

# Submission on the Planning and Development Bill 2022

Irish Human Rights and Equality Commission  
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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

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## Abbreviations

2001 Act	Local Government Act 2001
2001 Regulations	Planning and Development Regulations 2001 (as amended)
2014 Act	Irish Human Rights and Equality Commission Act 2014
2019 General Scheme	General Scheme of the Housing and Planning and Development Bill 2019
ERCI	European Commission against Racism
OPR	Office of the Planning Regulator
Part 8/Part 8 process	Part 8 of the 2001 Regulations
PDA 2000	Planning and Development Act 2000
The Bill	Planning and Development Bill 2022
The Expert Group	Traveller Accommodation Expert Group
ECHR	European Convention on Human Rights
UN	United Nations

## Recommendations

### Definition of Traveller-specific accommodation

The Commission recommends that:

- the Department of Housing, Local Government, and Heritage engages in an extensive consultation process with members of the Traveller community, associated civil society groups, experts, and/or local authorities to consider whether a statutory definition of Traveller specific accommodation is required and, if so, to devise an appropriate statutory definition.
- if it is considered that a statutory definition of Traveller accommodation is required, this should be put in place through an amendment to the Bill to introduce or amend the provisions of the Housing (Traveller Accommodation) Act 1998.
- if it is considered that a statutory definition of Traveller specific accommodation is required, a non-exhaustive list of criteria/characteristics is contained in statute to ensure flexibility in terms of types of accommodation that may not be identified through the consultation process.

### Exempted developments

The Commission recommends that:

- section 142 of the Bill is reviewed to consider whether to place Traveller-specific accommodation in an exceptional category which would result in it not being deemed as exempted from the need to be approved by An Coimisiún Pleanála.
- consideration be given to creating an alternative direct route for Traveller-specific accommodation to be assessed, and approved or rejected, by An Coimisiún Pleanála.
- a route for planning approval for Traveller-specific accommodation through the planning authority should be retained provided the processes are speedy and streamlined and the Commission's recommendations in relation to the notification and confirmation procedures are implemented.

The Commission recommends, through the Bill, putting forward an amendment to section 139 of the Local Government Act 2001 and the relevant parts of Schedule 3, Part 3 of the Local Government Act 2014, to introduce certain requirements in respect of the amount of Traveller-specific accommodation respective local authorities are to commence development of in a particular period to limit the scope to veto plans for Traveller-specific accommodation in a functional area.

### Public notification procedure

The Commission recommends that an amendment or amendments are made to section 148 of the Bill to prescribe that, for a specified period, Traveller-specific accommodation initiatives which have already been detailed in a local authority's development plan will not be the subject of the public notice procedure.

### Confirmation procedure

The Commission recommends that section 149 of the Bill is amended so as to ensure that sections 149(3)(b) and 149(3)(c) will not apply to Traveller-specific accommodation which has already been specified or provided for in a given local authority's development plan.

### Disposal and development of land

The Commission recommends that:

- amendments are made to the Local Government Act 2001 and the Local Government Reform Act 2014 to make the powers provided for in sections 357 and 358 of the Bill executive functions of local authorities with a statutory review process to be carried out by the Department of Housing, Local Government and Heritage every five years, in a similar manner as was proposed by the Expert Group.
- section 45(3)(g) of the Bill is amended to reflect that local authorities are under obligations to put forward objectives in respect of Traveller-specific accommodation in their respective development plans as opposed to simply setting out statements in respect of same.

- section 41(1)-(2) of the Bill is amended to reflect that development plans will be compiled and finalised in five-year cycles as opposed to the proposed ten-year cycles, with a review period of three-years for each development plan, to bring it in line with the periods provided for in respect of Traveller accommodation programmes under the Housing (Traveller Accommodation) Act 1998.
- if such recommendation is not accepted, the State places the provision of Traveller-specific accommodation in a special statutory category that results in the relevant portion of a development plan being reviewed and updated every five years, in line with a local authority's Traveller accommodation programme.
- the Bill is amended to include provisions which would amend or insert provisions into the Housing (Traveller Accommodation) Act 1998 that place statutory obligations on local authorities to:
  - specify in their development plans the particular number of Traveller-specific accommodation that will be provided in each five-year period in each category of accommodation (e.g. halting site, caravan, and standalone housing), to include a statutory minimum number of developments for each functional area (to be calculated using statistics regarding the population size of the Traveller community in that area) which should be reviewed every five-year development plan cycle;
  - particularise cultural amenities that will be developed alongside Traveller-specific accommodation, including amenities such as shops, community spaces, and areas to keep animals where it is not planned for same to be provided on site (such cultural amenities should be specified following a mandatory consultation period in respect of a particular site and a statutory obligation to ensure such amenities are situated within a one-mile radius of each proposed development should also be created);
  - specify particular lands for every Traveller-accommodation development proposed, with a mandatory obligation to amend a development plan to

specify an alternative site should An Coimisiún Pleanála deem a particular site as not meeting planning requirements; and

- identify sites in each development plan that are suitable for the development of Traveller-specific accommodation in the following five-year cycle.

## Enforcement procedures and powers in respect of unauthorised developments

The Commission recommends that:

- section 293 (and the corresponding provisions) of the Bill is amended so as to ensure that there is court oversight over all actions in respect of alleged unauthorised developments where there is any possible interference with a person's home or dwelling (as understood within the terms of Article 8 of the ECHR and/or Article 40.5 of the Constitution).
- section 293 of the Bill is amended to ensure that local authorities and the courts are mandated by statute to carry out a proportionality assessment taking account of all relevant circumstances prior to any interference occurring with an alleged unauthorised development which may constitute a person's home or dwelling.
- section 293 of the Bill is amended to set out a non-exhaustive list of circumstances to be considered by local authorities and the courts when carrying out a proportionality assessment which should include those which were deemed to be relevant by the Supreme Court in *Clare County Council v McDonagh*.
- consideration should be given to amending the Bill to eradicate the criminal offence that flows from a failure to comply with an enforcement notice where the alleged unauthorised development comprises a person's home or dwelling.
- section 294 of the Bill should be amended to place a mandatory obligation on local authorities to carry out a proportionality assessment taking into account a non-exhaustive list of circumstances including those deemed to be relevant by the



Supreme Court in *Clare County Council v McDonagh* before seeking injunctive relief from a court.

- section 294 of the Bill should be amended so as to ensure that courts are mandated by statute to carry out a proportionality assessment that takes into account a non-exhaustive list of circumstances including those deemed relevant by the Supreme Court in *Clare County Council v McDonagh* above before granting injunctive relief.

## Proposed reforms in respect of notice procedures in judicial review proceedings relating to matters pertaining to planning and development

The Commission recommends that the proposed notice procedure set out in section 249(2) of the Bill is amended to retain the current system, whereby applications for leave to apply for judicial review can be made ex-parte with the Court retaining a discretion to direct that such an application is heard on notice where certain circumstances require same.

## Proposed reforms in respect of the legal standing of non-governmental organisations

The Commission recommends that section 249(10)(c) of the Bill is amended to remove the requirements that before an organisation or body may institute judicial review proceedings relating to matters falling within the scope of the Bill it must be a company, have no fewer than ten members, and pass a resolution.

## Proposed reforms in respect of legal costs

The Commission recommends that:

- section 250(1) is amended to ensure that successful applicants in judicial review proceedings relating to environmental and planning matters may recover the entirety of their legal costs, where a court deems that to be in the interests of justice in accordance with established rules in relation to costs.

- the Government reconsiders the proposal for costs to be dealt with in an administrative scheme and instead ensures that all rules in respect of costs are placed on a statutory footing within the Bill.

## Proposed reforms in respect of the right of appeal

The Commission recommends that:

- section 249(15) of the Bill should be amended to reinstate the jurisdiction of the Court of Appeal.
- any restriction on appeals in proceedings involving environmental matters (as currently provided for in the PDA 2000) are removed to ensure compliance with the international legal obligations placed on the State and/or the provisions of the Constitution

## Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the Irish Human Rights and Equality Commission Act 2014 (the '2014 Act'). We have a statutory mandate to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to examine any legislative proposal and report our views on any implications for human rights or equality.<sup>1</sup>

We welcome the opportunity to provide our submission on the Planning and Development Bill 2022. We take this opportunity to highlight the deep-rooted relationship between planning and development, and human rights and equality. Human rights cannot be enjoyed without an accessible, safe, clean, healthy and sustainable environment, and planning and development in the State has, and will continue to have, significant impacts on the human rights and equality of multiple cross-sections of society including but not limited to: children; disabled people; and minority or marginalised groups such as the Traveller community. Many human rights and equality issues are intrinsically linked to, and impacted by, planning and development, such as the ability to access accommodation, including that which is suitable and which satisfies cultural needs;<sup>2</sup> the right to live independently and be included in the community;<sup>3</sup> and the right to a clean, healthy, and sustainable environment.<sup>4</sup>

In order to protect and advance human rights and equality in the planning and development system, it is necessary for there to be effective public participation in the formation of

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<sup>1</sup> Section 10(2)(c) of the [Irish Human Rights and Equality Commission Act 2014](#).

<sup>2</sup> United Nations Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland*, UNDoc. CRC/C/IRL/CO/3-4, 1 March 2016, § 69(b): "The Committee is deeply concerned about the structural discrimination against Traveller and Roma children, including as regards their access to education, health and an adequate standard of living. It is particularly concerned about:...Significant number of Traveller households in mobile or temporary accommodation with no access to adequate water and sanitation facilities or safe and appropriate play areas." See also, for example: European Commission Against Racism and Intolerance, *ERCI Conclusions on the implementation of the Recommendations in respect of Ireland subject to interim follow-up*, CRI(2022)02, 3 March 2022, p.4: "...ERCI regrets that little has been done to address the structural shortcomings in the identification of the housing needs of Travellers...Most importantly, there has been no major improvement in the accommodation conditions of Travellers."

<sup>3</sup> Article 19, Convention on the Rights of Persons with Disabilities.

<sup>4</sup> United Nations General Assembly, *The human right to a clean, healthy and sustainable environment* (2022) UN Doc. A/76/L.75.

legally binding measures that have a significant effect on the environment<sup>5</sup> and the public must have wide access to justice.<sup>6</sup> Significant restrictions on access to justice in this area will negatively impact the public's ability to safeguard their rights and will pose significant challenges in terms of ensuring that human rights and equality are at the centre of decision-making in respect of planning and development in the State.

We note that the Planning and Development Bill 2022 ('the Bill') has the potential to have significant consequences for the Traveller community in particular, and in the area of judicial review and access to justice more generally.

In recent times, we have carried out a significant body of activities in these areas. In the area of Traveller-specific accommodation, we have, for example:

- carried out several equality reviews, pursuant to our powers under section 32(2) of the 2014 Act, of the provision of such accommodation in the State by local authorities;<sup>7</sup>
- invited several local authorities to prepare and implement Equality Action Plans;<sup>8</sup>
- intervened in several cases involving issues around Traveller-specific accommodation and the provision of same;<sup>9</sup> and
- engaged in casework involving individual cases concerning Traveller-specific accommodation and/or discrimination in the provision of same.

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<sup>5</sup> Article 8, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention'), 25 June 1998

<sup>6</sup> Article 9(2), Aarhus Convention, 25 June 1998.

<sup>7</sup> Irish Human Rights and Equality Commission, *Equality Review*, available at: <https://www.ihrec.ie/our-work/equality-review/>

<sup>8</sup> Irish Human Rights and Equality Commission, *IHREC uses Legal Powers to ask Local Authorities to Prepare and Implement Equality Action Plan on Traveller Accommodation*, 7 December 2022, available at: <https://www.ihrec.ie/ihrec-uses-legal-powers-to-ask-local-authorities-to-prepare-and-implement-equality-action-plan-on-traveller-accommodation/>

<sup>9</sup> See, for example: Irish Human Rights and Equality Commission, *European Court of Human Rights case, Faulkner v Ireland (Application no. 30391/18)*, 11 November 2021, available at: <https://www.ihrec.ie/documents/european-court-of-human-rights-case-faulkner-v-ireland-application-no-30391-18/>; and Irish Human Rights and Equality Commission, *Bernard McDonagh and Helen McDonagh v Clare County Council*, 17 December 2021, available at: <https://www.ihrec.ie/documents/bernard-mcdonagh-and-helen-mcdonagh-v-clare-county-council/>

We have consistently highlighted that the State is not currently meeting the needs of Travellers who require culturally appropriate Traveller-specific accommodation, or those who would prefer to live in standard housing, and have called upon the State to fulfil its obligations under, for example, the United Nations Convention on the Rights of the Child and the European Social Charter by providing accommodation to Traveller children and families that fully respect their cultural rights, including nomadism, living in extended family groups, keeping horses and other social activities.<sup>10</sup>

Most recently, in our Comments on Ireland's 20<sup>th</sup> National Report on the Implementation of the European Social Charter, we restated our view that, despite repeated findings by the European Committee of Social Rights, Ireland is not meeting its obligations in respect of Traveller accommodation and the State continues to violate Article 16 of the Charter (which provides for the right of the family to social, legal and economic protection). We restated our position that the Traveller accommodation architecture in the State remains incoherent and inadequate. In particular, we highlighted that the establishment of an independent authority responsible for oversight and delivery, and clear policy commitments and targets, would likely improve the situation. We observed that the lived reality of Travellers is that they continue to experience egregious violations of the right to adequate and culturally appropriate housing.<sup>11</sup>

We also engaged with the delegation from the Advisory Committee on the Framework Convention for the Protection of National Minorities during its country evaluation of Ireland in September 2023 and raised this legislation as a matter of concern.<sup>12</sup>

We note the recommendations of the Traveller Accommodation Expert Group ('the Expert Group'), which was established by the Department of Housing, Local Government and

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<sup>10</sup> See, for example: Irish Human Rights and Equality Commission, *Comments on Ireland's 18<sup>th</sup> National Report on the implementation of the European Social Charter*, 30 June 2021, pp.7-23, available at: <https://rm.coe.int/comments-irish-human-rights-and-equality-18th-nr-ireland-2021/1680a334b9>; and Irish Human Rights and Equality Commission, *Submission to the Committee on the Rights of the Child on Ireland's combined fifth and sixth periodic reports*, August 2022, available at:

<https://www.ihrec.ie/app/uploads/2022/09/Ireland-and-the-Rights-of-the-Child-Final.pdf>

<sup>11</sup> Irish Human Rights and Equality Commission, *Comments on Ireland's 20<sup>th</sup> National Report on the Implementation of the European Social Charter*, 2023, available at:

<https://www.ihrec.ie/documents/comments-on-irelands-20th-national-report-on-the-implementation-of-the-european-social-charter/>

<sup>12</sup> <https://www.coe.int/en/web/minorities>

Heritage (or its predecessor in title) in 2018 to review the Housing (Traveller Accommodation) Act 1998 and other related issues. The Expert Group published a report in 2019 ('the Expert Group's Report'),<sup>13</sup> and at pages 26-36 of its report, the Expert Group outlined the significant challenges posed by the current planning framework in terms of the provision of Traveller-specific accommodation.

The Expert Group set out a number of recommendations in respect of planning in the State, which can be summarised as follows:

- (i) in the immediate term, local authority chief executives should be encouraged to use emergency powers, where necessary, to bypass problems with decision-making by elected members regarding Traveller accommodation;
- (ii) legislative provisions should be put in place to suspend the reserved functions of elected members for approval of Part 8 planning proposals for Traveller-specific accommodation, and to suspend the reserved function relating to the agreement to dispose of land for the purposes of developing Traveller-specific accommodation and provide these as executive functions, with a recommended review after a period of five years;
- (iii) legislative provisions should be put in place to provide an alternative and direct route for all entities of Traveller-specific accommodation to An Bord Pleanála in line with the processes established for Strategic Housing Developments, with a recommended review after five years;
- (iv) appropriate baseline studies around Traveller-specific accommodation needs as part of integrated Housing Need and Demand Assessments for Development Plans, should be carried out;
- (v) a review by the Office of the Planning Regulator ('OPR') of Traveller-specific accommodation policies and objectives in statutory Development Plans should be sought;
- (vi) it should be ensured that local authority development plans comply with the provisions of the Planning and Development Act 2000 (as amended), particularly in relation to the requirement around Traveller accommodation;

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<sup>13</sup> The Housing Agency, *Traveller Accommodation Expert Review*, July 2019, available at: <https://www.housingagency.ie/publications/traveller-accommodation-expert-review-2019>

- (vii) legislation in respect of Traveller accommodation and also planning legislation should be updated to improve general alignment of the different mechanisms for planning for the provision of Traveller accommodation. A particular focus was paid by the Expert Group to the fact that the timeframe for the production, adoption, and implementation of Traveller Accommodation Programmes needs to align with local authorities' respective Development Plans timings and cycles;
- (viii) planning guidelines for Regional Assemblies and local authorities should be provided to ensure consistency and integration of Traveller Accommodation Programmes and the Housing Strategy section of development plans;
- (ix) Regional Assemblies should be provided with a formal role in advising on, coordinating and monitoring of local level delivery of Traveller-specific accommodation at regional level, and, in the shorter term pending this new role, designate local authorities in each Region as leads in the areas of review, policy, delivery, etc.; and
- (x) it should be ensured that a new national level authority would incorporate a role in monitoring statutory plans and referral as necessary, to the Office of the Planning Regulator.

Updates in respect of the implementation of these recommendations have been provided in intervals by a 'Programme Board' established by the Department to oversee implementation.<sup>14</sup> We welcomed the establishment of the Programme Board to drive implementation of the Expert Group's recommendations but have also urged the Government to ensure that there is no undue delay in respect of its work.<sup>15</sup>

It is clear to us that a number of the recommendations of the Expert Group have not been addressed adequately or at all in the Bill and in some instances, as discussed below, the proposed reforms may result in greater challenges in respect of access to justice and Traveller accommodation in this area. In order for the Bill to satisfy or advance the

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<sup>14</sup> Department of Housing, Local Government and Heritage, *Traveller Accommodation Expert Review – Programme Board Update*, available at: <https://www.gov.ie/en/publication/37910-traveller-accommodation-expert-review-programme-board-update/>

<sup>15</sup> Irish Human Rights and Equality Commission, Submission to the Joint Committee on Key Issues affecting the Traveller Community, February 2021, p. 10, available at: <https://www.ihrec.ie/app/uploads/2021/03/Submission-to-the-Joint-Committee-on-Key-Issues-affecting-the-Traveller-Community-FINAL.pdf>

recommendations set out by the Expert Group and/or comply with principles and requirements of human rights and equality law, a number of provisions require amendment and clarification.

We are also of the view that the Bill would result in considerable changes being ushered in with regard to the right of and/or the ability to access the courts and to obtain justice in respect of actions and decision taken in respect of planning in the State. In this regard, we highlight the obligations placed on the State to ensure that members of the public have the ability to obtain adequate and effective remedies in respect of matters relating to the environment which, by their very nature, include actions and/or decisions relating to planning.<sup>16</sup>

The first part of this submission will deal with matters arising from the Bill we view as relating to and/or having the potential to have a significant impact on the Traveller community, who have traditionally been and who regrettably remain a marginalised group within Irish society.

The second part of the submission will deal with the provisions of the Bill which relate to proposed judicial review procedures and issues relating to access to justice.

We remain available to assist if further scrutiny of the legislation is required and on any specific issue which may arise.

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<sup>16</sup> See, for example: Article 9(3)-(4), Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998 ('Aarhus Convention') and



## Examples of observations and recommendations made by international human rights monitoring bodies in respect of Traveller accommodation

The European Committee of Social Rights, a body of the Council of Europe, found Ireland to be in violation of Article 16 of the European Social Charter (the right of the family to social, legal and economic protection) due to the failure to provide sufficient and/or culturally appropriate accommodation for Travellers, the inadequate conditions of existing Traveller sites, and as a result of inadequate safeguards relating to Traveller evictions.<sup>17</sup> Having reviewed the situation in 2018, the Committee found that the State had still not fulfilled the requirements of Article 16 of the Charter.<sup>18</sup> Once again in 2019, the Committee concluded that the State had not brought the situation into conformity with Article 16 in the areas of Traveller accommodation and evictions.<sup>19</sup>

Separately, another body of the Council of Europe, the European Commission against Racism ('the ERCI') has consistently recommended that efforts to meet the accommodation needs of Travellers be improved, including by addressing inadequate conditions at existing halting sites to meet decent and safe living standards, and by providing adequate, accessible, suitable and culturally appropriate accommodation. ERCI has also urged the Government to introduce a solution to address the failure by local authorities to use funding allocated for Traveller accommodation, including by imposing dissuasive sanctions on local

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<sup>17</sup> *European Roma Rights Centre (ERRC) v. Ireland*, Complaint No. 100/2013, available at: [https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset\\_publisher/5GEFkJmH2bYG/content/no-100-2013-european-roma-rights-centre-errc-v-ireland?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2F european-social-charter%2Fprocessed-complaints%3Fp\\_p\\_id%3D101\\_INSTANCE\\_5GEFkJmH2bYG%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-4%26p\\_p\\_col\\_count%3D1%26p\\_r\\_p\\_564233524\\_categoryId%3D28547789%26p\\_r\\_p\\_564233524\\_resetCur%3Dtrue](https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-100-2013-european-roma-rights-centre-errc-v-ireland?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2F european-social-charter%2Fprocessed-complaints%3Fp_p_id%3D101_INSTANCE_5GEFkJmH2bYG%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1%26p_r_p_564233524_categoryId%3D28547789%26p_r_p_564233524_resetCur%3Dtrue)

<sup>18</sup> European Committee of Social Rights, *Follow-up to Decisions on the Merits of Collective Complaints*, December 2018, available at: <https://rm.coe.int/findings-2018-on-collective-complaints/168091f0c7>

<sup>19</sup> European Committee of Social Rights, *Conclusions of the European Committee of Social Rights 2019 Ireland*, March 2020, available at: <https://rm.coe.int/rapport-irl-en/16809cfbc0>

authorities for failures to spend allocated funding, or shifting the responsibility for accommodation from local authorities to a central housing agency.<sup>20</sup>

Ireland's record on the provision of Traveller accommodation and eviction procedures that have profoundly negative impacts on the Traveller community have also been criticised by several United Nations ('UN') treaty monitoring bodies on the same grounds, those bodies include the Committee on the Rights of the Child,<sup>21</sup> the Committee on the Elimination of Discrimination against Women,<sup>22</sup> the Committee on the Elimination of Racial Discrimination,<sup>23</sup> and the Committee on Economic, Social and Cultural Rights, which stated:

“The Committee is also concerned at the lack of culturally appropriate accommodation provided to Travellers and Roma and of adequate legal protection of Traveller families at risk of eviction (art. 11).”<sup>24</sup>

The Committee on the Elimination of Racial Discrimination made the following cogent observations in 2019:

“Despite the provision of Section 20 of the Housing (Miscellaneous Provision) Act 2009 and the Equal Status Act; and while noting the nationwide housing crisis in Ireland, the Committee remains concerned at reports that ethnic minority groups such as Travellers, Roma, people of African descent, and migrant communities, who have limited access to social housing, face serious discrimination and inequality in

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<sup>20</sup> European Commission against Racism and Intolerance, *ERCI Report on Ireland (fourth monitoring cycle)*, adopted on 5 December 2012 and published on 19 February 2013, available at: <https://rm.coe.int/fourth-report-on-ireland/16808b5808>; European Commission against Racism and Intolerance, *ERCI Report on Ireland (fifth monitoring cycle)*, adopted on 2 April 2019 and published on 4 June 2019, available at: <https://rm.coe.int/fifth-report-on-ireland/168094c575>

<sup>21</sup> Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland*, 1 March 2016, para. 69, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsvOufvUWRUJILHiLHKqpXZxUGOtzQFOI%2B37QzAKosbh7yc40d4J3lynFaWf0Egu6J99RK6Y%2FTHjged5r1H3f3KQliFieFkoeAPALAwKpbZz>

<sup>22</sup> Committee on the Elimination of Discrimination Against Women, *Concluding observations on the combined sixth and seventh periodic reports of Ireland*, 9 March 2017, paras. 48-49, available at: <https://www.ohchr.org/en/documents/concluding-observations/cedawcirlco6-7-concluding-observations-combined-sixth-and-seventh>

<sup>23</sup> United Nations Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined fifth to ninth reports of Ireland*, UNDoc. CERD/C/IRL/CO/5-9, para. 27.

<sup>24</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations on the third periodic report of Ireland*, 8 July 2015, para. 27, available at: [https://www.ihrec.ie/app/uploads/download/pdf/un\\_committee\\_on\\_economic\\_social\\_and\\_cultural\\_rights\\_concluding\\_observations\\_on\\_the\\_third\\_periodic\\_report\\_of\\_ireland\\_8\\_july\\_2015.pdf](https://www.ihrec.ie/app/uploads/download/pdf/un_committee_on_economic_social_and_cultural_rights_concluding_observations_on_the_third_periodic_report_of_ireland_8_july_2015.pdf)

the competitive private rental sector and are disproportionately at risk of being homeless. It is also concerned that the Housing (Miscellaneous Provisions) Act 2002 is reportedly used by local authorities to justify forced evictions of Travellers. The Committee is further concerned about the persistent underspending of available budgets by local authorities on culturally appropriate housing for Travellers (art.5).”

## Overview of the current legal framework as it relates to Traveller accommodation

The Housing Acts 1966-2021 provide a detailed code for the provision of housing and related services by local authorities (referred to as 'housing authorities' under the Acts). The Housing (Traveller Accommodation) Act 1998 is of particular relevance given the obligations it places on local authorities in respect of the provision of Traveller-specific accommodation.

Section 13 of the Housing Act 1988 (as amended by section 29 of the 1998 Act and by section 8 of the Housing (Miscellaneous Provisions) Act 2009) governs the provision of halting sites, commonly required by the Traveller community who have a nomadic lifestyle and/or who wish to live in caravan type accommodation. It provides, amongst other things:

“13. (1) This section applies to persons belonging to the class of persons who traditionally pursue or have pursued a nomadic way of life.

(2) A housing authority may provide, improve, manage and control sites for caravans used by persons to whom this section applies, including sites with limited facilities for the use by such persons otherwise than as their normal place of residence or pending the provision of permanent accommodation under an accommodation programme within the meaning of section 7 of the Housing (Traveller Accommodation) Act, 1998, and may carry out any works incidental to such provision, improvement, management or control, including the provision of services for such sites...

(7) In this section—

“caravan” means any structure designed or adapted for human habitation which is capable of being moved from one place to another, whether by towing or transport on a vehicle or trailer, and includes a motor vehicle so designed or adapted and a mobile home, but does not include a tent;

“sites with limited facilities” means sites which, having regard to the temporary nature of such sites or the short duration of periods of use, have

sufficient water, facilities for solid and liquid waste disposal and hard surface parking area for caravans.”

Other key obligations and/or powers under the legislation include:

- (i) an obligation to make an assessment of the accommodation needs of members of the Traveller community who have qualified for social housing supports, including:
  - a. the need for halting sites;<sup>25</sup>
  - b. the distinct needs and family circumstances of Travellers;<sup>26</sup>
  - c. the needs and patterns of movement of Travellers who live a nomadic lifestyle and require non-permanent halting sites;<sup>27</sup>
- (ii) an obligation to adopt an accommodation programme for a five-year period (with a review at least every three years), which is to outline the accommodation needs of Travellers and the provision of accommodation required to meet those needs;<sup>28</sup>
- (iii) an obligation to take ‘...any reasonable steps as are necessary’ for the purpose of implementing the said accommodation programme;<sup>29</sup> and
- (iv) a power to make financial loans available to members of the Traveller community to purchase or repair caravans, to fund the acquisition of land for sites to place caravan accommodation on and/or to finance associated construction works.<sup>30</sup>

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<sup>25</sup> Section 6(1), Housing (Traveller Accommodation) Act 1998.

<sup>26</sup> Section 10(3)(b), Housing (Traveller Accommodation) Act 1998.

<sup>27</sup> Section 10(3)(c), Housing (Traveller Accommodation) Act 1998.

<sup>28</sup> Sections 7 and 10, Housing (Traveller Accommodation) Act 1998.

<sup>29</sup> Section 16, Housing (Traveller Accommodation) Act 1998.

<sup>30</sup> Section 25, Housing (Traveller Accommodation) Act 1998. For interpretation of the provisions of the Housing (Traveller Accommodation) Act 1998 and the obligations created by it, see judgments of the Superior Courts, for example: *O’Donoghue v Limerick Corporation* [2003] 4 IR 93; *O’Reilly v Limerick County Council* [2007] 1 IR 593; and *Clare County Council v McDonagh* [2022] IESC 2.

# Observations on the Bill and issues which relate to members of the Traveller community

## Definition of Traveller-specific accommodation

### Overview of the current framework

The Office of the Planning Regulator has identified that the lack of an agreed definition of what constitutes Traveller-specific accommodation can lead to difficulties in the delivery of same and/or the measurement of planned delivery.<sup>31</sup>

While there may be various reasons for failures to and/or delays in advancing Traveller-specific accommodation in the State, it is likely that the lack of such a definition does pose challenges. As we outlined in our submissions to the Supreme Court in *Clare County Council v McDonagh*,<sup>32</sup> the accommodation needs of members of the Traveller community are very often assessed from the perspective of a settled person or members of the settled community and as such, they are often viewed as being Travellers' desires rather than needs. This position was acknowledged by the Supreme Court in its judgment in the aforementioned case.

In light of the observations of the Office of the Planning Regulator, we are of the view that there would be merit in giving careful consideration to inclusion in the Bill of a statutory definition to ensure progress is made in respect of the development of this category of accommodation and to ensure adequate measurement and accountability.

**The Commission recommends that the Department of Housing, Local Government, and Heritage engages in an extensive consultation process with members of the Traveller community, associated civil society groups, experts, and/or local authorities to consider**

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<sup>31</sup> Office of the Planning Regulator, *Traveller Accommodation and the Local Authority Development Plan*, October 2021, page 22, available at: <https://www.opr.ie/wp-content/uploads/2021/10/Traveller-Accommodation-and-the-Local-Authority-Development-Plan-Case-Study.pdf>

<sup>32</sup> *Clare County Council v McDonagh* [2022] IESC 2. Irish Human Rights and Equality Commission, *Bernard McDonagh and Helen McDonagh v Clare County Council*, available at: <https://www.ihrec.ie/documents/bernard-mcdonagh-and-helen-mcdonagh-v-clare-county-council/>

**whether a statutory definition of Traveller specific accommodation is required and, if so, to devise an appropriate statutory definition.**

**The Commission recommends that if it is considered that a statutory definition of Traveller accommodation is required, this should be put in place through an amendment to the Bill to introduce or amend the provisions of the Housing (Traveller Accommodation) Act 1998.**

**The Commission recommends that, if it is considered that a statutory definition of Traveller specific accommodation is required, a non-exhaustive list of criteria/characteristics is contained in statute to ensure flexibility in terms of types of accommodation that may not be identified through the consultation process.**

## Exempted developments

### Overview of the current framework

Section (4)(1) (aa) of the Planning and Development Act 2000 ('the PDA 2000') provides that where a local authority seeks to create a development in its own functional area, it will be categorised as an exempt development and will, therefore, not require a grant of planning permission.

However, certain types of local authority own developments are required to undergo a form of public consultation. This process is set out in Section 179 of the PDA 2000 and Part 8 of the Planning and Development Regulations 2001 (as amended) ('the 2001 Regulations').

Article 80(1) of the 2001 Regulations requires that the following developments be subjected to the process laid out in Part 8 of the 2001 Regulations ('Part 8' or the 'Part 8 process'):

- (i) the construction or erection of a house;<sup>33</sup> and
- (ii) any development (other than those specified elsewhere in Article 80), the estimated cost of which would exceed €126,000, and which is not a development

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<sup>33</sup> Article 80(1)(a), Planning and Development Regulations 2001.

that consists of the laying underground of sewers, mains, pipes, or other apparatus.<sup>34</sup>

There are some limited exceptions to the mandatory consultation process provided for in Part 8, including where the proposed development is necessary for dealing urgently with any situation which a chief executive of a local authority considers to be an emergency situation, calling for immediate action.<sup>35</sup> In such circumstances, public consultation is not required and, according to the Expert Group's Report, these powers have been utilised in a small number of cases involving Traveller-specific accommodation.<sup>36</sup>

As was highlighted in the Expert Group's Report, the vast majority of Traveller-specific accommodation is delivered through the Part 8 process. It is likely that a small number of Traveller-specific accommodation projects have not or will not be required to undergo this process as the cost would not exceed the monetary limit provided for in Article 80(1)(k) of the 2001 Regulations. The rationale underpinning this procedure has been described as aiming to ensure that there is 'public debate and scrutiny'.<sup>37</sup> However, as the Expert Group's Report sets out in detail, the Part 8 process and related statutory provisions have the potential to give rise to significant challenges in terms of providing Traveller-specific accommodation.

The Expert Group described the impact of the aforementioned framework, that is currently in place, in the following way:

"Taking the decision-making functions on Part 8 applications and land disposal together, local elected members of local authorities have very substantial control over the final approval of proposals for Traveller specific accommodation. This control over delivery has been criticised for many years by many groups as being overly-politicised (in response to pervasive local opposition to the development of new Traveller-specific accommodation). It has also been a significant contributor to delay and, ultimately, the failure to deliver Traveller-specific accommodation. It has

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<sup>34</sup> Article 80(1)(k), Planning and Development Regulations 2001.

<sup>35</sup> Section 179(6)(b), Planning and Development Act 2000.

<sup>36</sup> The Housing Agency, *Traveller Accommodation Expert Review*, July 2019, p. 35, available at: <https://www.housingagency.ie/publications/traveller-accommodation-expert-review-2019>

<sup>37</sup> *Hoare v Limerick County Council* [2011] IEHC 27.



been suggested previously, and frequently during the consultation process for this report, that Traveller-specific accommodation should be removed from the Part 8 process, or that local Elected Members should no longer have a decision-making role in the case of Traveller-specific accommodation within the Part 8 process.”

In addition, section 139 of the Local Government Act 2001 (‘the 2001 Act’) allows elected councils, by resolution, to direct that works of which they are informed under section 138 of the 2001 Act, and which are not required by law or an order of a court, to not proceed. Where such a resolution is passed, the chief executive of a particular local authority must comply with same.<sup>38</sup>

### Proposed legislative reforms

As is the case under section 4 of the PDA 2000, developments proposed and/or carried out by local authorities are automatically classified as exempted developments within section 142(1) of the Bill, except where an environmental impact assessment is required.<sup>39</sup>

On its face, the continued categorisation of local authority developments as ‘exempted developments’ may seem positive, on the basis that it will allow for a more streamlined process for the development of local authority accommodation. However, as the Expert Group’s Report indicates, this has actually not been the case insofar as the categorisation impacts on the development of Traveller-specific accommodation. Rather, the fact that planning approval for Traveller-specific accommodation has not fallen within the ambit of An Bord Pleanála was reported by the Expert Group as having caused challenges and it recommended that the Government:

“Put in place the legislative provisions to provide an alternative and direct route for Traveller-specific accommodation to An Bord Pleanála in line with the processes established for Strategic Housing Development. This provision should be reviewed after a period of five years.”<sup>40</sup>

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<sup>38</sup> Section 139(2), Local Government Act 2001. For interpretation of a similar statutory provision, section 3 of the City and County Management (Amendment) Act 1995, see: *East Wicklow Conservation Community v Wicklow County Council* [1996] 3 IR 175.

<sup>39</sup> Sections 7(3) and 142(1), Planning and Development Bill 2022.

<sup>40</sup> The Housing Agency, *Traveller Accommodation Expert Review*, July 2019, p. 35, available at: <https://www.housingagency.ie/publications/traveller-accommodation-expert-review-2019>

While acknowledging and welcoming the establishment of the Programme Board to oversee implementation of the Expert Group's recommendations, we also note that the Expert Group described as 'short-term' the recommendation for a direct route for Traveller specific accommodation to An Bord Pleanála. However, we are not aware of the Government having legislated to implement this and the relevant provisions of the Bill do not appear to advance this recommendation.

We are of the view that the categorisation of local authority developments as exempted developments under the current legal framework has led to significant shortcomings in respect of plans for and/or the development of adequate, accessible, suitable and culturally appropriate accommodation for the Traveller community in the State. The lack of such accommodation has been evidenced by the Commission through our equality reviews and by other independent bodies in the State that have carried out investigations, such as, the Ombudsman for Children,<sup>41</sup> and we note that the Expert Group, and local authorities and Traveller representative groups that made submissions to it, put this down at least in part to the fact that Traveller-specific accommodation is subjected to the Part 8 process.<sup>42</sup>

**The Commission recommends that section 142 of the Bill is reviewed to consider whether to place Traveller-specific accommodation in an exceptional category which would result in it not being deemed as exempted from the need to be approved by An Coimisiún Pleanála.**

**The Commission recommends that consideration be given to creating an alternative direct route for Traveller-specific accommodation to be assessed, and approved or rejected, by An Coimisiún Pleanála.**

**The Commission recommends that a route for planning approval for Traveller-specific accommodation through the planning authority should be retained provided the**

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<sup>41</sup> Ombudsman for Children, *No End in Site – An investigation into the living conditions of children living on a local authority halting site*, May 2021, available at: <https://www.oco.ie/library/no-end-in-site-an-investigation-into-the-living-conditions-of-children-on-a-local-authority-halting-site/>

<sup>42</sup> The Housing Agency, *Traveller Accommodation Expert Review*, July 2019, pp. 35-36, available at: <https://www.housingagency.ie/publications/traveller-accommodation-expert-review-2019>

**processes are speedy and streamlined and the Commission’s recommendations in relation to the notification and confirmation procedures are implemented.**

**The Commission recommends, through the Bill, putting forward an amendment to section 139 of the Local Government Act 2001 and the relevant parts of Schedule 3, Part 3 of the Local Government Act 2014, to introduce certain requirements in respect of the amount of Traveller-specific accommodation respective local authorities are to commence development of in a particular period to limit the scope to veto plans for Traveller-specific accommodation in a functional area.**

## Public notification procedure

### Overview of the current framework

At present, Article 81(2)(d)(ii) of the 2001 Regulations allows members of the public to make submissions or observations with respect to proposed developments (including proposed Traveller-specific accommodation) within a period not less than 2 weeks after the end of the period of inspection for plans and particulars (as provided for in Article 81(2)(d)(i) of the 2001 Regulations).

### Proposed legislative reforms

In examining the current process and the proposed legislative reforms that are contained in the Bill, we note that the Traveller community has traditionally been a marginalised group in Irish society and this has led to isolation and/or segregation.

In the unanimous judgment of the Supreme Court in *Clare County Council v McDonagh*, Hogan J. observed:

“This judgment is being delivered just over 100 years since the first Provisional Government for an independent Irish State was called into being. It is nonetheless salutary to reflect that one hundred years later a distinct group – the Irish Traveller community – still remains a vulnerable minority at the margins of Irish society. The members of that community have struggled for recognition of their own cultural identity and way of life. While any dispassionate observer could recognise that there has been fault on both sides, the fact remains that the legal system has not found it

altogether easy to accommodate the distinct cultural traditions of the Travelling community – such as nomadism and living in large family groups – within the traditional ambit of protecting and enforcing property rights, enforcing laws restraining trespass and legislation designed to give effect to legitimate planning, zoning and environmental concerns...”<sup>43</sup>

It is against that backdrop that, as outlined above, the Expert Group observed that public participation in consultation processes in respect of Traveller-specific accommodation can be particularly problematic in terms of fuelling political objections to such categories of development.<sup>44</sup>

As has been set out above, all local authority developments are considered to be exempted developments (subject to a small number of exceptions). Section 143 of the Bill envisages that the Minister will be able to prescribe certain developments or class of developments as being subject to a public notice procedure provided for in section 148 of the Bill. Section 143(1) provides:

“...the Minister may prescribe classes of local authority development in respect of which, having regard to the nature, scale or location of such classes of development, a local authority shall be required to comply with the public notification and confirmation procedure under sections 148 and 149 prior to development of such a class being carried out.”<sup>45</sup>

Whilst we have called above for Traveller-specific accommodation to be categorised exceptionally as non-exempted developments, we also recommend the retention of a route for planning approval for Traveller-specific accommodation through the planning authority provided the processes are speedy and streamlined and our recommendations in relation to the notification and confirmation procedures are implemented.

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<sup>43</sup> *Clare County Council v McDonagh* [2022] IESC 2, para. 1.

<sup>44</sup> The Housing Agency, *Traveller Accommodation Expert Review*, July 2019, pp. 35-36, available at: <https://www.housingagency.ie/publications/traveller-accommodation-expert-review-2019>

<sup>45</sup> The Regulations referred to in section 143 of the PDB 2022 will not apply to *inter alia*, works that consist of maintenance or repair works (other than to a protected structure) and/or a development that is necessary for dealing urgently with any situation which the chief executive of a local authority considers to be an emergency situation calling for immediate action: section 143(2)(a)-(b) of the PDB 2022.

In this regard, we consider that proposed Traveller-specific accommodation developments should not be subject to the public notification procedure for a specified period. We recognise the need to ensure a level of public participation and democratic accountability in the planning process and the development of local authority land. However, in light of the continued egregious violations of the right to adequate and culturally appropriate housing experienced by the Traveller Community, we consider that, with regard to Traveller-specific accommodation only and for a specified period, the public notice procedure should not apply and the process of drawing up and consulting in respect of local authority development plans should be considered sufficient to satisfy the need for public participation and democratic accountability.

**The Commission recommends that an amendment or amendments are made to section 148 of the Bill to prescribe that, for a specified period, Traveller-specific accommodation initiatives which have already been detailed in a local authority's development plan will not be the subject of the public notice procedure.**

## Confirmation procedure

### Proposed legislative reforms

Section 149 of the Bill seeks to introduce a new confirmation procedure whereby elected representatives will oversee all developments which are subject to the public notification procedure provided for in section 148 of the Bill.

If enacted in its current form, in summary, the provision would allow elected members to direct any of the following:

- (i) carry out the proposed development as recommended in the report of a chief executive (prepared in compliance with the requirements of section 149(1)-(2) of the Bill);<sup>46</sup>
- (ii) vary or modify the development otherwise recommended;<sup>47</sup> or
- (iii) not proceed with the development.<sup>48</sup>

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<sup>46</sup> Section 149(3)(a), Planning and Development Bill 2022.

<sup>47</sup> Section 149(3)(b), Planning and Development Bill 2022.

<sup>48</sup> Section 143(c), Planning and Development Bill 2022.

Where no decision/resolution is made within six weeks of the members being in receipt of a chief executive's report compiled under section 149(1)-(2) of the Bill, it will be deemed to have been decided that the development should be carried out.<sup>49</sup>

These powers are similar to those which are provided for in section 139 of the Local Government Act 2001 and the related provisions of the Local Government Reform Act 2014, reserving decision-making to elected officials, and do not address the concerns around the politicisation of planning and development of Traveller-specific accommodation as highlighted by the Expert Group.

As noted above we consider that any retained route to obtain planning approval from a planning authority in respect of Traveller-specific accommodation should not be subject to a notification procedure for a specified period, nor to a confirmation procedure.

**The Commission recommends that section 149 of the Bill is amended so as to ensure that sections 149(3)(b) and 149(3)(c) will not apply to Traveller-specific accommodation which has already been specified or provided for in a given local authority's development plan.**

## Disposal and development of land

### Overview of the current framework

The Local Government Reform Act 2014 provides that decision-making in respect of the disposal of local authority owned land is a reserved function, in that decisions in respect of same are made by elected representatives.<sup>50</sup> The Expert Group's Report observed that obtaining the approval of councillors in respect of the acquisition and disposal of land for the development of Traveller-specific accommodation can prove challenging, leading to a lack of progress being made in respect of same. The Expert Group stated:

“...Opposition from residents' associations and councillors means that the delivery of Traveller-specific accommodation is challenging, but the Expert Group's analysis indicates that the land use planning is also a significant factor in delaying and blocking the delivery of accommodation...the acquisition and disposal of land by

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<sup>49</sup> Section 149(4), Planning and Development Bill 2022.

<sup>50</sup> Schedule 3, Part 3, Reference 31, Local Government Reform Act 2014.

local authorities also requires the approval of councillors and this is often not secured.”<sup>51</sup>

In light of the challenges which the Expert Group identified as flowing from this phenomenon in terms of making provision for Traveller-specific accommodation, the Expert Group recommended that the reserved function relating to the agreement to dispose of land for the purposes of developing Traveller-specific accommodation should be removed, instead proposing that this would become an executive function, with a review after five years.<sup>52</sup> This is not what is envisaged by the current iteration of the Bill.

### Proposed legislative reforms

Part 13 of the Bill which contains sections 356-358, addresses the functions and/or powers of local authorities in respect of the appropriation, disposal and development of land. The Expert Group’s Report established that most Traveller-specific accommodation is developed on land owned by local authorities, and therefore, the provision in respect of the disposal of land is, in our view, the most pertinent.

Section 357 of the Bill provides significant discretion to local authorities in respect of lands owned and/or held by them.<sup>53</sup> In respect of land development, section 358 of the Bill sets out:

“358.(1) A planning authority may develop, secure or facilitate the development of land in connection with any of its functions under this Act or any other enactment.

(2) A planning authority may, in connection with any of its functions under this Act or any other enactment, make and carry out arrangements or enter into agreements with any person or body for the development or management of land, and may incorporate a company for these purposes.

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<sup>51</sup> The Housing Agency, *Traveller Accommodation Expert Review*, July 2019, p.i, available at: <https://www.housingagency.ie/publications/traveller-accommodation-expert-review-2019>

<sup>52</sup> The Housing Agency, *Traveller Accommodation Expert Review*, July 2019, Recommendations, page viii, available at: <https://www.housingagency.ie/publications/traveller-accommodation-expert-review-2019>

<sup>53</sup> See, in particular: sections 357(1)-(2) and (5), Planning and Development Bill 2022.

(3) A planning authority use any of the powers available to it under any enactment in order to facilitate the assembly of sites for the purposes of the orderly development of land.”

We note that the powers and functions bestowed upon local authorities under the PDA 2000, the 2001 Act, and the Local Government Reform Act 2014 remain largely unchanged as a result of sections 356 and 358 of the Bill. As a result, we are of the view that the recommendations of the Expert Group are unlikely to be advanced through the enactment of the Bill in its current form.

**The Commission recommends that amendments are made to the Local Government Act 2001 and the Local Government Reform Act 2014 to make the powers provided for in sections 357 and 358 of the Bill executive functions of local authorities with a statutory review process to be carried out by the Department of Housing, Local Government and Heritage every five years, in a similar manner as was proposed by the Expert Group.**

## Development plans as they relate to Traveller-specific accommodation

### Overview of the current framework

Section 10(2)(i) of the PDA 2000 places an obligation on local authorities to set out their objectives in respect of Traveller-specific accommodation in their respective development plans, sections 10(1) and 10(2)(i) state specifically:

“10.(1) A development plan shall set out an overall strategy for the proper planning and sustainable development of the area of the development plan and shall consist of a written statement and a plan or plans indicating the development objectives for the area in question...

(2) Without prejudice to the generality of subsection (1), a development plan shall include objectives for...

(i) the provision of accommodation for travellers, and the use of particular areas for that purpose.”



There are some examples of the Superior Courts having held that particular local authorities have failed to fulfil the requirements of this statutory provision.<sup>54</sup> Notwithstanding this obligation, we have still been required to repeatedly highlight<sup>55</sup> the failure to make provision for adequate and culturally appropriate Traveller-specific accommodation, which failure has resulted in the State being the subject of much criticism by international human rights monitoring bodies as noted above.

### Proposed legislative reforms

Section 45(3)(g) of the Bill adopts similar wording as provided for in section 10(2)(i) of the PDA 2000. However, there is one important distinction. Instead of the provision referring to local authorities having an obligation to include objectives in respect of Traveller-specific accommodation, the aforementioned provision in the Bill states:

“45.(3) The housing delivery strategy shall include...

(g) a statement regarding the provision of accommodation for members of the Traveller community and the use of particular areas for that purpose.”

(emphasis added).

The word ‘statement’ is more neutral in its import than the word ‘objective’. In publishing a statement within its housing delivery strategy, a local authority would not necessarily have to set out what it hoped to achieve in terms of Traveller-specific accommodation. For that reason, we view the proposed statutory provision as limiting the obligation currently placed on local authorities to the potential detriment of members of the Traveller community. This is particularly important in light of the distinction made by the Office of the Planning Regulator between development plans with:

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<sup>54</sup> See, for example, *O’Reilly v Limerick County Council* [2007] 1 IR 593.

<sup>55</sup> See: IHREC (2021) Submission to the Joint Committee on Key Issues affecting the Traveller Community; IHREC (June 2021), Comments on Ireland’s 18th National Report on the Implementation of the European Social Charter pp.7-23; IHREC (October 2019), Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland’s Combined 5th to 9th Report; IHREC (May 2015), Report to UN Committee on Economic, Social and Cultural Rights on Ireland’s third periodic review.

“...specific listed policies and objectives’ (emphasis in original),<sup>56</sup> and those that have no more than written policy statements in the narrative of the plans.”<sup>57</sup>

We are concerned that this revision may result in the Traveller community having even less scope to mount legal challenges against the failures of local authorities to make provision for adequate and culturally appropriate Traveller-specific accommodation.

While it is our view that the proposed reform due to be ushered in by section 45(3)(g) of the Bill would dilute the obligation on local authorities in terms of making proposals in respect of Traveller-specific accommodation even less onerous, it is clear that the current statutory requirements have also not led to sufficient progress.

We note the observation made by the Office of the Planning Regulator that development plans should include specific listed policies and objectives in relation to the following:

- (i) an obligation being placed on local authorities to set out listed objectives, with specific timeframes detailed;<sup>58</sup>
- (ii) requirements for development plans to set out the identification of settlements and lands where Traveller accommodation exists and where it will be required and/or can be improved upon;
- (iii) an obligation to set out specific and defined criteria in respect of site selection for Traveller-specific accommodation at the time at which local area plans are being developed;
- (iv) an obligation to provide detailed mapping of potential future sites for Traveller-specific accommodation; and

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<sup>56</sup> Office of the Planning Regulator, *Traveller Accommodation and the Local Authority Development Plan*, October 2021, p.21, available at: <https://www.opr.ie/wp-content/uploads/2021/10/Traveller-Accommodation-and-the-Local-Authority-Development-Plan-Case-Study.pdf>

<sup>57</sup> Office of the Planning Regulator, *Traveller Accommodation and the Local Authority Development Plan*, October 2021, p.21, available at: <https://www.opr.ie/wp-content/uploads/2021/10/Traveller-Accommodation-and-the-Local-Authority-Development-Plan-Case-Study.pdf>

<sup>58</sup> For a definition of the term ‘*listed objectives*’, see: Office of the Planning Regulator, *Traveller Accommodation and the Local Authority Development Plan*, October 2021, p.21, available at: <https://www.opr.ie/wp-content/uploads/2021/10/Traveller-Accommodation-and-the-Local-Authority-Development-Plan-Case-Study.pdf>

- (v) a requirement for the making of provision in a development plan for cultural amenities alongside Traveller-specific accommodation.<sup>59</sup>

Separately, we view the proposed reformulation of the planning framework as providing an important opportunity to develop the requirements placed on local authorities in respect of the provision of Traveller-specific accommodation and introduce reforms that have the potential to result in greater advancements being made in relation to Traveller-specific accommodation in the State. In this regard, we invite the State to place additional statutory obligations on local authorities as set out in our recommendation below.

In addition, a significant change under the Bill is that development plans will now only be made every ten years, with the review period commencing eight years into the lifetime of a given development plan, instead of the current four year review period.<sup>60</sup> This ten-year period can be extended by a further two years by direction of the Minister.<sup>61</sup> The Commission is of the view that this will have significant, and potentially detrimental, consequences in respect of Traveller-specific accommodation. The Expert Group's Report highlighted that the lack of

“...monitoring and reviewing of Development Plans and how they relate to Traveller accommodation’ poses a ‘major problem.”<sup>62</sup>

This proposed extended review period has the potential to exacerbate the problem identified by the Expert Group rather than solving it. The very nature of many Travellers’ nomadic way of life is that they move one from location to another. As such, there is a significant possibility that Travellers’ needs will not be adequately addressed as a result of the lengthy periods that it is envisaged a development plan will be in being and the lack of review periods. It is essential that, if the State is to meet its obligations towards the Traveller community, there is recognition that the number of Travellers living in a functional area as well as their needs are characterised by a certain level of fluidity. At the same time,

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<sup>59</sup> For the recommendations made by the Office of the Planning Regulator, see: Office of the Planning Regulator, *Traveller Accommodation and the Local Authority Development Plan*, October 2021, p.22., available at: <https://www.opr.ie/wp-content/uploads/2021/10/Traveller-Accommodation-and-the-Local-Authority-Development-Plan-Case-Study.pdf>

<sup>60</sup> Section 41(1)-(2), Planning and Development Bill 2022

<sup>61</sup> Section 41(5)(b), Planning and Development Bill 2022.

<sup>62</sup> The Housing Agency, *Traveller Accommodation Expert Review*, July 2019, Recommendations, page iv, available at: <https://www.housingagency.ie/publications/traveller-accommodation-expert-review-2019>

we are concerned that these proposed lengthy periods for development plans and review periods could result in some Travellers having their access to a nomadic way of life limited because there will be further delays in assessing and providing for their culturally appropriate accommodation needs. We also consider that this would not be in keeping with local authorities' statutory Public Sector Equality and Human Rights duty under section 42 of the Irish Human Rights and Equality Commission Act 2014.

The Expert Group further commented that a '...misalignment of timing and cycles of Traveller Accommodation Programmes and Development Plans' causes significant challenges in respect of the provision of Traveller-specific accommodation.<sup>63</sup>

We anticipate that the longer review periods included in the Bill (as detailed above) will lead to an even greater misalignment with the five-year review periods which are provided in respect of Traveller accommodation programmes under the Housing (Traveller Accommodation) Act 1998.

**The Commission recommends that section 45(3)(g) of the Bill is amended to reflect that local authorities are under obligations to put forward objectives in respect of Traveller-specific accommodation in their respective development plans as opposed to simply setting out statements in respect of same.**

**The Commission recommends that section 41(1)-(2) of the Bill is amended to reflect that development plans will be compiled and finalised in five-year cycles as opposed to the proposed ten-year cycles, with a review period of three-years for each development plan, to bring it in line with the periods provided for in respect of Traveller accommodation programmes under the Housing (Traveller Accommodation) Act 1998.**

**The Commission recommends that if such recommendation is not accepted, the State places the provision of Traveller-specific accommodation in a special statutory category that results in the relevant portion of a development plan being reviewed and updated every five years, in line with a local authority's Traveller accommodation programme.**

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<sup>63</sup> The Housing Agency, *Traveller Accommodation Expert Review*, July 2019, Recommendations, page iv, available at: <https://www.housingagency.ie/publications/traveller-accommodation-expert-review-2019>

**The Commission recommends that the Bill is amended to include provisions which would amend or insert provisions into the Housing (Traveller Accommodation) Act 1998 that place statutory obligations on local authorities to:**

- **specify in their development plans the particular number of Traveller-specific accommodation that will be provided in each five-year period in each category of accommodation (e.g. halting site, caravan, and standalone housing), to include a statutory minimum number of developments for each functional area (to be calculated using statistics regarding the population size of the Traveller community in that area) which should be reviewed every five-year development plan cycle;**
- **particularise cultural amenities that will be developed alongside Traveller-specific accommodation, including amenities such as shops, community spaces, and areas to keep animals where it is not planned for same to be provided on site (such cultural amenities should be specified following a mandatory consultation period in respect of a particular site and a statutory obligation to ensure such amenities are situated within a one-mile radius of each proposed development should also be created);**
- **specify particular lands for every Traveller-accommodation development proposed, with a mandatory obligation to amend a development plan to specify an alternative site should An Coimisiún Pleanála deem a particular site as not meeting planning requirements; and**
- **identify sites in each development plan that are suitable for the development of Traveller-specific accommodation in the following five-year cycle.**

## Enforcement procedures and powers in respect of unauthorised developments

### The current framework and proposed legislative reforms in respect of enforcement notices

The provisions of the Bill that provide for enforcement procedures and measures are likely to have a significant and possibly disproportionately negative impact on the Traveller community, particularly where a local authority has failed in its duties towards those individuals in its capacity as a housing authority. As stated above, eviction procedures which impact upon the Traveller community have been the subject of significant criticism by international monitoring bodies. Under the current planning framework, sections 152-153 of the PDA 2000 and related provisions provide for an enforcement notice procedure.

In our view, there is a strong basis to contend that sections 152-153 of the PDA 2000 do not comply with the requirements of the Constitution, in particular Article 40.5 thereof, and/or are not compatible with the European Convention on Human Rights ('ECHR'), in particular Articles 6 and/or 8 thereof.

We note that doubts<sup>64</sup> have been raised as to the compliance of the enforcement notice procedure with the ECHR given the considerable powers afforded to planning authorities under these provisions which allow them, following the expiration of the period specified in the enforcement notice, to enter onto land and take such steps as are specified in the notice, including the demolition of any structure and the restoration of land,<sup>65</sup> and there is no requirement for prior judicial approval.<sup>66</sup>

We are also of the view that the said statutory procedure is likely to not comply with the requirements of the Constitution considering the principles set out in the judgment of the Supreme Court in *Clare County Council v McDonagh*.<sup>67</sup>

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<sup>64</sup> See the seminal legal text, *Simons on Planning Law* (2021, 3<sup>rd</sup> ed.), paragraph 17-3111.

<sup>65</sup> PDA 2000 Section 154 (6).

<sup>66</sup> It is only if a planning authority seeks to prosecute for failure to comply with an enforcement notice that the matter will be required to be brought before the court.

<sup>67</sup>[2022] IESC 2. See further below.

In our view, there are even stronger arguments to be made that the enforcement notice procedure and mechanisms that flow from it are not compliant and/or compatible with the Constitution and/or the ECHR, given that the High Court has rejected the contention that an enforcement notice issued under sections 152-153 of the PDA 2000 could be challenged on procedural grounds.<sup>68</sup>

Local authorities are generally obliged to take enforcement action where they conclude that an unauthorised development has been or is being carried out.<sup>69</sup> We note that section 153(3) of the PDA 2000 provides that a local authority may take account of certain submissions made to it in relation to an alleged unauthorised development and ‘any other material considerations’. However, the extent to which a local authority is obliged or even has a discretion to carry out a proportionality assessment is questionable in light of section 153(7). Where a local authority is satisfied that an unauthorised development has occurred and is not trivial or minor in nature, the latter statutory provision appears to oblige it to issue an enforcement notice regardless of whether the unauthorised development may be a person’s home or dwelling and/or where it may be disproportionate for it to do so.

An enforcement notice issued in respect of a suspected unauthorised development pursuant to section 154 (following a warning letter having been furnished under section 152 and a decision on enforcement having been made pursuant to section 153 of the PDA 2000) must specify a period in which steps are to be taken to remove, demolish or alter the structure concerned.<sup>70</sup> However, once that period has passed, section 154(6) provides:

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<sup>68</sup> *O’Neill v Kerry County Council* [2015] IEHC 827. See also: *Connors v United Kingdom* (2004) 40 EHRR 189, where it was held by the European Court of Human Rights that judicial review was not sufficient to remedy the absence of procedural safeguards provided to gypsies under a summary eviction procedure.

<sup>69</sup> Section 153(7), Planning and Development Act 2000, provides for a limited exception where a local authority determines that it should not take enforcement action as a result of ‘*compelling reasons*’ for not doing so. Section 291(7)(d) of the Bill contains a similar provision. However, the Commission considers that the exception provided for in these provisions is not clearly defined and it does not place an obligation on a local authority to carry out a proportionality analysis. *Simons on Planning Law* (2021, 3<sup>rd</sup> ed.) contends that section 153 makes enforcement action ‘mandatory’ in certain circumstances: ‘*Thus, where a planning authority establishes, following an investigation, that unauthorised development (other than development that is of a trivial or minor nature) has been or is being carried out and the person who has carried out or is carrying out the development has not proceeded to remedy the position, then it should issue an enforcement notice and/or make an application pursuant to s.160, unless there are compelling reasons for not doing so.*’ (emphasis in original), para. 11-158.

<sup>70</sup> Section 154(6), Planning and Development Act 2000.

“154...(6) If, within the period specified under subsection 5(b) or within such extended period, not being more than 6 months, as the planning authority may allow, the steps specified in the notice to be taken are not taken, the planning authority may enter on the land and take such steps, including the demolition of any structure and the restoration of land, and may recover any expenses reasonably incurred by it in that behalf.”

In our view, effectively, on its face the section and its proposed replacement (section 293 of the Bill, which almost mirrors the current provision) allow for interferences with homes or dwellings without any proportionality analysis having been undertaken and without any court oversight being necessary. We consider that this is not compatible with the judgment of the Supreme Court in *Clare County Council v McDonagh*<sup>71</sup>, or of that delivered in *Meath County Council v Murray*.<sup>72</sup> Those judgments make clear that before any adverse interference with a person’s home or dwelling by the State can occur,<sup>73</sup> a proportionality assessment is required. This is not provided for in section 154 of the PDA 2000 or in its proposed replacement, section 293 of the Bill. We consider that in order for the enforcement notice procedure which currently exists and the similar procedure proposed by the new Bill to be compliant with the requirements of the Constitution and/or the ECHR<sup>74</sup> it is necessary that a proportionality assessment (in the form set out in *Clare County v McDonagh*)<sup>75</sup> be carried out prior to any interference occurring with a development which may constitute a person’s home or dwelling.

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<sup>71</sup> [2022] IESC 2

<sup>72</sup> [2018] 1 IR 189

<sup>73</sup> *Clare County Council v McDonagh* [2022] IESC 2, paragraph 106, puts beyond doubt that a dwelling (within the meaning of Article 40.5 of the Constitution) can include a caravan or mobile home.

<sup>74</sup> For further examples of procedures that were deemed to not be compatible with the ECHR, see: *Pullen v Dublin City Council and Human Rights and Equality Commission, Amicus Curiae and Attorney General, Notice Party* [2008] IEHC 379.

<sup>75</sup> The Court stated that the following matters should be considered: the question of whether any order or penalty sought is mandatory and/or permanent in nature; whether the order or penalty sought is to be imposed upon members of a vulnerable minority group and the impact that may have in light of their particular circumstances; whether the local authority in question has or has not, or whether there is an arguable case that the local authority has or has not, complied with its legal obligation qua housing authority; whether the individuals who it is proposed would be the subject of the proposed penalty or order would be rendered homeless by it; and any other hardship that would be caused to those who would be the subject of the penalty or order as compared to the interference with the property rights of the local authority as landowner - *Clare County Council v McDonagh* [2022] IESC 2, paragraphs 91, 96, 97 and 117.



A failure to comply with the terms of an enforcement notice issued pursuant to section 154 of the PDA 2000 results in a person, who is the recipient of such a notice, being guilty of an offence,<sup>76</sup> which may be prosecuted pursuant to section 157 of the PDA 2000. While a court adjudicating upon a prosecution under section 157 of the PDA 2000 should carry out a proportionality analysis in respect of sentencing, courts do not appear to retain a discretion to not convict a person of an offence where an enforcement notice has been served upon them and not been complied with. The practical effect being that where an enforcement notice has been served in respect of a person's home and/or dwelling and has not been complied with (without any court oversight of the decision to issue the notice), a court must still convict that person no matter the impact and hardship that altering, removing and/or demolishing the unauthorised development may have for them. It is our view that the revised enforcement notice procedure, contained in section 293 of the Bill does not remedy this. Section 293(7) of the Bill is framed in almost exactly the same terms as section 156(8) of the PDA 2000, it states:

“If, within the period specified under paragraph (d) of subsection (2) or such extended period as provided for under subsection (5) or (6), the steps specified in the enforcement notice are not taken, the enforcement authority may, in accordance with section 345 or 346, enter on the land or maritime site and take such steps (including the demolition of any structure and the restoration of the land or maritime site) as it considers appropriate.”

While section 298(7) of the Bill does envisage a defence being possible where a criminal prosecution is instituted against an individual or individuals who have failed to comply with the terms of an enforcement notice within the time prescribed, that defence is similar to that provided for in the PDA 2000, and is limited to individuals who are able to show that the subject matter of the enforcement notice was not an unauthorised development or to situations where such individuals are able to show they took reasonable steps to comply with an enforcement notice.<sup>77</sup>

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<sup>76</sup> Section 154(8), Planning and Development Act 2000

<sup>77</sup> Section 298(7), Planning and Development Bill 2022.

**The Commission recommends that section 293 (and the corresponding provisions) of the Bill is amended so as to ensure that there is court oversight over all actions in respect of alleged unauthorised developments where there is any possible interference with a person's home or dwelling (as understood within the terms of Article 8 of the ECHR and/or Article 40.5 of the Constitution).**

**The Commission recommends that section 293 of the Bill is amended to ensure that local authorities and the courts are mandated by statute to carry out a proportionality assessment taking account of all relevant circumstances prior to any interference occurring with an alleged unauthorised development which may constitute a person's home or dwelling.**

**The Commission recommends that section 293 of the Bill is amended to set out a non-exhaustive list of circumstances to be considered by local authorities and the courts when carrying out a proportionality assessment which should include those which were deemed to be relevant by the Supreme Court in *Clare County Council v McDonagh*.**

**The Commission recommends that consideration should be given to amending the Bill to eradicate the criminal offence that flows from a failure to comply with an enforcement notice where the alleged unauthorised development comprises a person's home or dwelling.**

## **The current framework and proposed legislative reforms in respect of planning injunctions**

Section 160 of the PDA 2000 sets out the current framework governing the process for seeking planning injunctions.

The Superior Courts have held that while it is necessary for a court adjudicating upon an application for an injunction made pursuant to section 160 of the PDA 2000, in relation to an unauthorised development that is a home and/or a dwelling, to carry out a proportionality assessment (as that concept is understood in human rights and

Constitutional law) a local authority is not required to do so before seeking relief from the Court.<sup>78</sup>

Notwithstanding these findings, in our capacity as *amicus curiae* in the case adjudicated upon by the Supreme Court, *Clare County Council v McDonagh*, we argued that previous judgments of the Superior Courts had not considered the obligations placed on local authorities pursuant to section 42 of the 2014 Act and/or section 3 of the European Convention on Human Rights Act 2003. Had they done so, we argued, those courts may have arrived at different conclusions.

We stated:

“Insofar as the High Court judgment in *Waterford City and County Council v. Centz Retail Holding Limited* [2020] IEHC 634 holds that there is never any obligation on a local authority to have regard to factors which are relevant to proportionality before instituting an application pursuant to section 160, relying on *Murray*, the Commission respectfully submits that this is in error, having regard inter alia to section 42 of the IHREC Act 2014, and section 3 of the ECHR Act 2003. The mandatory duty imposed on local authorities by section 42 of the IHREC Act 2014 will in many, if not all, cases of eviction, require an assessment of the proportionality of the consequential interference with a person’s family and/or private life, and home, where the Council itself owes duties to that person in the provision of housing supports. The Council in the herein appeal has statutory duties to the Appellants by administering their application for housing supports, a key distinction with *Waterford County Council v. Centz Retail Holding Limited and Murray*.”<sup>79</sup>

The argument was acknowledged by the Supreme Court but not dealt with substantively.

Section 3 of the ECHR Act 2003 states:

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<sup>78</sup> *Meath County Council v Murray* [2018] 1 IR 189, paras. 62-64; *Waterford City and County Council v Centz Retail Holdings Ireland Limited* [2020] IEHC 634, para. 53.

<sup>79</sup> Irish Human Rights and Equality Commission, *Bernard McDonagh and Helen McDonagh v Clare County Council*, available at: <https://www.ihrec.ie/documents/bernard-mcdonagh-and-helen-mcdonagh-v-clare-county-council/>

“3.(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of State shall perform its functions in a manner compatible with the State’s obligations under the Convention provisions.”

While section 42 of the 2014 Act stipulates:

“42.(1) A public body shall, in the performance of its functions, have regard to the need to –

- (a) eliminate discrimination,
- (b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and
- (c) protect the human rights of its members, staff and the persons to whom it provides services.”

In England and Wales, there are similar provisions that can be compared to both section 160 of the PDA 2000,<sup>80</sup> and section 42 of the 2014 Act.<sup>81</sup> In considering section 187B of the Town and Country Planning Act 1990, the Court of Appeal of England and Wales has stated, in a judgment that was later upheld on appeal by the House of Lords, *South Buckinghamshire District Council v Porter* [2001] EWCA Civ 1549:

“Relevant too will be the local authority’s decision under s.187B(1) to seek injunctive relief. They, after all, are the democratically elected and accountable body principally responsible for planning control in their area. Again, however, the relevance and weight of their decision will depend above all on the extent to which they can be shown to have regard to all the material considerations and to have properly posed and approached the article 8(2) questions as to necessity and proportionality.”<sup>82</sup>

The effect of this, unlike the position that currently pertains in Ireland, is that local authorities in England and Wales are required to carry out a type of proportionality

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<sup>80</sup> Section 187B, (England and Wales) Town and Country Planning Act 1990, which also provides local authorities with the power to seek injunctive relief where a breach of planning control has occurred.

<sup>81</sup> Section 149, Equality Act 2010 (United Kingdom).

<sup>82</sup> *South Buckinghamshire District Council v Porter* [2001] EWCA Civ 1549, per Simon Brown LJ, para. 39.

assessment before seeking injunctive relief. In our view, such an approach is more likely to ensure a planning system that is fully compliant with principles of human rights law.

It would appear to us that it is proposed that section 294 of the Bill will replace the framework set out in section 160 of the PDA 2000 which governs applications for injunctive reliefs in relation to unauthorised developments.

We welcome the inclusion of section 294(3)(e) of the Bill, which introduces a mechanism which may result in more proportionate responses to Travellers' circumstances where they are found to have carried out an unauthorised development but where the proportionate response would be to not immediately evict them from the site they are in occupation of and/or to not direct that they immediately cease the unauthorised development.

The relevant provision now explicitly provides courts adjudicating upon such applications with the power to place a stay on an injunction, if granted:

“294...(3)(e) The court may grant a stay on the execution of a final order made upon an application by an enforcement authority under this section where it is satisfied that special circumstances (which shall be stated in the order) exist to warrant such stay...”

We consider that the fact a court may take account of 'special circumstances' in determining whether a stay should be granted would, in its view, permit it to consider the types of precarious and vulnerable circumstances that members of the Traveller community find themselves in as a result of a lack of adequate and/or culturally appropriate accommodation.

**The Commission recommends that section 294 of the Bill should be amended to place a mandatory obligation on local authorities to carry out a proportionality assessment taking into account a non-exhaustive list of circumstances including those deemed to be relevant by the Supreme Court in *Clare County Council v McDonagh* before seeking injunctive relief from a court.**

**The Commission recommends that section 294 of the Bill should be amended so as to ensure that courts are mandated by statute to carry out a proportionality assessment that takes into account a non-exhaustive list of circumstances including those deemed relevant**

by the Supreme Court in *Clare County Council v McDonagh* above before granting injunctive relief.

## Observations on the Bill and issues which relate to judicial review

### Proposed reforms in respect of notice procedures in judicial review proceedings relating to matters pertaining to planning and development

Section 249(2) of the Bill alters the current position in respect of the requirement to provide notice when seeking leave to apply for judicial review. The current default position is that motions seeking leave to apply for judicial review are made *ex parte*, where an applicant is heard by a court without a respondent, whether it be a local authority or An Bord Pleanála, having been provided with an opportunity to make submissions.<sup>83</sup>

Section 249(2) of the Bill now provides:

“Subject to subsection (6), an application under subsection (1) shall be commenced by motion on notice issued out of the Central Office of the High Court within the period of 8 weeks beginning on the date of the decision, the date of the doing of the act or the date of the failure to perform as the case may be.”<sup>84</sup>

Article 9(4) of the Aarhus Convention provides:

“...the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief, as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.”

We are of the view that the proposed reforms, which require applications for leave to apply for judicial review to be made on notice to a proposed respondent or respondents, have the

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<sup>83</sup> Section 50A(2), Planning and Development Act 2000.

<sup>84</sup> Section 249(6), Planning and Development Bill 2022 relates to seeking an extension of time where an application for leave to apply for judicial review has not been instituted within a period of six weeks.

potential to not comply or, at least, undermine the principles and requirements set out in the said legal provision.<sup>85</sup>

The requirement that a respondent or respondents be placed on notice of such applications has the potential to delay proceedings advancing and to increase costs, thus resulting in some cases not being dealt with in a timely manner and/or becoming prohibitively expensive, particularly for some private citizens.

The UN Special Rapporteur on Human Rights and the Environment has stressed that pursuant to international human rights law, states have procedural obligations to

“...enable affordable and timely access to justice and effective remedies for all [and] to hold states and businesses accountable for fulfilling their climate change obligations.”<sup>86</sup>

While we note the potential for some proceedings to be resolved at an early stage without court time being taken up by an application for leave to apply for judicial review, it is also the case that a proposed respondent will have an opportunity to contest an application for leave to apply for judicial review should they wish to do so. Where an applicant is successful, this will result in it being likely that detailed arguments will be heard twice by a court, at the leave stage and later at the substantive hearing. The Supreme Court has highlighted the delays that can be caused by statutory requirements to seek leave on notice, albeit in a different area of law.<sup>87</sup>

At paragraph 6.2 of the Court’s judgment, Clarke J. stated:

“It is my view that the system of applications for leave on notice (which was designed to weed out unmeritorious applications at an early stage) has had significant unintended consequences. The High Court list is full of cases awaiting a hearing of the leave application precisely because many of the leave applications are

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<sup>85</sup> See also our previous submission on the General Scheme of the Housing and Planning and Development Bill 2019: Irish Human Rights and Equality Commission, *Submission on the General Scheme of the Housing and Planning and Development Bill 2019*, p.16, available at:

<https://www.ihrec.ie/app/uploads/2022/01/Submission-on-the-General-Scheme-of-the-Housing-and-Planning-and-Development-Bill-2019.pdf>, p.14-15.

<sup>86</sup> Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UNDoc. A/74/161, 15 July 2020, para. 64.

<sup>87</sup> *Okunade v Minister for Justice* [2012] 3 IR 152, para.6.2.



opposed thus requiring time for the filing of materials and submissions and, because of the necessarily longer hearing time required for opposed applications, a significant waiting list exists until a sufficient slot for such a hearing can be provided. It seems to me that the concept of leave on notice, while well intended, has turned out to be counter-productive.”

We are of the view that Clarke J’s finding is likely to equally apply to the new notice procedure proposed in the Bill and, if that is indeed the case, it is likely that it will not comply with the requirements of the Aarhus Convention outlined above.

The likelihood that the proposed procedure will also increase costs has the potential to inhibit individual litigants from bringing or advancing legal challenges against decisions relating to the environment, planning and development, and may lead to violations of international law.

**The Commission recommends that the proposed notice procedure set out in section 249(2) of the Bill is amended to retain the current system, whereby applications for leave to apply for judicial review can be made ex-parte with the Court retaining a discretion to direct that such an application is heard on notice where certain circumstances require same.**

## Proposed reforms in respect of the legal standing of non-governmental organisations

Section 249(10) of the Bill provides that a court shall not grant an application for leave unless it is satisfied that an applicant has a ‘sufficient interest’ in the grounds raised in the proceedings, and section 249(10)(c) of the Bill sets out a number of requirements which will relate to non-governmental organisations that seek to advance proceedings relating to actions and/or decisions which pertain to planning and the environment. In particular, it provides that companies may advance proceedings where:

- the company has existed for a period of not less than one year;

- the constitution of the company includes objects relating to the promotion of environmental protection and those objects have been pursued for a period of not less than one year;
- the company has no fewer than ten members; and
- a resolution in accordance with the constitution of the company has been passed prior to the bringing of the application for judicial review authorising it to do so.

In our view, the requirements provide for a more restrictive regime in respect of legal standing for non-governmental organisations as exists under section 50A(3)(b)(ii) of the PDA 2000. The organisation having to be a company (within the meaning of the Companies Act 2014), it having no fewer than ten members, and the need to pass a resolution in accordance with its constitution prior to issuing proceedings, are all new requirements.

These additional criteria should be examined in light of the relevant international human rights law standards.

Article 2(5) of the Aarhus Convention provides a broad definition of what ‘the public concerned’ should be understood to mean, it is:

“...the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”

Article 9(2) of the Convention is also relevant, it established that:

‘...the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose’ of having a sufficient interest.<sup>88</sup>

We acknowledge and welcome the decision to retain the current criterion that non-governmental organisations must have been in existence for a period of one year prior to

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<sup>88</sup> See also Article 11(3) of the EIA Directive and Article 11 of Regulation (EC) No. 1367/2006 (the ‘Aarhus Regulation’) for further broad interpretations of legal standing in this area.

instituting the proceedings, as opposed to the three-year period that was previously proposed.

However, we anticipate that the cumulative nature of the new, more stringent requirements set down by section 249(10)(c) of the Bill (outlined above) will result in significant hurdles, and even barriers being put in the way of organisations that have a bona fide interest and/or that satisfy the definitions set out in the Aarhus Convention and other international instruments from advancing legal challenges in this area.

In our view, the requirements that an organisation must now be a company and have ten members constitutes a regression insofar as the environmental rights of citizens are concerned, in circumstances where no such requirements were contained within the relevant provision of the PDA 2000.

In addition, the requirement that a resolution be passed before proceedings may be instituted is likely to give rise to significant practical difficulties in many instances, in terms of the passing of such a resolution within the proposed time limits for instituting an application for leave to apply for judicial review.

**The Commission recommends that section 249(10)(c) of the Bill is amended to remove the requirements that before an organisation or body may institute judicial review proceedings relating to matters falling within the scope of the Bill it must be a company , have no fewer than ten members, and pass a resolution.**

## Proposed reforms in respect of legal costs

Section 250 of the Bill provides:

“250.(1) the Court shall make no order as to costs in any proceedings relating to non-compliance with national law, or the law of the European Union, relating to the environment unless the Court considers, for stated reasons, that the proceedings are frivolous or vexatious or constitute an abuse of process.

(2) An administrative scheme to deal with costs in Judicial Review proceedings under this Part is to be established by the Minister for the Environment, Climate and Communications, or a body authorised to do so on his behalf, having consulted the

Minister for Housing, Local Government and Heritage, the Minister for Justice, and with the consent of the Minister for Public Expenditure and Reform.”

We consider the effect of the proposed section 250(1) to be that applicants who successfully challenge planning decisions and/or actions relating to the environment on the basis that they contravene either national or European Union law will not be able to recover costs. However, they still run the risk of having costs orders made against them, where a court considers the proceedings to have been frivolous or vexatious or when they are deemed to constitute an abuse of process.

Further, if enacted in its proposed form, it is envisaged that rules in respect of costs in judicial review proceedings will be dealt with by way of an administrative scheme. On its face, it would not appear that any such scheme would itself have a legislative footing.

Article 9(4) of the Aarhus Convention sets out that the court procedures:

‘shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.’<sup>89</sup>

In light of the fact that section 250(2) envisages an administrative scheme in respect of costs being established and because the statements remain relevant in respect of section 250(1) of the Bill, we take this opportunity to reiterate observations previously made in respect of special legal costs rules proposed within the General Scheme of the Housing and Planning and Development Bill 2019 (‘the 2019 General Scheme’),<sup>90</sup> which the Commission notes appear to not feature in the current iteration of the Bill.

Head 6 of the 2019 General Scheme envisaged new legal cost capping arrangements. There would be a cost cap of €5,000 for individuals, €10,000 for groups, as well as €40,000 for defendants. We noted our concern that if enacted, those costs proposals would deter judicial review challenges. Similar to what is envisaged by section 250(1), this would have resulted in those applicants who are successful in litigation not being able to recover their costs if they win a case. We once again highlight that those cost capping measures, and the

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<sup>89</sup> Article 11(4) of the EIA Directive includes a similar provision.

<sup>90</sup> Irish Human Rights and Equality Commission, *Submission on the General Scheme of the Housing and Planning and Development Bill 2019*, p.16, available at: <https://www.ihrec.ie/app/uploads/2022/01/Submission-on-the-General-Scheme-of-the-Housing-and-Planning-and-Development-Bill-2019.pdf>

measures now proposed in section 250(1) are inconsistent with the requirements of Article 9(4) of the Aarhus Convention and Article 10(a) of the EIA Directive, given that procedures must be fair, equitable and not prohibitively expensive. The current proposed costs regime is, in the Commission's view, none of those things.

In addition, we have a concern that the proposals in respect of the establishment of an administrative scheme may not comply with Article 15.2.1° of the Constitution, particularly where other legislative frameworks dealing with costs may still apply.<sup>91</sup>

**The Commission recommends that section 250(1) is amended to ensure that successful applicants in judicial review proceedings relating to environmental and planning matters may recover the entirety of their legal costs, where a court deems that to be in the interests of justice in accordance with established rules in relation to costs.**

**The Commission recommends that the Government reconsiders the proposal for costs to be dealt with in an administrative scheme and instead ensures that all rules in respect of costs are placed on a statutory footing within the Bill.**

## Proposed reforms in respect of the right of appeal

Section 249(15) of the Bill establishes that litigants will no longer have a right of appeal to the Court of Appeal in respect of any applications taken in judicial review proceedings (including applications for leave to apply for judicial review and substantive applications for judicial review).<sup>92</sup> This restriction will not apply to proceedings which give rise to the validity of any law having regard to the provisions of the Constitution.<sup>93</sup>

Instead, the only right of appeal will be to the Supreme Court, where that Court deems the proceedings to meet the threshold provided for in Article 34.5.4° of the Constitution, that is, that the matter gives rise to a question of general public importance and where the interests of justice require it.

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<sup>91</sup> Article 15.2.1 provides that "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

<sup>92</sup> Section 149(15)(a), Planning and Development Bill 2022.

<sup>93</sup> Section 249(16), Planning and Development Bill 2022.

We note that the Superior Courts have previously upheld restrictions placed on the right of appeal including, for example, by requiring that leave to appeal be sought from the trial judge.<sup>94</sup> Even that restrictive regime has been observed to be ‘virtually unprecedented.’<sup>95</sup>

The proposal contained within section 249(15) of the Bill goes a great deal further than this, and extinguishes any right of appeal unless issues of constitutional validity or matters of general public importance are raised. In addition, the aforementioned case, *Illegal Immigrants (Trafficking) Bill 1999* was delivered prior to the Court of Appeal having been established. In light of those observations, different constitutional issues now arise.

Examples of issues that we consider give rise to questions of the Constitutional validity of this provision include the fact that Article 34.4.2 of the Constitution prohibits restrictions being placed on the jurisdiction of the Court of Appeal in respect of matters which relate to validity of any law.

In addition, Article 9(2) of the Aarhus Convention establishes that the public concerned should have wide access to justice in respect of environmental matters, which include planning. This restriction clearly undermines and potentially violates this legal requirement.

We also note that the Oireachtas Joint Committee on Housing, Local Government and Heritage has recommended that the jurisdiction of the Court of Appeal be reinstated in section 249(15) of the Bill.<sup>96</sup>

**The Commission recommends that section 249(15) of the Bill should be amended to reinstate the jurisdiction of the Court of Appeal.**

**The Commission recommends that any restriction on appeals in proceedings involving environmental matters (as currently provided for in the PDA 2000) are removed to ensure compliance with the international legal obligations placed on the State and/or the provisions of the Constitution.**

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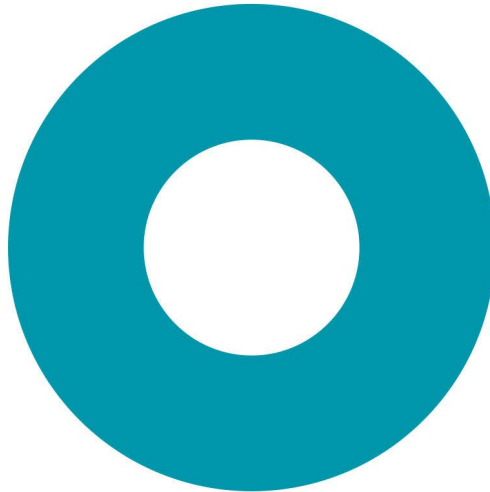
<sup>94</sup> See, for example: *Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, p.400.

<sup>95</sup> Forde and Leonard, *Constitutional Law of Ireland*, (Bloomsbury Professional, 3<sup>rd</sup> ed.), para. 7.19.

<sup>96</sup> Oireachtas Joint Committee on Housing, Local Government and Heritage, *Report on the Pre-Legislative Scrutiny of the Draft Planning and Development Bill 2022*, April 2023, p.19, available at: [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_housing\\_local\\_government\\_and\\_heritage/reports/2023/2023-05-04\\_report-on-the-pre-legislative-scrutiny-of-the-draft-planning-and-development-bill-2022\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_housing_local_government_and_heritage/reports/2023/2023-05-04_report-on-the-pre-legislative-scrutiny-of-the-draft-planning-and-development-bill-2022_en.pdf)



Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas  
Irish Human Rights and Equality Commission



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