but a few of the issues presented by these proposals.

6.2 Outline Commentary – "Head 1: "Short title, construction, collective citation and commencement"

Head 1(1) indicates the title of the Bill.

It is noted that "Housing" is included in the title, yet not one single provision in the Heads as set out relates specifically to Housing. Clearly the housing issue is one which the Environmental Pillar is very sensitive to. However, the extent to which the national Housing issue, is through a rather bizarre inclusion in the title of the proposed Bill might be being compounded with the curtailment of rights proposed is of serious concern.

It must also be noted that the Planning and Development (Housing) and Residential tenancies Act, 2016, ("The 2016 Act"), has already implemented a significant curtailment of both public participatory and access to justice rights, by facilitating the making of applications for certain types of Housing developments directly to the Board. That legislation has therefore already served to remove the opportunity appeal to An Bord Pleanála, eliminating the administrative review of the decision before the Board, and thus has already curtailed Access to Justice.

The 2016 Act, also instituted an extensive consultation phase between the Developer and the Board, and from which the public is excluded quite controversially in the context of obligations under the Aarhus Convention.

The curtailment of rights in the 2016 Act is all the more controversial given the failure of the provisions in effecting faster delivery of houses. This has been the subject of extensive controversy, with Micheál Martin, Leader of Fianna Fáil raising issue in the Dáil[41], following a study by UCD and Queen's University and exposé in the Sunday Business Post[42]. The article by Killian Woods of The Sunday Business Post in Sept 2019 highlights the study's findings

[41] https://www.oireachtas.ie/en/debates/debate/dail/2019-10-02/15/
[42] https://www.businesspost.ie/news-focus/construction-yet-to-start-on-nearly-10000-houses-and-apartments-given-fast-track-planning-approval-88c31588

which show to a truly alarming extent the very direct impact of lobby interests in influencing the Minister and in the framing of the 2016legislation. Deputy Eoin O'Broin commenting in the article on the findings and expose in the academic paper as highlighting how large players in the construction industry have a *"disproportionate influence on the framing of the public debate on housing and an unhealthy influence on Government policy".* The article also demonstrates clearly that the fast-track planning scheme has not worked in terms of delivery of housing.

The inadequacies of that legislation in addressing root causes and influences, does nothing in terms of confidence in the administration behind these further proposals. This particularly given the absolute deficit in data and analysis, and the lack of transparency thus provided.

Head 1(3) provides for discretion for the Minister to commence the provisions or the coming into operation of the provisions. But it provides no insight into the considerations which would inform the timing of the provisions and their commencement. Given the express urgency with which we understand the current Government had sought to advance these Heads, (we understand they hoped to have the legislation in its entirety concluded by Easter 2020) - the extent to which the Minister might then delay the commencement of provisions raises important questions in relation to the relative timing of the various provisions, and the associated implications of the legislation.

6.3 Outline Commentary- "Head 2: "Interpretation"

The issues with Head 2 will be self-evident from certain of the comments associated with the other Heads, and are therefore not repeated here.

6.4 Outline Commentary - "Head 3: Specific points in time for initiating judicial review challenges and alleged deficiencies"

The explanatory note opens by stating *"There is presently no provision in the Planning and Development Act 2000, as amended (the 2000 Act), specifying the time(s) that planning cases* can be challenged by way of judicial review." This is not disputed. It continues to state: *"This Head introduces a new provision in section 50 of the 2000 Act under which the right to initiate a judicial review challenge will be restricted to decisions determined by An Bord Pleanala."*

The extraordinary implications of this change will not be immediately apparent to many. In the title of the Head, and the 3 paragraphs of text of some 266 words in the explanatory note, the fact that the proposed provisions will thus serve to exclude from scrutiny by the

Courts a whole range of public authority acts, omissions and decisions in which An Bord Pleanála has no role is entirely omitted. Currently these are subject to the proper scrutiny of the courts, but the Heads as indicated propose a radical reduction in the scope of matters which can be subject to challenge.

Thus, amongst other considerations Head 3(i) clearly raises very specific issues under:

- the Irish Constitution given the Citizen's right of access to justice and to invoke the supervisory powers of the Court over the conduct of administrative bodies within the meaning of Article 37 of the Constitution, and

- given the rights to effective judicial protection:

    - under Article 6(1) of the European Convention on Human Rights, ("ECHR") and

    - Article 47 of the EU Charter of Fundamental Rights, ("the Charter")

The implications of the delay in review and access to remedy consequent on the proposals also needs to be considered in the content of Ireland's obligations under to deliver on a access to justice for relevant decisions, acts and omissions as set out in Articles 9(1)-(3) of the Aarhus Convention and all of which are required to meet all the characteristics of Article 9(4) including the requirement that the review by "timely" and the requirement that remedies are "adequate" and "effective". Where Ireland is bound by such provisions as a party to the Convention in its own right, and through it's membership of the EU, also a party to the Convention.

The further provisions of Head 3(ii) propose to further exclude from Judicial Review :

> "(a) clerical or typographical errors in the order or determination which is sought to be quashed,
>
> (b) unintentional errors or omissions in the order or determination,
>
> (c) text, or an omission of text, which has the effect that the determination or order as issued does not on its face accurately express the determination or order as intended,
>
> Unless it can be shown that the applicant had previously applied for rectification of the deficiency concerned and had wrongly been refused that relief"

These proposals present some quite bizarre and unique challenges for the public in particular. The obvious difficulty being to determine what was or was not intended by the Board other than that which is on the order or decision. A further difficulty arises for the wider public, developers, on the issue of legal certainty which arise given reliance on decisions, and other obvious issues arise for bodies responsible for enforcement.

However, additionally, the ability of the public to scrutinise decisions and orders to the extent necessary here, puts all sorts of burdens, including significant financial ones on the public, in order to be able to be in a position to identify and effectively cover off errors and failures of the Board without any hope to recover those expenses. It also does not incentivise the Board to be particular or careful in its decisions. The following all arise as significant issues in the context of these proposals:

- reversal of burden of proof;
- the supervisory role of the Courts in the Constitution;
- and as set out earlier above the compatibility with Article 6(1) of the ECHR and the Charter; the concept of legal certainty in terms of reliance on the recorded decision of a public authority.

6.5 Outline Commentary - "Head 4: Bringing of judicial review proceedings including standing rights"

Head 4 proposes a number of changes including:

- To the current court process for seeking leave to apply for judicial review;
- To the tests to be applied in deciding on leave;
- To limit quite significantly who is entitled to bring judicial review, both in the terms of members of the public, their organisations and environmental groups.

All of these proposals, individually and collectively operate to create substantial barriers to accessing justice. The absence of supporting analysis and data is quite astounding in the context of the curtailment of rights proposed, and the proposed re-introduction of a leave on notice system which was abandoned, and a number of other highly controversial legal tests around *locus standi* or standing to take challenges in particular.

Head 4(1)(2) proposes to re-introduce the previously abandoned leave on notice system.

The current system provides for an *ex-parte* leave application[43]– where the person seeking leave for Judicial Review makes the application to the Court and the Court decides on the application on hearing from them. If they are granted leave, the other parties are served

[43] S. 50A(2) of the Planning and Development Act, 2000

and the substantive proceedings can then advance as set out in the legislation. But the judge maintains the discretion to hear from the other side in granting leave[44] .

As noted by Garrett Simons SC, as he was then prior to his elevation, in [2010] Irish Planning and Environmental Law Journal 135 - *"The requirement for an inter partes hearing of the leave application had had the unintended consequence of causing unnecessary delay in many cases."* Given this previous experience, there is no reason to think that re-introducing the leave on notice requirement will have any effect other than delaying the procedure, and complicating it, thus adding to the time and expense which the explanatory note indicates without any supporting evidence that the re-introduction of 'leave on notice' it is intended to reduce.

We understand also that the experience of leave on notice was not just abandoned in the context of planning decisions, but following its introduction into the Asylum & Immigration list which was very problematic, it was also abandoned 3 years later.

Bizarrely, the explanatory notes actually concede that the discretion of the judiciary to put the other side on notice is rarely used. Yet without considering the rationale for that approach by the Courts, the reintroduction of a mandatory on notice application is proposed. The practicalities for the further considerations set out which are required to be considered in an application for leave absent a substantive hearing, and the wider legal implications are not addressed either.

The extent to which there are large volumes of applications which warrant the introduction of this cumbersome and legally problematic proposal is entirely unclear. No data is provided to give any indication of the volumes of Judicial Review applications which legitimately could have been excluded on this basis etc and the consequences.

The proposals appear to exclude consideration of the proper professional discretion and conduct of the legal profession, and the role of the judiciary in ensuring the proper conduct of legal proceedings.

The invariable issues of delay, and the potential for twin-track proceedings with appeals of refusals of leave on certain grounds running in parallel, or holding back the rest of the proceedings, are no-where considered.

[44] S. 50A(2)(b) of the Planning and Development Act, 2000 provides: " The Court hearing the *ex parte* application for leave may decide, having regard to the issues arising, the likely impact of the proceedings on the respondent or another party, or for other good and sufficient reason, that the application for leave should be conducted on an *inter partes* basis and may adjourn the application on such terms as it may direct in order that a notice may be served on that person"

Head 4(3) proposes the reintroduction of the previously abandoned requirement that applicants demonstrate a "substantial interest". As is well understood, this term was quietly abandoned following prolonged litigation, and was replaced with the term "sufficient" in 2011[45] to reflect the wording of the Public Participation Directive and the Aarhus Convention which refer to "sufficient interest". What effect is intended by the Heads in abandoning "sufficient interest" and reverting to "substantial interest" is not clear. However it would seem that it might be the intention to raise the threshold beyond what can be conveyed by the current term "sufficient", notwithstanding the case law on same. The obvious issues of compliance and compatibility are thus self-evident, and the prospect of complex satellite litigation and associated delays obvious.

Head 4(2) introduces a requirement a "reasonable prospect of success" in addition to the "substantive grounds" which will invariably tend to complicate and elongate the leave stage. It also involves the court in an assessment of the prospects of success - which is inimical to the concept of an interlocutory hearing.

Head 4(3) also substantially curtails the rights of the public to take challenges, It not only incorrectly requires prior participation as a pre-condition for review, but adds to this an additional requirement with a particularly high bar in terms of being "directly affected by a proposed development in a way which is either personal or peculiar". In the context of environmental decisions this is of course particularly challenging, and raises the prospect of all the issues with the Plaumann test[46] which the Compliance Committee of the Aarhus Convention have considered in case ACCC/C/2008/32 in considering its non-compatibility with the Convention in the context of a communication against the European Union. These are of course even more serious in the context of limitations in front of national courts. The proposal seeks to limit the ability of citizens to defend their EU law rights and protect the Environment, where particularly for example in the context of remote areas of significant environmental importance, the ability to meet this requirement would be really limited, and thus it will operate to weaken the protection of important species and habitats.

Notwithstanding the provisions in Head 4(4) regarding certain exemptions to prior participation requirements, the compatibility with both EU law and the Convention of what is proposed in Head 4(3) is of the most extreme concern, and barrier to accessing justice for ordinary members of the public and their organisations.

These are but some of the issues presented by these heads.

[45] Substituted (23.08.2011) by Environment (Miscellaneous Provisions) Act 2011 (20/2011), s. 20, S.I. No. 433 of 2011.
[46] Plaumann & Co v Commission, Case 25/62, 15 July 1963

Head 4(5) proposes significant new and further requirements in respect of environmental organisations, requiring that in order to have standing to take a challenge, they must:

- have a legal personality,
- have 100 "affiliated members" – where exactly what that means is entirely unclear,
- have been in operation pursuing their environmental objectives for 3 years – a 3 fold increase from the current 12 months, and
- must be a not for profit organisation.

Additionally it is proposed to limit the grounds or scope of what the eNGO can challenge based on their aims and objectives, thus confusing and compromising scope of review with standing considerations.

For many national and local groups, and pan-European groups these proposals would constitute an absolute barrier to their ability to take challenges. Even a temporary displacement of eNGO standing will also raises real issues for the State, and potentially compromise the legitimacy of environmental decisions.

The only rationale, if indeed it can be called that, which is offered in the explanatory notes is: *"These are fairly standard minimum requirements in most other jurisdictions".*

It is not disputed that Member States of the European Union and Parties to the Aarhus Convention can establish national criteria in respect of environmental organisations. However they cannot exercise such discretion in such a way as to make it effectively impossible for environmental organisations to access justice and to undertake the important role in protecting the environment. This was clarified by the Court of Justice in the Swedish Djurgården case, c-263/08[47]. Yet the specific practicalities, context and implications of these criteria are no where considered.

Neither is there consideration of how such proposals would be compliant with EU law and in particular the obligations in respect of delivering on "wide access to justice" as required by Article 9(2) of the Aarhus Convention. The specific obligations in respect of eNGOs' the recognition of the importance of their role in environmental protection as a matter of public interest rather than for any personal gain as has been reflected upon time and time again by the EU Court of Justice[48], is nowhere reflected here.

Further questions of compatibility in respect of freedom of association under Article 40.6.1.iii of the Constitution and Article 11 of the ECHR are raised by these specific proposals.

[47] Judgment of the Court, 15 October 2009, Case C-263/08, EU:C:2009:631
[48] For example: Judgment of the Court, 8 March 2011, Case C-240/09, EU:C:2011:125, para 51

Individually and collectively these proposals in Head 4 raise the most serious concerns on their compatibility with:

- The jurisprudence of the Court of Justice on the scope of review, and locus standi,
- Their compatibility with:
- multiple provisions of the Irish Constitution, including Article 37 and Article 40,
- the European Convention on Human Rights, Articles 6(1), 11 and 13
- the Charter of Fundamental Rights, Article 47

The further implications of these additional test and a requirement for leave on notice in the context of changes to the special cost rules are considered under Head 6.

6.6 Outline Commentary – "Head 5: Consequential amendments to section 37 of the Act"

Head 5 proposes to introduce the same limitations to eNGO standing in the case of certain appeals to the Board, involving Environmental Impact Assessment. In addition to all of the issues raised in respect of the extensive increase in requirements for standing set out in respect of Head 4 which should be considered as repeated here also.

It must be highlighted that for many national and local groups this will be an absolute barrier to their ability to take appeals to the Board where a development involves Environmental Impact Assessment, regardless of their prior submission to the Local Authority. It will also serve to bring into sharp focus other issues with public participation in the Irish system.

Given the practical limitations for many environmental groups in an Irish context to be able to make submissions across so many applications at Local Authority stage, this potentially is a significant curtailment. What is even more of a concern, is the extent to which it may be intended to make that curtailment of right to appeal more absolute.

Again in the context of the volume of decisions appealed and the consequence of this - the implications of what are proposed are nowhere set out.

6.7 Outline Commentary - "Head 6. Special legal costs rules"

Head 6 proposes radical changes to the protective cost rules introduced in Ireland to facilitate compliance with the requirement that challenges to certain environmental decisions, acts and omissions, should not be prohibitively expensive, in accordance with the Aarhus Convention Article 9(4), the public participation Directive, and indeed the wider obligations in respect of Article 47 of the Charter and the principles of excessive difficulty etc.

While there might be some sense that in some respects certain of the operation of these new or proposed rules might in principle favour Developers, the practical effect of their introduction will invariably be to provide for a climate of complete uncertainty on the extent, duration, complexity of legal proceedings given the satellite litigation which will invariably flow from, and indeed around them.

The proposal is to replace the current Irish system with the system used in the UK which caps costs. This is proposed in the absence of any consideration of the significant structural differences between here and the UK which render this proposed system entirely unsuited to an Irish context, including in particular differences in relation to: demographics; environmental groups; and the organisation of legal practices.

The level of caps proposed also seem curiously drawn from the UK system, where a cap on the exposure to costs for an applicant of €5000 is proposed for individuals and €10,000 for all other cases, with the equivalents in the UK being £5000 and £10,000 respectively. A cap on the award for a successful applicant is proposed to be €40,000 – which when taken as excluding VAT at 23% leaves the potential to be able to recover costs to €32,500, where in the UK the cap is £35,000. The basis for these figures and their relevance in an Irish context is entirely absent.

Chilling uncertainty is provided to any potential applicant given the heads provide for the potential for the Court to vary the cost exposure caps, with no criteria indicated at all in Head 6(5) to limit the court in deciding to vary the caps. This could be particularly problematic for Developer applicants, as albeit inadequately done, there is some attempt to reflect certain of the Court of Justice's clarifications in delivering on the requirement that costs should not be prohibitively expensive - which might serve to insulate third party applicants, as per case c-530/11 Commission v UK[49] and c-260/11 Edwards[50] ,
The prospect for an applicant to have to pursue further court proceedings in order to address the caps proposed is an appalling and chilling vista, given they will be incurring further costs to do so, and have no guarantee of success.

For the Defendant or State Respondents – equally there is no certainty on the extent of cost exposure they could be impacted by as a consequence.

Bizarrely, despite all the rhetoric about vexatious litigation – these proposed changes dispense with the disincentive to frivolous and vexatious claimants and counter claimants in the current system.

[49] Judgment of the Court, 13 February 2014, Case C-530/11, EU:C:2014:67
[50] Judgment of the Court, 11 April 2013, Case C-260/11, EU:C:2013:221

While the commentary on the Heads expresses concern that "no-foal no fee" arrangements are *"facilitating the taking of greater numbers of judicial reviews in the planning area in Ireland than might otherwise be the case",* the no-foal no fee is in fact a useful safeguard against the bringing of un-meritorious applications. It also refers to "greater numbers" of judicial reviews being taken as a consequence, but does not substantiate the inference of legions of challengers sitting at the doors of the Four Courts. It is interesting the note the explanatory note is shockingly candid in reflecting as a negative feature of the current system that the operation of the no foal no fee model facilitates the taking of cases which would otherwise not be possible, where in fact this model is an essential factor which has emerged which allows in certain instances the current system to be in practice and effect compliant with the "not prohibitively expensive" or "NPE" obligation.

The cost caps are indicated without any reference to the number of proceedings involved and are quite dysfunctional in that regard.

Bearing in mind the proposals in the other Heads of Bill, including for example the proposal to introduce a mandatory contested leave application, with substantial further tests to be examined, the overall complexity of a review are being increased, and the associated financial burden is placed more directly on the applicant, given the limitation on the ability to recover their costs. Thus he compatibility with the requirements of effective judicial protection are required under the Charter and the ECHR must be questioned.

The potential for State respondents and Notice Parties to deploy all their resources at the leave stage with a view to 'seeing off' as it were a potential meritorious challenge, and/or exhausting their resources, has already been well identified and remarked upon in the context of various briefings on the proposed Heads.

As observed by the Commission in its 2017 Notice on Access to Justice at para. 177 – *"A cost regime has therefore to be shaped in such a way as to guarantee that rights conferred by the EU can be effectively exercised."* - and this proposed cost regime on its own or in conjunction with the other proposals clearly fail to demonstrate that adequately or at all.

The proposed Head 6 raises additional very specific issues, including:

- How can this proposal be consistent with Article 9(4) of the Aarhus Conventions requirement and the Public Participation Directive that a review be "fair" and "equitable" when the caps on award can operate to limit the potential representation a third party applicant or environmental group can rely on, and where no equivalent and effective restriction and limit is imposed on the other side?
- How can this proposal be consistent with Article 9(4) of the Aarhus Convention where in plain terms (a) it denies a successful applicant their fair costs and (b) does nothing to provide a legal system which is not prohibitively expensive?

- Is the cap on costs recovery for applicants compatible with the doctrine of equivalence given that in almost all domestic litigation and applicant is entitled to recover its fair and reasonable costs and the cap proposed will in almost all cases be less than this?
- Does Head 6 provide "reasonable predictability" per *Commission v UK* Case c-530/11 par 58 and in light of the obligations arising under the EIA Directive, the Aarhus Convention and Article 47 of the Charter?
- Can a restriction on recoverable costs to a sum which is known to be a fraction of the costs liability in a typical judicial review action, be said to vindicate the personal rights of the successful litigant under the Article 37 and/or the rights to fair hearing in Article 6(1) of the European Convention on Human Rights, the right to an effective remedy under Article 13 of the European Convention on Human rights and the right to an effective remedy under Article 47 CFR.

7 Conclusion

7.1 Public Participation deficit in the context of the major public interest and environmental impacts at stake:

In the context of the extent of public interest at stake with the proposed changes, the timing of this public consultation was entirely inappropriate. It was scheduled by the Minister for Housing, Planning and Local Government, Minister Eoghan Murphy, to run from 9th December 2019 to 13th January 2020, so the peak of the traditional festivities and holidays of Christmas and New Year. This is despite the fact the Heads were put in front of the Joint Oireachtas Committee ("JOC") for Housing, Planning and Local Government, ("HPLG") over a month earlier, on November 6th 2019.

Following correspondence sent from the Environmental law Officer of the Irish Environmental Network, and further initiatives which resulted pressure from certain members of the Joint Oireachtas Committee for Housing, Planning and Local Government, other individual TDs and Senators, and Members of the European Parliament on the Minister to extend the consultation, the Minister finally relented and extended the consultation, but only by a mere two weeks to January 27th, 2020. We do not consider this to be in any way appropriate or adequate, given the period before and over Christmas and New Year was effectively nullified.

The consultation period selected and what is thus in practical effect a very short **duration** for the consultation is all the more of an issue particularly when one takes the complexity of the issues at stake into account, where the period of participation should have been informed by the complexity and volume of materials which are required to be considered, Department. The Heads of Bill are a mere 12 pages, however, the corpus of information which needs to be considered is considerable. No provision of relevant reading was provided to assist the public, and no regulatory impact assessment was provided, no supporting data analysis set out, no assessment framework to comply with Article 51(2) of the EU Charter of Fundamental Rights was provided.

The ability to raise questions in the Oireachtas, was impacted by the Christmas recess, and further compounded by the dissolution of the Dáil.

We do not consider it constitutes a public consultation for the purpose of such far reaching legislative proposals. Also given this is merely heads and thus policy of an outgoing government, there is likely to be some considerable apathy amongst the public about engaging in the context of something which may not see the light of day.

7.2 The way forward:

We wish to simply reflect here on our earlier recommendations, which we do not propose to rehearse.

However, we find it difficult to restrain ourselves from the level of condemnation which we feel is occasioned by:

- the nature of these proposals in the context we have set out;
- the manner in which they have been advanced and the associated deficiencies; and
- the approach to a purported consultation which was seems to have been orchestrated to minimise engagement and scrutiny

- as outlined in this submission.

The only tenable approach for any future Government which might be minded to return to consider the legislative provisions governing judicial review is to ensure it is first informed by: a proper analysis of the existing system and the operation thereof, and a proper consideration of the various legal obligations with which it must comply, before proposing any changes.

These Heads of Bill and the consultation conducted thereon – are no basis on which such profound changes could, or should be advanced.