Joint Committee on Justice, Home Affairs and Migration

General Scheme of the Civil Reform Bill 2025

Written submission from Fred Logue, Solicitor

5 February 2025

A Chara

1. Thank you for the invitation to make a written submission. My submission will be confined to my area of expertise, namely judicial review and other civil litigation which comes within the scope of the Aarhus Convention. These submission are made in a personal capacity and do not reflect those of my firm or any other body to which I am appointed or involved with.

Introduction – The Aarhus Convention

2. The Aarhus Convention is an international treaty that has been ratified by the EU (2005) and Ireland (2012). Under Article 216(2) TFEU it forms an integral part of EU law. As such, provisions of this convention which have not been implemented in national law may still be directly effective, and if not there remains an obligation for national law to be interpreted to the fullest extent possible in conformity with the convention. Separately the legislature has an obligation under national law to pass laws which are consistent with international treaties such as the Aarhus Convention.

3. One of the defining features of the Aarhus Convention is that it recognises that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations and that to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters.

4. Article 9 of the Aarhus Convention provides for access to justice in relation to (1) access to environmental information; (2) decision-making involving public

participation (for example under the EIA Directive); and (3) in relation to acts and omissions of public and private persons which contravene national law relating to the environment.

5. Article 9(4) provides for certain over-arching standards for access to justice which require parties to the Aarhus Convention to provide adequate and effective remedies including injunctive relief, fair, equitable and timely procedures and procedures which are not prohibitively expensive.

6. The extensive of the case law of the Court of Justice over the last twenty years has clarified many of the important concepts around pre-conditions to litigation, standing, remedies, costs etc. The direction of travel of the Court of Justice case law sees an alignment between Article 9(4) of the Aarhus Convention and Article 47 of the Charter of Fundamental Rights. The consequence of this is that Article 9(4) is rendered directly effective.

7. Historically planning and environmental review has been subject to statutory judicial review, most recently under the Planning and Development Act 2000 which implements many of the Article 9(2)-(4) provisions of the Aarhus Convention. The recent reform of this legislation culminating in the enactment of the Planning and Development Act 2024 has put in place a new statutory framework for planning judicial review and it appears to more Aarhus judicial review will be brought within the scope of this legislation.

8. In summary it would be my recommendation that Aarhus Convention judicial review should be excluded entirely from this bill since it is already subject to its own specific legislation.

Comments on specific heads

<u>Head 8</u>

9. Head 8 provides general provisions for judicial review. It is not excluded by Head 13 and therefore applies to judicial review under the Planning and Development Act 2024.

10. Subhead (5)(a) provides for five criteria which must be satisfied cumulatively before the remedies in subhead (3) may be granted at the discretion of a court.

11. Subhead (5)(b) makes provision for how a court should consider whether an error of law or procedure was material to a decision under subhead 5(a)(iii)

12. Subhead (7) deals with costs

13. Subhead (8) disapplies subheads (5)(a)(ii), (5)(a)(v) and (7)[1] for judicial reviews where section 286(2) of the Planning and Development Act 2024 applies.

14. In my view subhead (1) is incompatible with planning enforcement actions against a public body. An act of unauthorised development by a public body may be challenged under section 160 of the Planning and Development Act 2000 which is neither judicial review or a statutory appeal. There may be other scenarios where the acts or omissions of a public body may be challenged other than statutory appeal or judicial review. This subhead is likely to be unconstitutional and in breach of EU law if it were to exclude such actions.

15. In my view, notwithstanding subhead (8), subhead (5) is not consistent with the Aarhus Convention and applicable EU law.

16. Subhead 5(a)(iii) only applies to decisions (which I assume to be used in the broad sense of acts of public bodies) but cannot apply to omissions, therefore this criterion is inapplicable to application for mandatory orders and therefore subhead (5)(a) is inconsistent with the general scope of subhead (5) which includes applications for relief under subhead 3(b)

17. Subhead (5)(a)(iii) and (5)(b) when read together are incompatible with the Aarhus Convention and EU case law. EU law doesn't require the applicant to show that a different decision would have been made which would have placed the applicant in a material better provisions for relief to be granted, in fact the opposite.

[1] There is a typo in the heads of bill here

18. Aarhus type claims are generally brought either wholly or partially in the public interest and not to materially improve the position of the applicant. Therefore this criterion for relief is unlawful.

19. Furthermore where the decision-making involves public participation the case law says that national courts are not precluded from refusing relief only if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, that will be the case only if the court of law or body hearing the action does not in any way make the burden of proof fall on the applicant and makes its ruling, where appropriate, on the basis of the evidence and, more generally, on the basis of all the documents submitted to it, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making[2].

20. It would be my view that this finding of the Court of Justice would apply more generally to access to justice under the Aarhus Convention.

21. Subheads (5)(a)(iii) and (5)(b) are inconsistent with this case law.

22. Thank you for inviting a submission. I remain available to assist the Joint Committee should it be required.

Fred Logue

Solicitor

5 February 2026

[2] Case C-72/12 *Gemeinde Altrip*