

# AVOSETTA RIGA MEETING

27-28 May 2016

## Selected Recent Developments

### Ireland

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#### Introduction

Following an inconclusive General Election held on 26 February 2016, a Fine Gael-led minority Government took up office on 6 May 2016.<sup>1</sup> The announcement by the Taoiseach (Prime Minister) of the new Government Ministers revealed a very significant reorganisation of the Departments of State. There are three new Departments which are of particular importance from the point of view of environmental protection: the Department of Housing, Planning and Local Government; the Department of Communications, Climate Change and Natural Resources; and the Department of Regional Development, Rural Affairs, Arts and the Gaeltacht. It is striking that the word ‘environment’ no longer appears in the title of any Government Department. The Taoiseach has indicated that many of the ‘environmental’ functions previously vested in the Department of the Environment, Community and Local Government will move to the (new) Department of Communications, Climate Change and Natural Resources. At the time of writing, it is not clear which particular environmental functions will fall under the control of each of the three individual Departments. We await with interest the statutory instruments (secondary legislation) which will settle this matter. It is not clear as yet, for example, which Department will have responsibility for the Environmental Protection Agency or for implementation of the Aarhus Convention.

Predictably, there was public outcry at the omission of the ‘environment’ from the title of any Government Department. A number of NGOs have launched a campaign and a petition calling on the Taoiseach to reverse this decision and establish a “Department of the Environment, Climate and Natural Heritage” which would bring together all environmental functions under one Department.<sup>2</sup> On a positive, note, the explicit reference to ‘Climate

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<sup>1</sup> For the background to this development see generally: *A Confidence and Supply Arrangement for a Fine Gael-led Government* (May 2016) [http://www.finegael.ie/\\_uuid/a9932506-1ad3-4517-8a5c-958190390a40/FF-FG-Agreement-May-3-3pm.pdf](http://www.finegael.ie/_uuid/a9932506-1ad3-4517-8a5c-958190390a40/FF-FG-Agreement-May-3-3pm.pdf).

<sup>2</sup> Petition available at: <https://my.uplift.ie/petitions/the-taoiseach-must-reverse-his-decision-to-abolish-the-department-of-the-environment>. See also, Environmental Pillar Press Release “Taoiseach misses opportunity to reinstate the Department of the Environment” 19 May 2016

Change’ in the new Department of Communications, Climate Change and Natural Resources is a welcome development.

**Update:** On 31 May 2016, Minister Denis Naughten announced in the Dáil (lower house of Parliament) that when the transfer of functions between Government Departments is complete, the Department of Communications, Energy and Natural Resources will be renamed the Department of Communications, Climate Action and Environment. This development is seen as a victory for common sense and is a direct result of the public outcry generated when it was proposed to drop ‘environment’ from the title of any Government Department. It is also notable that the new title of the Government Department will include ‘Climate Action’ as opposed to ‘Climate Change’.

The new Government programme - *A Programme for a Partnership Government* – was published on 11 May 2016.<sup>3</sup> It sets out a wide range of policy challenges and explains in general terms how the new Government intends to address these challenges. It is notable that ten pages of the 155 page document are devoted to climate change, although the content generally is long on ambition and short on specifics.

Also of note is the publication in December 2015 of a White Paper on Energy Policy in Ireland: *Ireland’s Transition to a Low Carbon Energy Future 2015-2030*.<sup>4</sup> This document provides a framework to guide policy in this area to 2030. The key objectives are to facilitate Ireland’s transition to a low carbon energy system and ensure a secure supply of competitive and affordable energy.

### **Climate Legislation**

Ireland recently adopted climate legislation in the form of the Climate Action and Low Carbon Development Act 2015 (10 December 2015).<sup>5</sup> This is a very significant development given that previous efforts to enact climate legislation failed to deliver. Essentially, the Act provides for the approval of Government plans in relation to climate change for the purpose of pursuing the transition to a low carbon, climate resilient and environmentally sustainable economy. These plans include a National Mitigation Plan, a National Adaptation Framework and various sectoral plans. It is notable that in considering a plan or framework for approval, ‘climate justice’ (which is not defined in the Act) is one of the factors to which the Government must have regard.<sup>6</sup> No specifically ‘Irish’ targets are set down in the legislation, which simply refers to the existing and future obligations of the State under international and EU law. The ‘national transition objective’ is stated as being to become a

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<http://environmentalpillar.ie/press-release-taoiseach-misses-opportunity-to-reinstate-the-department-of-the-environment/>.

<sup>3</sup> Text of programme here:

[http://www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme\\_for\\_Partnership\\_Government.pdf](http://www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf).

<sup>4</sup> <http://www.dcenr.gov.ie/energy/en-ie/Pages/Publication/White-Paper-on-Energy-Policy.aspx>.

<sup>5</sup> <http://www.oireachtas.ie/documents/bills28/acts/2015/a4615.pdf>.

<sup>6</sup> Climate Action and Low Carbon Development Act 2015, section 3(2)(d).

low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050. Work was already well underway on Ireland's first National Mitigation Plan before the 2015 Act was passed.<sup>7</sup> A public consultation on the first National Climate Change Adaptation Framework concluded on 20 May 2016.<sup>8</sup>

The Act provides for the establishment of the Climate Change Advisory Council which was formally established on 16 January 2016, having been established on an interim basis on 10 June 2015.<sup>9</sup> The Council, which the Act states "shall be independent in the performance of its functions", comprises a Chair and ten members. Its general functions include advising and making recommendations to the Minister (presumably now the Minister for Climate Change, following the reorganisation of Government Departments mentioned above) and the Government and to review and report on progress. The Climate Change Advisory Council does not, as yet, have a dedicated website presence and has had very limited visibility to date.

### **Developments in the jurisprudence**

There continues to be a significant amount of litigation involving alleged breach of the environmental impact assessment (EIA) directive and / or the Habitats directive by competent authorities, primarily in the case of proposed wind farm development approved by An Bord Pleanála. An account of the series of recent judgments on EIA and Habitats related matters lies beyond the scope of this brief overview.<sup>10</sup> However, there are interesting appeals currently pending in two cases involving challenges to proposed wind farm developments. First, in *Callaghan v An Bord Pleanála*, the Court of Appeal will have to determine whether or not members of the public have a right to be heard before An Bord Pleanála makes a decision as to whether a proposed project should be designated to be strategic infrastructure development. This appeal is scheduled for hearing in October 2016.<sup>11</sup> Second, in *Grace & Sweetman v An Bord Pleanála*, the Supreme Court has granted the applicants leave (permission) to appeal directly to the Supreme Court on a number of

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<sup>7</sup> A public consultation on Ireland's first National Mitigation Plan concluded in July 2015:

<http://www.environ.ie/environment/climate-change/mitigation/minister-kelly-launches-consultation-development-irelands>

<sup>8</sup> <http://www.environ.ie/environment/climate-change/invitation-submit-views-development-irelands-first-statutory-national>.

<sup>9</sup> See further: <http://www.environ.ie/environment/climate-change/climate-change-advisory-council/minister-kelly-appoints-irelands-first>.

<sup>10</sup> Generally speaking, An Bord Pleanála has defended the majority of recent judicial reviews involving EIA and AA successfully. There are, however, two recent decisions of note where the High Court ruled in favour of the applicants for judicial review: *An Taisce v An Bord Pleanála* [2015] IEHC 633 <http://www.bailii.org/ie/cases/IEHC/2015/H633.html> and *Balz and Heubach v An Bord Pleanála* [2016] IEHC 134 <http://www.bailii.org/ie/cases/IEHC/2016/H134.html>.

<sup>11</sup> Text of High Court judgment here: <http://www.bailii.org/ie/cases/IEHC/2015/H357.html> and text of High Court judgment granting certificate to appeal to the Court of Appeal here: <http://www.bailii.org/ie/cases/IEHC/2015/H493.html>.

points arising from their unsuccessful judicial review proceedings in the High Court.<sup>12</sup> The points on which leave to appeal was granted include whether the Supreme Court's jurisprudence on standing in environmental matters needs to be revised in light of recent judgments of the Court of Justice of the EU, in particular Case-137/14 *Commission v. Germany* EU:C:2015:683. The High Court had determined inter alia that the applicants did not have a 'sufficient interest' so as to give them *locus standi* / standing to bring the application for judicial review.

### **Organisational Review of An Bord Pleanála**

In late July 2015, the then Minister for the Environment, Community and Local Government, Alan Kelly TD, appointed an independent Review Group to conduct an organisational review of An Bord Pleanála (the Planning Appeals Board). The Review Group was asked to make recommendations to ensure that An Bord Pleanála is positioned to fulfil its legislative mandate and to meet future challenges. The Review Group was required to consider a range of matters when preparing its report and making recommendations to the Minister including: the anticipated increase in construction activity; the increasingly complex and changing national and EU legislative and policy context within which An Bord Pleanála operates; the need for more effective co-ordination of planning consents with other consent and licensing systems; the increase in litigation in the areas of An Bord Pleanála's work; the implications of the establishment of the Office of the Planning Regulator; and the expanding range of functions assigned to the Board.

The Minister published the Review Group's report on 14 March 2016.<sup>13</sup> The report, which runs to over 250 pages, makes over 100 recommendations across a range of themes, including: a more cohesive planning system; better communication; and an improved legislative base. Among the key findings and recommendations of the review are: simplification of the planning legislation; more open arrangements for membership of the board of An Bord Pleanála; improvements to the processes, systems and practices of An Bord Pleanála; access to environmental and other specialist advice; mandatory pre-application discussions for all potential Strategic Infrastructure Development applications; and changes to the statutory objective timeframes for the work of An Bord Pleanála.

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<sup>12</sup> [2016] IESCDT 29 (26 February 2016); text of Supreme Court Determination here:

<http://courts.ie/Judgments.nsf/5c975dd22ad51b5580257db0003d88a2/bca19d8b82ae0f4880257f6a0037202d?OpenDocument>. Text of High Court judgment here: <http://www.bailii.org/ie/cases/IEHC/2015/H593.html>.

<sup>13</sup> The Review Group's report is available here: <http://www.environ.ie/planning/bord-pleanala/review/organisational-review-bord-pleanala>. See also Department of Environment, Community and Local Government Press Release, 14 March 2016 <http://www.environ.ie/planning/bord-pleanala/review/kelly-welcomes-bord-pleanala-review-findings> and An Bord Pleanála Press Release following publication of the report:

[http://www.pleanala.ie/news/Review/Response%20to%20Publication%20of%20Review%20\[EN\].pdf](http://www.pleanala.ie/news/Review/Response%20to%20Publication%20of%20Review%20[EN].pdf).

The recently appointed Minister for Housing, Planning and Local Government, Simon Coveney TD, has confirmed that his Department is currently considering the contents of the report and has asked An Bord Pleanála to provide its views on the report and the recommendations made therein. Following consideration of the report, and receipt of An Bord Pleanála's views, it is envisaged that a comprehensive implementation plan will be developed. Implementation of a number of the recommendations made by the Review Group will require legislative underpinning.

**20 May 2016**