An Bille um Pleanáil agus Forbairt, Oidhreacht agus Craolachán (Leasú), 2021

Planning and Development, Heritage and Broadcasting (Amendment) Bill 2021

Meabhrán Mínitheach

Explanatory Memorandum

AN BILLE UM PLEANÁIL AGUS FORBAIRT, OIDHREACHT AGUS CRAOLACHÁN (LEASÚ), 2021
PLANNING AND DEVELOPMENT, HERITAGE AND BROADCASTING (AMENDMENT) BILL 2021

EXPLANATORY MEMORANDUM

Background

This technical Bill is necessary to allow for the transfer of functions relating to heritage under a number of enactments to the Minister for Housing, Local Government and Heritage.

Normally, such transfers of Ministerial functions are effected through orders made under the Ministers and Secretaries (Amendment) Act 1939. A number of powers and functions in relation to heritage have already transferred to the Minister for Housing, Local Government and Heritage under the Heritage (Transfer of Departmental Administration and Ministerial Functions) Order 2020 (S.I. No. 339 of 2020). However, two problems arise in relation to the transfer of the remainder of the functions relating to heritage to the Minister for Housing, Local Government and Heritage, which must be addressed by the Bill:

Firstly, section 30 of the Planning and Development Act 2000 prohibits the primary Minister under the Act (the Minister for Housing, Local Government and Heritage) from exercising any power or control in relation to any particular planning case. Section 30 must now be amended to provide for the Minister for Housing, Local Government and Heritage to lawfully exercise certain heritage functions proposed to be transferred from the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media, in particular, certain functions regarding commenting on planning applications and draft development plans from a heritage perspective.

Secondly, the Supreme Court decision in the *Mulcreevy* case of 2004 holds it to be impermissible to use secondary legislation (in the form of transfer of functions orders) to merge into one Minister functions the Oireachtas, in primary legislation (an Act), had intended to be divided between two separate Ministers; this being seen by the Court as breaching a key Constitutional principle that only the Oireachtas can make and amend primary legislation. There are certain legislative provisions relating to heritage in which this problem arises and must be addressed by the Bill.

If the Bill is enacted and commenced, the remainder of the heritage powers and functions held by the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media may be transferred to the Minister for Housing, Local Government and Heritage by a Transfer of Functions Order.

Purpose of the Bill

The Bill amends the Planning and Development Act 2000, the Wildlife Act 1976, the Wildlife (Amendment) Act 2000, the European Communities (Birds and Natural Habitats) Regulations 2011, the Broadcasting Act 2009 and makes provision in relation to certain planning matters relating to heritage.

Provisions of the Bill

The Bill contains three parts:

Part 1
Preliminary and General

Part 1 of the Bill contains standard provisions in relation to short title, collective citations, construction, commencement and expenses.

Part 2
Provisions relating to heritage

Part 2 of the Bill contains 5 Chapters and 13 sections in relation to Amendment of the Planning and Development Act 2000, Amendment of the Wildlife Acts, Amendment of the European Communities (Birds and Natural Habitats) Regulations 2011 and Planning matters in relation to heritage.

Chapter 1 - Definitions (Part 2)

Section 3 is a standard provision providing that, in this Part, the "Act of 2000" means the Planning and Development Act 2000 and "Minister" means the Minister for Housing, Local Government and Heritage.

Chapter 2 - Amendment of Planning and Development Act 2000

Chapter 2 contains 8 sections in relation to amending the Planning and Development Act 2000 (Act of 2000).

Section 4. Amendment of section 13 of Act of 2000

Section 4 amends section 13(2)(a) of the Planning and Development Act 2000 by the substitution of "to the Minister, the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media," for "to the Minister, the Minister for Arts, Heritage and the Gaeltacht,", and similarly amends section 13(8)(c) of that Act.

Section 13 of the Planning and Development Act 2000 deals with the adoption by planning authorities of variations to development plans. With regard to sending notice to specified bodies regarding proposed variations and notice to such bodies of the making of a variation, it contains references to the Minister for Arts, Heritage and the Gaeltacht (as the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media was titled in 2014) along with references to "the Minister", the latter being the primary Minister under the Planning and Development Act 2000 (and now titled the Minister for Housing, Local Government and Heritage). Without amendment to primary legislation, the merging (by means of a transfer of functions order) of the notification to the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media under the section with the notification to the Minister exercising the function of primary Minister under the Planning and Development Act 2000 (the Minister for Housing, Local Government and Heritage) would result in a Mulcreevy problem.

Section 5. Amendment of section 30 of Act of 2000

Section 5 amends section 30(2) of the Planning and Development Act 2000 to allow for the Minister for Housing, Local Government and Heritage to exercise certain heritage functions transferred or proposed to be transferred to him or her, in particular, certain functions regarding commenting on planning applications and draft development plans from a heritage perspective.

Section 6. Amendment of section 51 of Act of 2000

Section 6 amends section 51 of the Planning and Development Act 2000 by providing that the Minister for Housing, Local Government and Heritage shall prescribe the form of a record of protected structures.

The existing text of section 51(2) of the Act raises a Mulcreevy problem and this amendment solves this problem by providing for the Minister for Housing, Local Government and Heritage to make regulations regarding the form of a record of protected structures without needing to consult with another Minister.

Section 7. Amendment of section 52 of Act of 2000

Section 7 amends section 52 of the Planning and Development Act 2000 by providing that the Minister for Housing, Local Government and Heritage shall issue guidelines to planning authorities concerning development objectives for protecting structures or parts of structures, which are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest and for preserving the character of architectural conservation areas.

The existing text of section 52(1) of the Act raises a Mulcreevy problem and this amendment solves this problem by providing for the Minister for Housing, Local Government and Heritage to issue the guidelines to planning authorities without needing to consult with another Minister.

Section 8. Amendment of section 177X, Section 9. Amendment of section 177Y, Section 10. Amendment of section 177AB and Section 11. Amendment of section 177AC of Act of 2000

Part XAB of the Planning and Development Act 2000 provides for consultation by the primary Minister under the Act (the Minister for Housing, Local Government and Heritage) with the Minister for Arts, Heritage and the Gaeltacht (as the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media was titled at the time of enactment) as to whether the compensatory measures specified by a competent authority in an imperative reasons of overriding public interest case are sufficient to ensure that the overall coherence of the Natura 2000 network (European sites - Special Areas of Conservation and Special Protection Areas) is protected, where the making of certain land use plans specified in the Act or the granting of consent for a proposed development under the Act would adversely affect the ecological integrity of a European site, but it is proposed that it should still go ahead for imperative reasons of overriding public interest.

Sections 8-11 amend section 177X, section 177Y, section 177AB and section 177AC within Part XAB of the Act. These sections in the Bill provide for the transfer and merger of the consultation functions of the Minister for Arts, Heritage and the Gaeltacht in Part XAB of the Act to the Minister for Housing, Local Government and Heritage resolving the Mulcreevy problem in Part XAB.

Chapter 3 - Amendment of Wildlife Acts

Chapter 3 contains 1 section in relation to amending the Wildlife Act 1976 and 1 section in relation to amending the Wildlife (Amendment) Act 2000.

Section 12. Amendment of section 59 of Wildlife Act 1976

Section 12 amends section 59(3) of the Wildlife Act 1976 by providing that, where the Minister for Housing, Local Government and Heritage is regulating access to or use of the foreshore for nature conservation purposes, those regulations shall be made (i) following consultation with the Commissioners of Public Works, (ii) with the consent of the Minister for Public Expenditure and Reform and (iii), where the regulations relate to foreshore in relation to which functions are vested in a Minister of the Government, other than the Minister for Housing, Local Government and Heritage, with the consent of that other Minister of the Government.

Section 13. Amendment of section 16 of Wildlife (Amendment) Act 2000

Section 13 amends section 16(2)(a) of the Wildlife (Amendment) Act 2000 so that the Minister for Housing, Local Government and Heritage shall seek the observations of another Minister or Ministers of the Government as the Minister considers appropriate in the circumstances in relation to the proposed designation of a Natural Heritage Area (rather than seeking the observations of certain specified Ministers), as well as of the Commissioners of Public Works and the relevant planning authority.

The Ministers from whom observations would be sought would depend of the functions of those Ministers (which may vary over time) e.g. (i) the Minister with responsibility for agriculture, food and the marine, (ii) the environment, climate and communications and (iii) rural and community development. The amendment would also allow for the amended section to function without further amendment in the event that Ministerial heritage functions were, at some future time, separated again from planning functions.

Chapter 4 - Amendment of European Communities (Birds and Natural Habitats) Regulations 2011

Chapter 4 contains 1 section in relation to amending the European Communities (Birds and Natural Habitats) Regulations 2011.

Section 14. Amendment of European Communities (Birds and Natural Habitats) Regulations 2011

Section 14 amends the designation of sites as Special Areas of Conservation and Special Protection Areas and direction provisions of the 2011 Regulations by providing that, in the designation or direction process, the Minister for Housing, Local Government and Heritage will inform another Minister or Ministers of the Government of developments by, for example, (i) causing a copy of the particulars of a candidate Special Area of Conservation to be sent to another Minister or Ministers, (ii) causing notice of the designation of a site as a Special Area of Conservation, an amendment to or the revocation of the designation of a site as a Special Area of Conservation to be sent to another Minister or Ministers, (iii) causing notice of the designation of a site, an amendment to or the revocation of the designation of a site as a Special Protection Area or of a decision not to designate a site as a Special Protection Area to be sent to another Minister or Ministers and (iv) causing a copy of any Direction given under regulation 28(1) of the 2011 Regulations to be sent to another Minister or Ministers.

As with the amendment to section 16(2) of the Wildlife (Amendment) Act 2000, the Ministers to be communicated with would depend of the functions

of those Ministers (which may vary over time) e.g. (i) the Minister with responsibility for agriculture, food and the marine, (ii) the environment, climate and communications and (iii) rural and community development. The amendment would also allow for the amended regulations within the Regulations of 2011 to function without further amendment in the event that Ministerial heritage functions were, at some future time, separated again from planning functions.

Chapter 5 - Planning matters in relation to heritage

Chapter 5 contains 1 section as regards planning matters in relation to heritage.

Section 15. Planning matters in relation to heritage

Section 15 provides, in accordance with the relevant provisions of the Planning and Development Act 2000, for the Minister for Housing, Local Government and Heritage, when he or she is performing a function in relation to heritage:

(i) to make a planning application to a planning authority;

(ii) to make an appeal to An Bord Pleanála;

(iii) to make a request for a declaration to a planning authority, a referral for a decision or apply for a determination to An Bord Pleanála in relation to exempt development;

(iv) to do any act or thing pursuant to the provisions of the Planning and Development Act 2000 relating to any of these matters.

This section will ensure that the Minister is not prevented from engaging in the planning process in respect of the heritage functions, notwithstanding section 30(1) of the Planning and Development Act 2000 which prohibits the Minister for Housing, Local Government and Heritage from exercising any power or control in relation to any particular planning case.

Within various sections of Part 2 of the Bill, there are standard saver provisions providing that no amendment by the Bill shall be construed so as to affect the continuance or validity of anything done under the relevant provisions of the Wildlife Act 1976, the Wildlife (Amendment) Act 2000, the Planning and Development Act 2000 and the European Communities (Birds and Natural Habitats) Regulations 2011.

Part 3

Amendment of Broadcasting Act 2009

Part 3 of the Bill contains two sections in relation to amending the Broadcasting Act 2009.

Section 16. Amendment of section 127 of Broadcasting Act 2009

Section 16 amends section 127(6) of the Broadcasting Act 2009 by the deletion of "the Minister for Arts, Sport and Tourism".

Section 17. Amendment of section 162 of Broadcasting Act 2009

Section 17 amends section 162(5) of the Broadcasting Act 2009 by the substitution of "such Minister or Ministers of the Government as he or she considers appropriate" for "the Minister for Arts, Sport and Tourism".

Arising from the establishment of the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media in 2020, responsibilities for broadcasting and sport, previously under the remit of the Minister for Communications, Climate Action and Environment and the Minister for Transport, Tourism and Sport, now rest with the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media. However, the Minister for Transport has retained

consultation and consent functions under the Broadcasting Act 2009 that are inconsistent with the role.

It is now proposed to address this by these amendments to the Broadcasting Act 2009.

An Roinn Tithíochta, Rialtais Áitiúil agus Oidhreachta,

Aibreán, 2021.

Wt. —. 250. 4/21. Essentra. (87319). Gr. 30-15.