

Organisational Review of An Bord Pleanála

by the Independent Review Group

February 2016

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Foreword

Planning is all about shaping the places in which we live. Planning decisions are not always easy. They involve judgements based upon balancing competing interests upon which people may have strongly held and divergent views. The issues are often complex and controversial.

The way in which planning decisions are taken also involves striking a balance between many factors. Some of these factors pull in different directions. We want planning decisions to be taken by people of integrity. We want decisions-takers to have fully considered the evidence and for their decisions to be soundly and carefully reasoned. We want everyone to have had a fair say. And we want the decision to be delivered without undue delay and too much cost! Such demands are common to all planning systems in modern democracies.

Many challenges, such as, providing sufficient housing, securing sustainable economic growth, environment protection and addressing climate change, are shared by us all. In meeting these challenges countries can learn from one another. On the other hand, successful planning systems must also be fine-tuned to reflect the culture and values of the country and people they serve. One size does not fit all.

An Bord Pleanála enjoys a well-deserved high reputation for its integrity and professionalism. It is an internationally unique body playing a vital role in the planning system of Ireland. I consider it an honour and great responsibility to have been appointed to chair this Review.

With an ongoing overhaul of its information and communication technology, and expanded areas of competence, An Bord Pleanála faces a future of increasing legal complexity within the planning system and ever-changing environmental and socio-economic challenges. Now is certainly a good time for a high level organisational review in order to assess whether improvements to its operation can be achieved.

This Review Group was set a tight timeframe by the Minister for carrying out its task. Sometimes that is the best way. However, we could not have achieved what we have without the excellent assistance and cooperation of chairperson Dr Mary Kelly, chief officer Loretta Lambkin, the Board members, the Partnership Committee and staff of An Bord Pleanála.

The Review Group was greatly assisted by the high quality consultation responses received both within Ireland and from outside and by the information gathering meetings held with various bodies and organisations for which we are most grateful. I would particularly like to thank Chief Commissioner, Elaine Kinghan of the Planning Appeals Commission, Northern Ireland for her very useful written submissions and for taking time to meet with the Review Group in Dublin.

The Review Group has been well served by its Secretariat; Ronan Mulhall, Colin O'Hehir and Tony Collins. Eoin Corrigan, the Secretariat's chief wordsmith has made a particularly significant contribution to the production of this Report.

I cannot fully express my thanks and admiration for my colleagues in the Review Group, Dr Áine Ryall (Vice-Chair), Michael Malone and Mary Hughes.

Not only are they each highly distinguished in their fields but, for little or no financial reward they have brought a degree of dedication and insight to this task reflective only of those who care deeply for the proper planning of Ireland. It has been a great pleasure to have served with them.

Finally, the great town planner and Carlow native, Manning Robertson, described town planning as 'enabling common sense to be organised.' In carrying out this Review we have tried our best to achieve that goal.

Gregory Jones QC

Chair

February 2016

Introduction

Since its establishment in 1977, An Bord Pleanála has become an integral part of the Irish planning system, providing an independent, impartial and objective appeals process, in addition to numerous other functions. An Bord Pleanála has developed a high level of public and institutional confidence over its lifetime.

Establishment of the Review Group

An Bord Pleanála plays an important role within the planning system. It is now operating in a recovering national economy, faces further potential expansion of its remit, and functions within an increasingly challenging national, European Union (EU) and international legislative and regulatory context. With this in mind, Mr Alan Kelly T.D., Minister for the Environment, Community and Local Government, announced in July 2015 that an organisational review would be carried out to ensure that An Bord Pleanála is appropriately positioned for the future.

Terms of Reference

The Review Group, established by Minister Kelly, was asked to have regard to the following in compiling its report and in making recommendations to the Minister to support An Bord Pleanála in its operations, with a view to ensuring that it is appropriately positioned and fit for purpose from an organisational perspective to achieve its legislative mandate:

- The anticipated increase in construction activity, including on strategic infrastructure projects and Strategic Development Zones (SDZs), and the related volume of planning applications and appeals as the economy recovers, including measures to ensure that appeal and non-appeal cases are discharged in an efficient and timely manner.
- The increasingly complex and changing national and EU legislative and policy context within which the Board operates.
- The need for more effective co-ordination of the planning permission process with other development consent and licencing systems to, inter alia, facilitate compliance with relevant EU Directive requirements.
- The increase in litigation in the area of the Board's work and measures required to address same.
- The appropriateness of the current legislation governing the functions of the Board, its corporate governance structures and the Board appointment process.
- The increase in functions being assigned to the Board, including foreshore licencing under the proposed Maritime Area and Foreshore Bill, co-ordination of 'projects of common interest' (cross-border energy infrastructure projects) etc.
- The systems, procedures and administrative practices employed in the Board, including decision-making processes in determining planning appeals and determinations.
- The optimal organisational structure, including required skillsets, Information and Communications Technology (ICT) requirements, human resource development and capacity requirements, as well as financial resources, to enable it to effectively carry out its functions and meet its statutory remit drawing, as appropriate, on the current internal

business process review as part of the ongoing implementation of the ICT strategy.

- The implications of proposed changes to the planning system, both legislative and structural, including the establishment of the Office of the Planning Regulator.

Membership of Review Group

An expert and experienced external Review Group was appointed to undertake this independent review. The Review Group comprised:

Mr Gregory Jones, QC, Francis Taylor Building, Temple, London (Chair)

Gregory Jones QC (Chair) is in independent practice at the bar of England and Wales at Francis Taylor Building, Temple, London specialising in town and country planning, environmental, European and compulsory purchase law. Gregory is also called to the bars of Ireland and Northern Ireland. He is a Fellow of the Royal Geographical Society, Fellow of the Institute of Quarrying, Fellow of the Linnean Society, and a Legal Associate of the Royal Town Planning Institute. Educated at New College, Oxford University and University College, London, Gregory was a *stagiaire* at the European Commission and Jean Pierre Warner Scholar at the European Court of Justice. Elected in 2013 as an independent Common Councilman of the City of London, he is a member of its planning and transportation committee. Gregory is the Deputy Chancellor of the Dioceses of both Exeter and Truro.

Dr Áine Ryall, School of Law, University College Cork (Vice-Chair)

Dr Áine Ryall (Vice-Chair) teaches and researches environmental law and European Union law at the School of Law, University College Cork. A qualified barrister, she is a member of the Aarhus Convention Compliance Committee, the Environmental Protection Agency Advisory Committee and the Royal Irish Academy Climate Change and Environmental Sciences Committee. She served as a member of the Environmental Protection Agency Review Group which reported in May 2011. Her research focuses in particular on environmental assessment, access to justice, environmental law enforcement and implementation of the Aarhus Convention.

Mr Michael Malone, former County Manager, Kildare County Council

Mr Michael Malone MBA is the former County Manager, Kildare County Council. Michael retired from Kildare County Council in June 2014 following a 42-year career in local government. Starting off at North Tipperary County Council he worked in Galway City, South Tipperary, North Tipperary (as County Secretary), Kerry (Assistant Manager) and in Laois, Kilkenny and Kildare as County Manager.

Ms Mary Hughes, Director of HRA Planning.

Mary Hughes BA MSc Town Planning Dip. EIA/SEA is a Director of HRA Planning. She was elected to the national Council of the Irish Planning Institute (IPI) in 2010 and served as President of the Institute in 2014 / 2015. With in excess of 20 years' experience in planning, Mary's initial years were spent working as a planner with local government before moving to the private sector and becoming an Associate Director of an international transport and planning consultancy. She established HRA Planning in 2005 and continues to

provide planning and environmental services to both public and private sector clients throughout Ireland.

Work Programme of Review Group

As part of its deliberations, the Review Group engaged with interested and relevant parties:

- By holding a public consultation process between September and November 2015;
- By seeking written submissions from certain bodies and organisations with an institutional connection to An Bord Pleanála; and,
- By engaging in a series of information gathering meetings with a range of bodies involved in the planning sector.

Public Consultation Process

The public consultation process was launched on 25 September 2015, with an eight-week response period ending on 18 November 2015. Based on the Terms of Reference of the Review Group, respondents were encouraged to give feedback to the Review Group on a range of issues. This process took the form of an online survey, consisting of a range of questions designed to link responses with the key issues targeted by the Group, with scope for other issues to be raised. Online responses were received from 61 parties.¹ A summary of the responses and the issues raised in the public consultation process is provided on the Review Group's web site (details of which are provided below). The summary is provided as an *aide memoire* for use both

¹ Note that the Review Group required that online responses be identifiable for inclusion.

by the Review Group and the public. It does not purport to be a comprehensive treatment of the responses or of the issues raised. In preparing this Report, the Review Group took into account the responses as they appeared in full.

The Review Group notes that some issues emerged during its consultations which it was not possible to address in the Report due to the nature and scope of the Review, having regard to the Review Group's Terms of Reference. For instance, it has not been open to the Review Group to arbitrate on the issue of the fees charged by An Bord Pleanála, to undertake a detailed review of planning legislation or a forensic mapping of An Bord Pleanála's administrative processes. In carrying out this organisational review of An Bord Pleanála the Review Group has instead focussed, in the main, on strategic matters and issues which impact on An Bord Pleanála's operational performance.

Written Submissions

The Group sought written contributions from 71 bodies, comprising state agencies, groups involved in the planning process, and international counterparts. See Appendix II for further details. In addition to responses made to the online survey, 52 written responses were received by the Review Group, copies of which are available on the Review Group's web site. See Appendix V for a list of the responses.

Meetings with Relevant Agencies and Bodies

The Review Group arranged a series of meetings with the Board of An Bord Pleanála, the management of An Bord Pleanála and 16 other relevant agencies and bodies as part of its information-gathering process. See Appendix VI for details of these meetings. The meetings included a teleconference with Ms Lindsay Nicoll, Chief Reporter to the Scottish Government.

Meetings of the Review Group

The Review Group sat on eight occasions, over a total of 13 days, between its establishment and the finalisation of its Report. A list of the dates of these meetings can be found in Appendix I. In addition to meetings, given the geographic distance between the homes of the Review Group's members, the Review Group sought whenever possible to maximise time efficiency and minimise travel cost by fully utilising opportunities to perform its work using email and teleconference facilities.

Minutes of the Review Group's meetings, in addition to copies of the documents provided to the Review Group and composites of the public consultation responses can be found at:

<http://www.environ.ie/en/AnBordPleanálaReview/>

Following the Review Group's establishment, members of the Review Group also attended several oral hearings, in Dublin and elsewhere, to inform its deliberations.

Chapter One

A Brief Overview of An Bord Pleanála

Chapter One

A Brief Overview of An Bord Pleanála

A Short History

- 1.1 An Bord Pleanála² was established in 1977 under the Local Government (Planning and Development) Act 1976. The motivation in establishing An Bord Pleanála was to transfer the appellate function in relation to the granting or refusing of planning permission from the Minister to An Bord Pleanála, thereby removing decision-making concerning specific planning appeals from direct political control and insulating Ministers from the pressures and controversies occasionally associated with deciding individual appeals.³ The Local Government (Planning and Development) Bill 1973, which resulted in the 1976 Act, had all-party support for the establishment of an independent board to determine planning appeals, although the contemporary Oireachtas debates record some misgivings regarding a perceived reduction in Parliamentary accountability.⁴

- 1.2 During its passage through the Oireachtas certain provisions of the 1973 Bill received considerable attention in successive debates. Matters such as the independence of the chair and Board from the Minister and Government, qualification-related prerequisites of the chair and Board,

² For the purposes of clarity, this Report uses the terms 'An Bord Pleanála' to refer to the entire organisation, including its employees, and 'the Board' to refer to the ordinary members and chairperson of An Bord Pleanála. References to 'the Minister' and 'the Department' refer to the Minister for the Environment, Community and Local Government and the Department of the Environment, Community and Local Government, respectively. As all local authorities are planning authorities, the term 'local authority' encompasses the local planning function.

³ The appeals function had rested with the Minister since the Local Government (Planning and Development) Act 1963.

⁴ For example, during the Second Stage debate in Dáil Éireann on 13 March 1974.

and whether statutory time limits should apply to the work of An Bord Pleanála were the subject of considerable debate. The 1976 Act was somewhat different to the 1973 Bill; in particular, concerns regarding the independence of An Bord Pleanála were intended to be addressed by the requirement that the chairperson⁵ be a High Court judge or a former member of the judiciary.⁶

1.3 In terms of its relationship with Government, An Bord Pleanála was established such that it was independent in terms of planning decision-making, but was required to take account of policy.⁷ An Bord Pleanála had, and has, no role in determining substantive planning policy which reflects its independent role.

1.4 The 1976 Act provided for an independent body consisting of five to eleven members supported by a dedicated staffing structure. The chairperson was appointed by the Government and ordinary members were appointed by the Minister for a term of up to three years. In the beginning An Bord Pleanála's operation largely confirmed the reasoning behind its establishment. However, it is notable that in 1984 the existing Board was reconstituted and new appointment procedures for the chairperson and Board members were introduced which somewhat reduced political latitude in appointing Board members. These changes resulted in a Board which was explicitly full-time and at a greater remove from the national and local political spheres.

⁵ At the time, the 'chairman' under the 1976 Act.

⁶ During the 1980s the requirement of the 1976 Act that the chairperson be a High Court Judge or former member of the judiciary was dispensed with.

⁷ Under the 1976 Act, the Minister was empowered to issue general directives as to policy in relation to planning and development to An Bord Pleanála.

1.5 In its initial years, notwithstanding that the 1976 Act empowered An Bord Pleanála to appoint its own staff, An Bord Pleanála was serviced by staff of the Department of the Environment, including the Department's inspectors who had worked for the Planning Appeals Section within the Department. It was not until 1981 that steps to establish a separate staffing organisation began. Seconded staff were still *in situ* in 1984. The cultural effects however seem to have lingered longer. An Bord Pleanála has been characterised by some former employees as having inherited a 'culture of secrecy', for example concerning process and procedure, and a certain resistance to change, perhaps similar to many other components of the public service at the time.⁸ The intervening decades have seen an improvement in transparency due to changed work practices and some improvements made possible by advances in Information and Communications Technology (ICT). Nonetheless, this historic culture appears to have contributed to the persistence of an ethos of the need for internal independence between inspectors and the Board, specifically in order to reproduce the principle that the relationship between an inspector and a deciding Minister requires an appropriate distance and strict boundaries. However, as the Review Group makes clear in Chapters Three and Four, not only is there no necessity for a culture of quasi-partition within an independent An Bord Pleanála (where the Board members are independent of the Minister),⁹ such a culture inhibits the effectiveness and efficiency of An Bord Pleanála.

⁸ Walsh, M., The Thoughts of an Apostolic Inspector, in An Bord Pleanála 1977-2002 Celebrating the First Twenty Five Years, 2002, page 17.

⁹ This is reinforced by the fact that inspectors are given no delegated powers to decide planning appeals or Strategic Infrastructure Development applications.

- 1.6 Over the years, the full implications of Ireland's membership of the EU, as it affects planning and development matters gradually came to be more fully appreciated and reinforced through a series of court decisions at EU and national level, particularly in relation to obligations arising under the Environmental Impact Assessment Directive¹⁰ and the Habitats Directive.¹¹
- 1.7 A major development for An Bord Pleanála was the consolidation of the planning legislation in the Planning and Development Act 2000.¹² The 2000 Act enlarged the Board, from six to eight members, and widened An Bord Pleanála's role.¹³ Social and affordable homes and Strategic Development Zones were also provided for by the 2000 Act, which had strong implications for An Bord Pleanála,¹⁴ as did the transfer of functions to An Bord Pleanála in relation to the approval of local authority projects requiring Environmental Impact Assessment, compulsory acquisition of lands by a local authority and the approval of roads schemes under the Roads Acts.¹⁵
- 1.8 The Planning and Development (Strategic Infrastructure) Act 2006 was a further important development, since it provided for planning

¹⁰ The EIA Directive (85/337/EEC) and its three amendments have been codified by Directive 2011/92/EU of 13 December 2011. Directive 2011/92/EU has been amended in 2014 by Directive 2014/52/EU.

¹¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

¹² Note that references to Acts of the Oireachtas made in this report generally refer to the Act as amended. For instance, references to the Planning and Development Act 2000 are generally intended to include those amendments which have been made since enactment.

¹³ The Board was subsequently enlarged from eight to ten members by provisions of the Planning and Development (Strategic Infrastructure) Act 2006.

¹⁴ As was acknowledged in a speech given by Mr John O'Connor, then chairperson of An Bord Pleanála, at an Irish Planning Institute Conference held on 6 May 2011.

¹⁵ For a discussion of the impact of changes to legislation on An Bord Pleanála, see Mullally, P., *The Development of the Legislation Affecting the Board*, in *An Bord Pleanála 1977-2002 Celebrating the First Twenty Five Years*, 2002, page 7.

permission concerning proposed developments of strategic importance to be made directly to An Bord Pleanála. Today, such applications form a considerable proportion of An Bord Pleanála's work and accounts for the majority of the oral hearings convened by An Bord Pleanála.

1.9 Since the 2000 Act, An Bord Pleanála has been designated a competent authority for the overseeing of the permit-granting process for the assessment, approval and permitting of cross-border energy infrastructure projects, known as Projects of Common Interest. It is anticipated that forthcoming legislation will assign additional functions to An Bord Pleanála, including foreshore licencing under the proposed Maritime Area and Foreshore Bill.¹⁶

1.10 The Review Group notes that An Bord Pleanála stands at the nexus of a number of ongoing wider societal debates regarding the optimal balance between development, environmental protection and other considerations. Naturally, the operations of the planning system as a whole and of consent granting authorities in particular can generate a considerable degree of controversy. In a sense, An Bord Pleanála can act as a 'lightning rod'¹⁷ for the entire spatial planning and

¹⁶ The General Scheme of which is available online at: <http://www.environ.ie/en/Publications/DevelopmentandHousing/Foreshore/FileDownload,34315,en.pdf>

¹⁷ Some have suggested that, 'The buffer of the Board conveniently [allows] politicians an opportunity to blame bureaucrats in Dublin when required.' O'Leary, S., *A Sense of Place - A History of Irish Planning*, The History Press Ireland, 2014, page 156. This arises particularly where An Bord Pleanála has sought to stand firm in applying Government planning policy on sustainability in areas of often great local controversy, such as, 'once-off' rural housing; see McDonald, F., *A Long-Time Observer in An Bord Pleanála*, in *An Bord Pleanála 1977-2002 Celebrating the First Twenty Five Years*, 2002, page 11, and see also the speech given by Mr John O'Connor, then chairperson of An Bord Pleanála, at an Irish Planning Institute Conference held on 6 May 2011.

development consent system.¹⁸ Indeed, the Review Group considers that most informed commentators would agree that An Bord Pleanála has a well-earned reputation for professionalism, impartiality and integrity, of which An Bord Pleanála is justly proud.¹⁹ The Review Group, has, in making its recommendations, been assiduous in ensuring that these qualities are not only maintained but also enhanced where possible.

1.11 The Review Group notes that this organisational review is not the first such exercise that has been undertaken.²⁰ An Bord Pleanála has been the subject of several reviews since its establishment, which is not unexpected given An Bord Pleanála's role and prominence in the public eye. Some of the previous reports were motivated, in part at least, by concerns regarding output and productivity.²¹

¹⁸ 'Adjudicating on the rights and wrongs of anything can be a very difficult task, even for judges. Planning, in particular involves making hard choices about whether a proposed development would enhance or detract from its setting or, indeed, whether the principles of developing this or that piece of land is acceptable at all.' McDonald, F., A Long-Time Observer in An Bord Pleanála, in An Bord Pleanála 1977-2002 Celebrating the First Twenty Five Years, 2002, page 11.

¹⁹ Letter dated 12 August 2015 from Dr Mary Kelly, chairperson of An Bord Pleanála, to Gregory Jones QC, chair of the Review Group.

²⁰ See Chapter Three, at paragraph 3.4, for a discussion of previous reviews of An Bord Pleanála.

²¹ Indeed, Minister James Tully, when addressing the very first meeting of the Board, is said to have 'asked that [the Board] should give special attention to reducing the time taken to deal with appeals but... acknowledged that very real constraints would face the Board in attempting this.' See O'Donoghue, B., The First Board, in An Bord Pleanála 1977-2002 Celebrating the First Twenty Five Years, 2002, page 9.

Mission and Principal Function

1.12 An Bord Pleanála's current²² Mission Statement²³ is:

*'To play our part as an independent national body in an impartial, efficient and open manner, to ensure that physical development and major infrastructure projects in Ireland respect the principles of sustainable development, including the protection of the environment.'*²⁴

The Review Group is mindful of this current mission statement in making its recommendations. An Bord Pleanála is the national body with responsibility for adjudicating on planning appeals and direct strategic infrastructure development applications. The Board has a quasi-judicial role to determine planning cases and its case work procedures are reflective of the imperative to ensure compliance with the provisions of national, EU and international law and the over-arching legal principles of natural justice.

1.13 An Bord Pleanála's structure of full time Board members is underpinned by legislation, as is its duty and obligation to determine cases before it as expeditiously as possible and generally within the statutory objective period of 18 weeks of receipt under the provisions of the Planning and

²² Following the announcement of this Review by Minister Kelly, An Bord Pleanála issued 'A Statement Note – 2015' stating that it had 'delayed preparation of a new Statement of Strategy to allow any recommendations arising from the Review to be incorporated into strategies for the future. An Bord Pleanála's Strategy Statement 2011 - 2014 will continue in force until a new Strategy Statement is formulated and adopted.' Available online at: http://www.pleanala.ie/home/Strategy_Statement_NoteA.pdf

²³ Available online at:

http://www.pleanala.ie/home/Strategy_Statement_Bi-Lingual.pdf

²⁴ An Bord Pleanála, Annual Report and Accounts 2014, page 3.

Development Act 2000. As noted previously, since its establishment, An Bord Pleanála has assumed significant new functions, in particular in respect of development consent for both publicly and privately promoted major infrastructure projects.

Current Corporate Structure of the Board

1.14 An Bord Pleanála comprises a chairperson and up to nine ordinary members.²⁵ The chairperson is appointed by the Government from a shortlist selected by a committee following a public competition, in accordance with the 2000 Act. The ordinary members are appointed by the Minister from a group of nominees representative of a wide range of sectors of Irish society.²⁶ Planning legislation provides that, in general, a *quorum* for a Board meeting is three Board members with an option for a two-member meeting, subject to Board approval, in circumstances where the chairperson considers it necessary to ensure the efficient discharge of the business of the Board.²⁷ Every decision at

²⁵ The Minister is empowered to increase by order the number of ordinary members under section 104 of the 2000 Act, with any such appointments not exceeding five years. Any such Ministerial order must be laid before each House of the Oireachtas and requires a positive resolution by both Houses of the Oireachtas. In addition to the above, section 104 further provides the Minister may if deemed necessary appoint as a matter of urgency, having regard to the caseload on hand, one or more ordinary members from among the officers of the Department or from among the employees of the Board, for a period not exceeding 12 months. In such scenario, there shall not be any greater than three such appointments at any particular point in time and the number of such appointments shall not exceed one third of the total number of ordinary members at any one time. The latter provisions have been used in recent years to make two temporary one-year appointments to help reduce caseload; both of these appointments were An Bord Pleanála employees.

²⁶ No specific qualifications are required of Board members.

²⁷ The usual three person Board is employed for all cases, except for Strategic Infrastructure Development applications, and includes appeals, Compulsory Purchase Orders, Section 5 Referrals, etc. On occasion (depending on the scale, complexity etc.) a case may be referred to a larger group (e.g. five, seven or all available Board members). The *quorum* for Strategic Development Zone cases is also three Board members, however in practice the majority of these proposals involve large scale and complex developments and have been handled by a meeting of all available Board members. Strategic Infrastructure Development applications are determined by the Strategic Infrastructure Division of the Board, which has

a Board meeting relating to the performance of its statutory functions is determined by a majority of votes cast.

Current Membership of the Board

1.15 The Board currently has a membership of nine: Dr Mary Kelly, chairperson; Mr Conall Boland, deputy chairperson; Ms Fionna O'Regan, Mr Michael Leahy; Dr Gabriel Dennison; Mr Nicholas Mulcahy; Mr Paddy Keogh; Mr Paul Hyde; and, Mr Philip Jones. The terms of office of the current Board members will expire during 2017-19, with the exception of Ms O'Regan whose term of office will expire in April 2016.²⁸

Recent Activity of An Bord Pleanála

1.16 An indication of the current caseload level can be gleaned from An Bord Pleanála's 2015 Casework Report which states that:

- The Board received 1,979 new cases in 2015, as compared with 1,810 in 2014, considerably below the record intake of 6,664 in 2007. The number of cases determined by the Board, at 1,966 in 2015, was an increase from 1,864 in 2014;
- The proportion of planning cases disposed of within the statutory objective period rose from 75% to 80% from 2014 to 2015; and,

five members, including the chairperson and deputy chairperson, with the *quorum* being three members. All cases including strategic infrastructure development applications can also be determined by a meeting of all available Board members if that is so decided by the Board or chairperson/deputy chairperson.

²⁸ The terms of office of the chairperson and deputy chairperson will expire in 2018; the terms of office of four of the other Board members will expire in 2017, the remaining two in 2019.

- The number of normal planning appeals received was 1,646, an increase on the 2014 figure of 1,456. The Board disposed of 1,637 appeals during 2015, an increase on the 2014 figure of 1,572.

1.17 Performance in disposing of planning appeals is outlined in the table below.

Table 1: Case Load Management 2013-2015

	2013	2014	2015
All Case Types Disposed	2,253	1,864	1,966
All Case Types Disposed within Statutory Objective Period*	62%	75%	80%
Normal Planning Appeals Disposed	1,384	1,381	1,637
Normal Planning Appeals Disposed within Statutory Objective Period*	72%	83%	83%

**The Statutory Objective Period is generally 18 weeks from receipt of a case but in all Strategic Infrastructure cases the period is 18 weeks from the last day for receipt of public submissions on the application (this is a minimum period of six weeks from the date of notification/lodgement of the application).*

1.18 An Bord Pleanála agreed a Service Level Agreement with the Department in 2014.²⁹ The Agreement addresses topics such as performance commitments, case prioritisation, and communications. The purpose of the Agreement is to ensure clear service ownership, accountability, roles and responsibilities of both the Department and An Bord Pleanála with a view to ensuring that An Bord Pleanála is

²⁹ The Service Level Agreement was agreed again in late-2015, with minor modifications.

discharging its statutory functions in an efficient and effective manner, and commensurate with the resources allocated to it. The Agreement states that it will be reviewed on an annual basis.

Current and Future Challenges

1.19 Much of An Bord Pleanála's work can be relatively straightforward; however An Bord Pleanála operates within a complex planning system and adjudicates on cases which are controversial and divisive, both within communities and at the national level. Often such cases involve energy generation or distribution infrastructure, waste infrastructure, or legacy issues such as that which arose in respect of quarries. It seems probable that such cases will continue to challenge the entire planning process and broader environmental governance system, especially as it seems likely that planning will continue to grow in complexity and sophistication. Recent flooding is but one example of the type of event that means that the work of An Bord Pleanála will continue to occupy public attention. To meet such challenges and deliver on its public service mandate, An Bord Pleanála must be responsive to new and unanticipated demands; this may be, in part, a question of additional resources but will also require other measures, such as the reallocation of existing resources through restructuring and reskilling.

Chapter Two

A Changing Legal and Policy Environment

Chapter Two

A Changing Legal and Policy Environment

Introduction

- 2.1 An Bord Pleanála operates at the confluence of two major public policy concerns, the achievement of sustainable development and the preservation and protection of the environment. Neither area of public policy is static; the concepts of sustainable development and environmental protection are evolving and can be defined and updated using different mechanisms at the international, EU, national, regional and local levels. Society's changing understanding of these concepts manifests in new and altered policies and laws. It is the role of An Bord Pleanála to apply policy and law in determining appeals, applications,³⁰ and schemes in complex and changing circumstances.
- 2.2 Chapter One provides an overview of the history and current functions of An Bord Pleanála. This Chapter describes in more detail recent and anticipated legal and policy developments and their implications for An Bord Pleanála, such as the expansion of An Bord Pleanála's functional responsibilities and the forthcoming establishment of the Office of the Planning Regulator.

The Policy Context

- 2.3 In view of the recent macro-economic trajectory and projections of continued economic recovery, it seems likely that An Bord Pleanála's

³⁰ Where An Bord Pleanála is acting as a first instance decision-maker.

workload will increase in the coming years. In 2015, An Bord Pleanála disposed of 1,966 cases, compared to 5,801 in 2008; while it seems unlikely that levels of activity will meet or exceed the record 2008 levels of case disposal in the short to medium term, it may well be the case that An Bord Pleanála comes under increasing pressure in the coming years. In that regard, the Review Group notes the current supply difficulties associated with housing markets in urban areas; it seems likely that planning activity associated with residential construction will increase. In any event, it is prudent to plan for expanded activity and the ever-increasing complexity of the planning system.

- 2.4 Aside from the anticipated economic recovery, society's changing requirements in terms of future energy requirements, security, supply and management, and the climate change challenge will impact on An Bord Pleanála. Planning activity associated with energy infrastructure is expected to increase, in line with measures included in, or required under, the recent White Paper on Energy and the Climate Action and Low Carbon Development Act 2015.³¹ Ireland also faces challenges in the coming years in relation to commitments across a range of areas including water quality and wastewater treatment, waste management, nature conservation issues, sustainable transport, air quality and greenhouse gases; many of the responses required to meet national and international obligations will have pressing implications for An Bord Pleanála. The Review Group also notes the growing societal emphasis on health, wellbeing and quality of life. These issues are relevant to proper planning and sustainable

³¹ Department of Communications, Energy and Natural Resources, White Paper on Energy Policy in Ireland – Ireland's Transition to a Low Carbon Economy, 2015. Available online at: <http://www.dcenr.gov.ie/energy/SiteCollectionDocuments/Energy-Initiatives/Energy%20White%20Paper%20-%20Dec%202015.pdf>

development in a contemporary context. As noted in Chapter One events such as the recent flooding in January 2016 highlight that these matters are of widespread concern and seem likely to gain in public prominence.³²

2.5 An Bord Pleanála's role is also widening to incorporate additional elements of the development consent system. In recent years responsibility for Strategic Development Zones, Strategic Infrastructure Development and regularisation and substitute consent in respect of quarries and certain other developments³³ have been assigned to An Bord Pleanála. Among the major additional areas of responsibility which have been conferred on An Bord Pleanála recently, and further responsibilities which will be added in the short to medium term, are:

- An Bord Pleanála has taken on the role of competent authority for Projects of Common Interest under European Regulation 347/2013 on Guidelines for Trans-European Energy Infrastructure. In May 2014, An Bord Pleanála published a manual of procedures for the permit granting process applicable to Projects of Common Interest, and was among the first European competent authorities to do so.³⁴ One Project of Common Interest; the North-South Electricity Interconnector, entered the permit granting process in 2014;
- The Urban Regeneration and Housing Act 2015, which provides for a register of vacant sites and a vacant sites levy in certain areas, is likely to increase An Bord Pleanála's case load; and,

³² Ahlstrom, D., Water, water everywhere but why did we build on flood plains?, article in the *Irish Times*, 5 January 2016.

³³ In the main, developments which were permitted but which have been required to seek retrospective consent for activity which should have been, but was not, subject to Environmental Impact Assessment and/or Appropriate Assessment.

³⁴ An Bord Pleanála, Annual Report and Accounts 2014, page 14.

- The forthcoming Maritime Area and Foreshore Bill, when enacted, will mean that decisions on development consent for projects in the maritime area will be taken within the planning system, i.e. by local authorities or An Bord Pleanála, depending on the location, size, and scale of a project, and on whether an Environmental Impact Assessment is required. While the annual number of such cases determined by An Bord Pleanála is likely to be relatively low, cases are likely to be complex and this area of work will require additional expertise.

2.6 The Planning and Development (Amendment) Act 2015 includes amendments to procedures to be followed in the determination of a Planning Scheme for a Strategic Development Zone by An Bord Pleanála on appeal. This amending legislation adequately addresses concerns that the Review Group previously had in relation to Strategic Development Zones, such that the determination of a planning scheme on appeal to the Board can now be undertaken in a more effective and timely manner. Furthermore, the 2015 Act gives An Bord Pleanála the power to modify a planning scheme following an application by the local authority or agency. Notwithstanding the defined criteria restricting the extent of modifications that can be permitted, such authority to modify will ensure that a Strategic Development Zone can adapt to varying market demands and circumstances. The additional powers provided for in the 2015 Act will, of course, have resource implications for An Bord Pleanála.

2.7 The National Planning Framework, when published, and associated changes to the regional planning tier, will also shape the work of An Bord Pleanála.

2.8 Subsequent chapters will address capacity and performance issues arising from An Bord Pleanála's existing and new responsibilities.

A Changing EU and National Legislative Framework

2.9 Planning law by its nature can be complex, but the unnecessary complexity of the planning laws in Ireland is widely known and has been commented on specifically,³⁵ including by members of the judiciary on a number of occasions, particularly upon the manner by which EU environmental obligations are transposed into domestic legislation.³⁶ The Review Group acknowledges that a complex planning

³⁵ The point is well made by the Bar of Ireland in its response to this Review dated 19 November 2015 which states: 'A serious issue exists and needs to be addressed in relation to the legislation which governs the Planning process and the powers of An Bord Pleanála. This problem has been ongoing for some considerable time. Prior to the consolidation of the legislation in the 2000 Planning and Development Act, the Supreme Court made some pertinent comments in relation to the legislation. In *O'Connell v The Environmental Protection Agency* [2003] I.R. 530 Fennelly J. made the following comment in relation to the powers under the Planning Acts and under the legislation governing the Environmental Protection Agency in the following terms: "It is necessary to steer through what Counsel has aptly described as a statutory maze to uncover the effect the regulations implementing the State's European Union obligations". In a further, and more telling comment, he pointed to the effect the maze had on the ability of the public to interact with that legislation. He stated: "It is regrettable that the rules of law intended to regulate the process in which individual members of the public are supposed to be able to take part cannot be written in more accessible form". Regrettably, since the consolidation of the legislation in 2000 and the significant amendments that have been made thereto, the maze has become more dense, the ability of practitioners, let alone the public, to steer a course through that maze is even more complicated. It is time that a root and branch assessment of that legislation is undertaken in order to make it more accessible by the public and for the benefit of the public.'

³⁶ See, for example: *Kerry County Council v An Bord Pleanála* [2014] IEHC 238, paragraphs 19, 22, 27 and 32; *O'Reilly v Galway City Council* [2010] IEHC 97, paragraph 28; and *O'Connell v Environmental Protection Agency* [2003] IESC 14, paragraph 2. This criticism has not been restricted to the judiciary; see also Scannell, Y., *The Catastrophic Failure of the Planning System*, 33(1) *Dublin University Law Journal* 393, 2011.

code presents operational difficulties for all participants in the spatial planning system, and particularly for consent granting authorities, and is not user friendly for the public or for planning practitioners. The Review Group commends the valuable work of the Law Reform Commission in producing a consolidated Revised Act version of the Planning and Development Act 2000.

- 2.10 An unnecessarily complex and fragmented planning code acts as a barrier to access and must be regarded as a considerable challenge not only for An Bord Pleanála. It is the view of this Review Group that the Government should give prompt consideration to establishing a review³⁷ to address the complexity of planning law. Simplification of the legislative framework would also enable more efficient processes and practices among planning system participants, including An Bord Pleanála.

Recommendation 1: *That a greater emphasis and commitment be made to addressing the complexity of planning law, by codification and consolidation of the legislative framework, with the aim that the planning system operates within a clear comprehensive code. The Government should consider as a matter of priority the setting up of a legislative review with a view to proposing a simplification of the legislation.*

- 2.11 An Bord Pleanála operates in an increasingly litigious environment. Although there is some variation from year to year, the number of

³⁷ Whilst it is beyond the scope of the Terms of Reference of this Review Group to consider how this should be carried out, the Review Group notes, for example, the power of the Attorney General under the Law Reform Commission Act 1975 to request the Law Reform Commission to research and examine particular areas of law for reform.

applications for judicial review of decisions of An Bord Pleanála has followed a generally upward trend in recent years.³⁸ Reasons for this trend include alleged breaches of obligations arising under the Environmental Impact Assessment and Habitats Directives, which are featuring regularly in judicial review proceedings against An Bord Pleanála. In recent years, the Habitats Directive, in particular, has become the focus of attention and the obligations it creates regarding appropriate assessment are obviously proving challenging for An Bord Pleanála. Lord Carnwath's comment that the Habitats Directive 'is particularly significant for the town and country planning systems in the United Kingdom because it imposes obligations not only on how the decision-making must be carried out but also on the decision-making outcome' applies equally to its impact on the Irish planning system.³⁹ Additionally, issues continue to arise around the Environmental Impact Assessment Directive in An Bord Pleanála's decision-making. Alleged inadequacies concerning the reasoning of the Board, particularly when departing from the recommendations of inspectors, have also been raised by respondents to this Review as a factor which has contributed to increased litigation. This issue is addressed in paragraph 4.62 of Chapter Four.

- 2.12 The Review Group notes that the Department is considering convening an Environmental Impact Assessment working group in early 2016, on which planning authorities and An Bord Pleanála would be represented, in relation to the transposition of EU Directive 2014/52/EU. Directive 2014/52/EU provides for considerable amendments to the

³⁸ An Bord Pleanála, Annual Report and Accounts 2014, page 65.

³⁹ Foreword to Jones, G. (Ed), *The Habitats Directive; A Developer's Obstacle Course?*, Hart, 2012.

Environmental Impact Assessment Directive which must be implemented by EU Member States by 16 May 2017. Such a working group should operate as a forum for discussion on aspects of Environmental Impact Assessment-related practices that may be impacted by the requirements of Directive 2014/52/EU, including areas of practice that are considered to be problematic. The Review Group would welcome such an initiative insofar as it better enables An Bord Pleanála to address challenges associated with Environmental Impact Assessment.

2.13 The Aarhus Convention⁴⁰ has created new obligations regarding access to information, public participation and access to justice in environmental matters. The Convention has had, and continues to have, ramifications for how An Bord Pleanála carries out its legislative mandate. The introduction of the special costs rule for certain categories of environmental litigation in 2010 has had considerable implications, particularly as regards An Bord Pleanála's ability to recover its costs when it successfully defends judicial review proceedings. It is arguable that the special costs rule has led to a greater degree of litigation against An Bord Pleanála in that the rule reduced the scope for liability for costs in the event of an unsuccessful challenge to a decision of An Bord Pleanála in certain categories of cases. An Bord Pleanála has observed that the increased volume of cases may, in part, be a consequence of the implementation of the

⁴⁰ United Nations Economic Commission for Europe (UN ECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998. Available online at: <http://www.unece.org/env/pp/introduction.html>

Aarhus Convention / Public Participation Directive⁴¹ including new legal costs rules.⁴²

2.14 Publication of an 'Aarhus Convention Bill' is anticipated in 2016. The Review Group understands that the Bill is intended to consolidate and clarify the existing costs provisions in a single Act, and to provide a statutory basis for other provisions of the Aarhus Convention and related EU Directives.

Wider Environmental Governance

2.15 The Review Group notes that the Environmental Protection Agency Review Group,⁴³ which reported to the Minister in May 2011, recommended that consideration be given to a wider review of environmental governance to identify and address areas of fragmentation and duplication in the context of development consent procedures, Strategic Environmental Assessment, planning enforcement and related matters, with a view to supporting efforts to address infringements of EU environmental legislation.⁴⁴ While noting that the recommendation of the Environmental Protection Agency Review Group includes but plainly also goes beyond the Review Group's remit in conducting an organisational review of An Bord Pleanála, the Review

⁴¹ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. Available online at:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003L0035>

⁴² An Bord Pleanála, Annual Report and Accounts 2014, page 65.

⁴³ Dr Áine Ryall was a member of the Environmental Protection Agency Review Group.

⁴⁴ Environmental Protection Agency Review Group, A Review of the Environmental Protection Agency, 2011, pages 20-24 and Recommendation 7.1.1, page 78. Available online at: <http://www.environ.ie/en/Environment/EPA/PublicationsDocuments/FileDownload,26491,en.pdf>

Group endorses the recommendation, particularly given the points raised by several consultees to this Review concerning a greater need for coordinated environmental governance which is discussed in Chapter 5. The Review Group also considers that the experience of delay in implementing this recommendation reinforces the need for Recommendation 82 of Chapter 5 concerning oversight of the implementation of accepted recommendations from this Review.

Recommendation 2: *That the recommendation of the Environmental Protection Agency Review Group concerning a wider review of environmental governance be implemented as a matter of urgency.*

Establishment of the Office of the Planning Regulator

2.16 The purpose of the Planning and Development (Amendment) Bill 2016, introduced to the Oireachtas in January 2016, is to provide for the implementation of the planning-related recommendations of the Tribunal of Inquiry into Certain Planning Matters and Payments,⁴⁵ including in particular, the establishment of the Office of the Planning Regulator. The Bill provides that the Regulator, which will be independent of the Department, will have powers to facilitate enhanced oversight of the planning system and will:

- Evaluate and assess local authority development plans, variations to development plans, local area plans and regional spatial and economic strategies and make statutory observations and recommendations on the content of such plans and strategies to

⁴⁵ More generally known as 'the Mahon Tribunal', the final report of which was published in 2012.

the relevant local authorities and regional assemblies to ensure that a plan or strategy sets out an overall strategy for the proper planning and development of the area concerned;

- Undertake reviews of the organisation and systems and procedures used by planning authorities and An Bord Pleanála in relation to the performance of their functions under the Planning Acts; and
- Undertake research and conduct programmes of education and training in respect of proper planning and sustainable development.⁴⁶

2.17 The Review Group understands that the primary aim of the establishment of the Office of The Planning Regulator is to provide independent oversight for the purposes of ensuring the optimal functioning of a robust, accountable, transparent and evidence-based planning system that will deliver quality outcomes.

2.18 In terms of the inter-operation of An Bord Pleanála and the Office of The Planning Regulator, on the basis of the information available, the Review Group understands that there will be no functional relationship between the two bodies insofar as the planning decision-making process is concerned. The Regulator will not be a decision-making body in the same manner as An Bord Pleanála and therefore the Regulator will not have any function in respect of individual decisions by the Board. However, a wider strategic oversight role has been given to the Regulator whereby it will have the discretionary function, where it considers it necessary or appropriate, to initiate and undertake a

⁴⁶ The Planning and Development (Amendment) Bill 2016 Explanatory Memorandum. Available online at: <http://www.oireachtas.ie/documents/bills28/bills/2016/116/b116d-memo.pdf>

review of the organisation and systems and procedures used by An Bord Pleanála, as well as local authorities, in relation to the performance of their functions under the planning code. The Review Group understands that such reviews will solely be a matter for the Regulator and the Regulator cannot exercise any of its functions in relation to any particular case with which An Bord Pleanála is either involved or could be involved.

2.19 In view of the functions of the Office of The Planning Regulator as set out in the Planning and Development (Amendment) Bill 2016, as introduced, the Review Group considers the establishment of the Regulator as a positive development, subject to the Review Group's understanding that the forthcoming legislation is not intended to affect the current level of independence of decision-making of An Bord Pleanála. In the event of any doubt emerging on this latter point,⁴⁷ or if the position changes during the passage of the Bill, the issue of An Bord Pleanála's independence should be clarified and addressed before the Bill is enacted.

2.20 The Review Group observes that the Office of the Planning Regulator is intended to have a research role, in the main concerning the operation of the planning system as a whole. The Review Group considers that the Regulator's research role does not obviate the need for An Bord Pleanála to conduct and publish research, on its own behalf and jointly

⁴⁷ The Review Group has noted that concerns exist that 'The establishment of Planning Regulator may be *perceived* as undermining [An Bord Pleanála].' [Emphasis added] Local Authority Members Association Review response dated 18 November 2015.

with the Regulator, to inform the development of guidance and joint guidance documents, as per Recommendation 80 of Chapter Five.⁴⁸

⁴⁸ An Bord Pleanála currently has no explicit statutory function to conduct and publish research, however the Review Group considers that this fact does not prevent An Bord Pleanála from conducting such research with the aim of the wider efficiency and effectiveness of the planning system, such as but not only, in assisting in the development by An Bord Pleanála of the suite of guidance documents in accordance with Recommendation 30. The Review Group notes in particular, the Review response dated 9 December 2015, made by An Bord Pleanála's Partnership Committee, which states at page 3 that, 'the research role is not adequately resourced in the organisation despite the rich sources of information available.' Although improvements have been made, this appears not to be a new issue. The IPC Report: 'An Bord Pleanála the Planning Appeals Board Organisational Review', October 2003, at page 72 recorded in 2003 that An Bord Pleanála's 'research library is under resourced.' The Review Group considers that opportunities could be exploited. In its Review response letter dated 13 November 2015 the Irish Landscape Institute pointed out that 'As the ultimate adjudicator on all major planning applications [An Bord Pleanála] has a massive body of information – plans, reports, EIS, and a knowledge of what represents good/best practice and what is not. This needs to be wielded to improve practice, by (a) making it easily available/searchable – currently only inspector's reports and decisions are available on the website, with application documents retained on the local authority site, (b) publishing annual or bi-annual reports on trends and quality in planning and related (e.g. Landscape Architectural) disciplines.'

Chapter Three
Organisational Structure

Chapter Three

Organisational Structure

Introduction

- 3.1 An Bord Pleanála is a distinctive organisation in the Irish public sector institutional landscape. For whilst there are certain structural similarities with other bodies, such as with the Environmental Protection Agency, An Bord Pleanála is a unique organisation, when considered in terms of its goals, functions, and structure. Since its establishment in 1977, An Bord Pleanála's institutional structure, staffing resources, governance arrangements and other aspects of its organisation have evolved considerably.⁴⁹
- 3.2 As noted in Chapter Two of this Report, the functions of An Bord Pleanála have expanded considerably beyond its initial remit, particularly since 2000; the continued provision by the Oireachtas of new functions to An Bord Pleanála is a tribute to the organisation's standing in the public eye and an endorsement of its performance. It is generally acknowledged that throughout its existence An Bord Pleanála has achieved a high reputation for integrity.⁵⁰ However, it is also claimed by some that the general public regard An Bord Pleanála as a body slow to respond and somewhat distant, sitting in an 'Ivory

⁴⁹ For instance, it was not until 1981 that moves began to provide An Bord Pleanála with a staffing structure separate from that of the Department of Local Government An Bord Pleanála, An Bord Pleanála 1977-2002 Celebrating the First Twenty Five Years, 2002, page 9. See further Chapter One at paragraph 1.5

⁵⁰ Most commentators acknowledge that An Bord Pleanála's reputation for its professionalism, impartiality and integrity, was successfully maintained and enhanced during the challenges of the so-called 'Celtic Tiger' years to the present day, see paragraph 1.10 of Chapter One.

Tower.⁵¹ Such criticism suggests a degree of isolation beyond the legitimate separateness required of any independent public body. The most obvious symptom is the difficulties An Bord Pleanála has experienced in communicating effectively, or as fully as it might, with its stakeholders and the wider public. Elsewhere in this Report, the Review Group has identified particular examples of such difficulties and how they can be addressed.⁵² Less obvious, but just as important are the weaknesses the Review Group has found in the internal communications within An Bord Pleanála itself.⁵³

3.3 Accordingly, notwithstanding An Bord Pleanála's many achievements, the Review Group considers it is timely to consider afresh An Bord Pleanála's structure and management, governance arrangements, staffing, the role of inspectors, and financial and ICT resourcing to meet the evolving new challenges, which are outlined in Chapter Two. Examples include the challenges posed by the additional responsibilities

⁵¹ This is expressly acknowledged by some inspectors of An Bord Pleanála, see for example, the Review response letter from An Bord Pleanála's 'Remotely-based' inspectors, dated 17 November 2015. The remotely-based inspectors were the only grouping of inspectors to engage with the Review consultation and the Review Group appreciates that other inspectors may not agree with the perspective of the remotely-based inspectors. The Royal Institute of Architects of Ireland commented that 'Interaction with [An Bord Pleanála] is seen as faceless' in its Review response letter dated 18 November 2015, under the heading 'Engagement with An Bord Pleanála During the Appeal Process.' Such views are not new, as to which, the Review Group observes that although improvements have been made, the IPC Report: 'An Bord Pleanála the Planning Appeals Board Organisational Review' (October 2003), paragraph 3, at page 62 recorded that concerns had been raised that the 'Perception is that the Board is remote and that regular consultation with stakeholder groups is required.'

⁵² As discussed further in Chapter Five.

⁵³ The Review Group notes that the need internally 'for more effective communication...' was a recommendation of the IPC Report: 'An Bord Pleanála the Planning Appeals Board Organisational Review' (October 2003) at page 30. Furthermore, although no specific examples are given, the Review Group also notes that in its Review response letter, dated 16 November 2015, IMPACT raised concerns about the communication between the Board and inspectors and asked in particular this Review to 'clarify the role of Board members versus the roles of the staff.' The Review Group has sought to clarify both roles in this Report, see, for example, at paragraphs 3.30 and 3.40 below.

given to An Bord Pleanála, changing socio-economic circumstances and the increased sophistication and complexities in the field of planning, which have occurred over the last four decades, including the impact of European Union and international environmental law obligations.

Previous Reports

3.4 A number of formal reports concerning the management, structure and/or processes of or relevant to An Bord Pleanála have been undertaken by external bodies since its establishment:

- The Survey of An Bord Pleanála (1980);
- The Review of An Bord Pleanála (1990);⁵⁴
- The Value for Money Examination of Planning Appeals (2001);⁵⁵ and,
- The IPC Consulting Organisational Review of An Bord Pleanála (2003).⁵⁶

An Bord Pleanála has changed considerably over the years and the four reports have collectively provided the Review Group with useful snapshots of the organisation's evolution. As might be expected there is a considerable degree of overlap among the topics examined in these reports with certain issues recurring, such as:

⁵⁴ The 1990 Review had a relatively narrow focus on matters relating to An Bord Pleanála's throughput of appeals.

⁵⁵ Although the Value for Money examination had a somewhat different remit than the other reports, being concerned with the management of the planning appeals system and the factors impacting on the effectiveness of the system, therefore encompassing the work of planning authorities in addition to An Bord Pleanála.

⁵⁶ Unlike the other reports, the 2003 Organisational Review was commissioned by An Bord Pleanála.

- Organisational structure and reporting lines;
- The role of the Board;
- Managerial authority and performance monitoring;
- Systems and procedures;
- Internal coherence, the integration of the inspectorate with the other sections of An Bord Pleanála;
- The links between An Bord Pleanála and other bodies involved in the spatial planning system; and,
- Quality and consistency of recommendations and decision-making.

3.5 The Review Group's recommendations also traverse some of these topics. The fact that some of these issues recur does not necessarily represent persistent weaknesses within An Bord Pleanála; after all, it would be remiss if similar reports concerning any organisation were not to focus on, for example, issues of organisational efficiency and performance. Even in ideal organisational circumstances broader changes to the public service and ICT advances would require a focus on performance. However, the Review Group does consider that the prolonged prominence of certain issues throughout An Bord Pleanála's institutional lifetime does indicate that certain cultural and organisational challenges remain ongoing.

3.6 Several of the previous reports provided considerable coverage to the functions, duties, and workload of various grades of staff and presented detailed examinations of the internal processes of An Bord Pleanála. The Review Group's Terms of Reference, set out in the Introduction on pages 5 and 6, and its *modus operandi* have precluded such an approach; the Review Group has generally focused on strategic

organisational and operational matters. However, some of the Review Group's recommendations may well inevitably require the carrying out of a consequential and detailed examination of various aspects of the internal working processes of An Bord Pleanála.

The Principle of Independence and An Bord Pleanála

- 3.7 An Bord Pleanála was established to ensure that the public could have confidence in the integrity of the decision-making process with respect to the determination of planning applications. Whilst substantive planning policy is made or directed by national and local government An Bord Pleanála's role, as an independent non-political body, is to provide oversight of the application and execution of policy in respect of individual planning decisions.⁵⁷ Since its establishment, professionalism, impartiality and integrity have been central elements of An Bord Pleanála's institutional identity and of the public's perception of the organisation. To a very large degree, the institutional application of these values has shaped the culture and structure of the organisation. Clearly, it is very important that any changes made to An Bord Pleanála do not compromise society's confidence in the organisation, nor should they damage the self-perception of An Bord Pleanála's staff of their role as custodians of the common good. Nonetheless, the Review Group is of the view that there is merit in

⁵⁷ Despite requests by some consultees to this Review, the Review Group considers it would not be consistent with its independent role for An Bord Pleanála in general, or its Board in particular, to be directly involved in assisting Government in the creation of any *substantive* planning policy, the formulation of which is by its very nature political. The situation in Ireland can be compared, for example, to England and Wales where by stark contrast to An Bord Pleanála, the Planning Inspectorate is not independent of government in its decision-making functions and where the Secretary of State can both make policy and apply it. See e.g. Lord Hoffmann in *R (Alconbury Limited) v Secretary of State* [2003] 2 AC 327 at paragraph 110: 'On matters of policy, the inspector [in England] was no more independent than the Secretary of State himself. But this was a matter on which independence was unnecessary.'

exploring the extent to which the internal practices and culture of An Bord Pleanála may have evolved to become unduly shaped in some quarters by an excessive application of the principle of independence. The Review Group is most specifically concerned about the relationship between the inspectorate of An Bord Pleanála and the remainder of the organisation.⁵⁸

3.8 An Bord Pleanála itself exists as a single statutory body. It has a single legal identity comprising the chairperson and ordinary members.⁵⁹ An Bord Pleanála is entitled to employ persons to assist in its various tasks. It has done so, most obviously for example, by the employment of those who act as inspectors. However, the Review Group considers that the work of An Bord Pleanála is at times hampered by a misunderstanding by some that the inspectors operate within a planning inspectorate separate and independent from the members of the Board. Whilst the term 'planning inspectorate' is a convenient phrase for reference purposes, indeed it is one which has been employed in this Report, it does not appear in the 2000 Act, and it should not be used to suggest that there exists a distinct legal body within An Bord Pleanála. It is evident from the statutory scheme that all those employed by An Bord Pleanála are expected to facilitate the carrying out of the work of the Board. Accordingly, the Review Group considers that it is An Bord Pleanála as a corporate entity which ought to be primarily considered as independent of external interference. The Review Group considers that the respective role of the chairperson, ordinary member and inspector, in particular, should be clarified in accordance with the views

⁵⁸ As discussed at paragraph 1.5 of Chapter One, the origin of this misconception may lie in the fact that the planning inspectors were originally employed directly by the Department of the Environment before being transferred to An Bord Pleanála.

⁵⁹ See sections 103 and 104 of the 2000 Act.

and recommendations expressed by the Review Group in this Report (See e.g., Recommendations 3 and 6).

3.9 The misunderstanding as to the separateness of the Board from its inspectors has also contributed to a view shared by some, but not all, ordinary members of the Board that their role is largely restricted to day-to-day case management.⁶⁰ This is not new. Indeed, the Review Group notes the content of the Survey of An Bord Pleanála, published in 1980, which identified problems relating to insufficient managerial authority including 'insufficient appreciation by some members of the staff of the policies and objectives of the Board.'⁶¹ The 2000 Value for Money Examination of Planning Appeals also noted that 'the Board does not have an internal quality assurance function to review the quality of its decisions,' and that the Board is, 'in effect, the final arbiter in planning matters and the merit of its planning decisions is not subject to any form of independent scrutiny.'⁶² The Examination recommended that 'the Board should consider the introduction of quality review procedures to evaluate whether its objectives are being met in relation to the planning merits of decisions.'⁶³ The Review Group understands that, to date, no comprehensive quality review procedure is in place. The immersion by the Board in so-called 'operational' matters was also noted by the previous IPC Consulting Organisation Review completed in October 2003, which stated that: 'Currently the Board's primary role is

⁶⁰ But see paragraph 3.20 below in respect of the adopted role profile for ordinary Board members. The Review Group also notes that the role profile highlights the need to 'operate to stringent deadlines.'

⁶¹ Organisation Unit of the Department of the Environment and Organisation Division of the Department of the Public Service, Survey of An Bord Pleanála, page 40.

⁶² On Page 12 of Chapter 4.

⁶³ Ibid.

of an operational nature, with little time available for involvement in day-to-day and strategic management issues.’⁶⁴

3.10 Whilst there have been considerable improvements in the last decade the Review Group considers that there is further scope for Board members to contribute to strategic, governance or wider organisational management functions. The Review Group would agree that it would not be appropriate for Board members to micro-manage the work of the inspectors. However, the Review Group is firmly of the view that in order for An Bord Pleanála to operate effectively and efficiently in the disposal of its case load, the Board should, where necessary, give greater strategic leadership and direction to its employees as to how it expects the work to be carried out including, in the case of planning inspectors, its general approach to the process by which reports are produced and evidence gathering is carried out. The current weakness in this regard can be illustrated by the failure of all inspectors to adopt a standardised format of reporting⁶⁵ and the failure to promulgate and secure adherence to its own internal guidance on model planning conditions throughout An Bord Pleanála.

3.11 Certainly, all staff of An Bord Pleanála should have the latitude to perform their duties, not least the inspectorate. The primary role of an inspector is to inform and advise the Board of An Bord Pleanála, in the main by providing a written report and recommendation for the

⁶⁴ At paragraph 4.2 on page 29.

⁶⁵ The Review Group notes that the potential ‘for standardising of inspectors (*sic*) report formats’ was a recommendation of the IPC Report: ‘An Bord Pleanála the Planning Appeals Board Organisational Review’, October 2003, at page 30. It also notes that a standard template exists for inspectors, see Section B of the ‘Submission to Review Group from An Bord Pleanála’, 30 October 2015 at page 37. However, the Review Group understands that not all inspectors follow the template.

Board's consideration, under section 146 of the Planning and Development Act 2000. The Review Group notes that section 146 of the 2000 Act states simply that the Board, or an employee of the Board, 'may assign a person to report on any matter on behalf of the Board.' Section 146 does not include explicit provisions which speak to the independence, or otherwise, of employees of the Board acting on behalf of the Board. The Review Group fully supports the principle that inspectors should be independent when applying their professional judgement, in accordance with the legal and policy framework, to specific cases. However, individual inspectors and the inspectorate collectively are components of a broader organisation and as such inspectors should be subject to managerial oversight and direction, including in respect of:

- The performance of individual inspectors in terms of output quality and volume;
- Adherence, generally speaking, by individual inspectors to a collective institutional interpretation of planning law and policy as defined by An Bord Pleanála as a whole, with a view to consistency of decision-making and coherence between the Board and the inspectorate;
- Engagement with the Board, management and the administrative elements of the organisation; and,
- Change management within the organisation.

This is also important in order to encourage as far as possible a consistency of approach.

Recommendation 3: *The Review Group is firmly of the view that stronger general managerial oversight and direction of the inspectorate, as described above, at paragraph 3.11, would be wholly beneficial and would not diminish the operational independence of inspectors when making reports and recommendations. In Chapter 4 the Review Group has set out recommendations as to how greater strategic direction can be given by the Board to improve the efficiency and effectiveness of the case management process.*

Organisational Structure and Management

3.12 The Local Government (Planning and Development) Act 1976 gave effect to the establishment of An Bord Pleanála, providing for a Board including a chairperson,⁶⁶ in addition to the ability to appoint employees of An Bord Pleanála. The Local Government (Planning and Development) Act 1983 introduced changes in relation to the appointment procedure for Board members and the terms of office for the chairperson and other Board members. The number of Board members has fluctuated over the years, influenced by changes in relevant legislative provisions, additional legal functions and the organisation's expanding workload. The method of appointment of Board members on occasions has led to delays in the filling of positions and on occasion to a high number of vacancies. Recommendation 12 addresses this issue. The current Board structure comprises 10 members, of which nine positions are filled, including the chairperson and a deputy chairperson.⁶⁷

⁶⁶ Originally, a chairman under section 4 of the 1976 Act.

⁶⁷ See Chapter One at paragraph 1.15 for the current composition of the Board.

- 3.13 In order to appreciate fully how An Bord Pleanála functions in terms of case management, it is necessary to understand the current working relationship between its main constituent parts. The organisation consists of the Board, which under the direction of the chairperson is responsible for appraisal and decision-making in relation to the organisation's statutory functions and two support divisions, Planning Operations and Corporate Affairs, which report to a chief officer.
- 3.14 An informal Executive Management Team comprising the chairperson, the deputy chairperson, the chief officer and the two divisional directors responsible for the Planning Operations and Corporate Affairs divisions, meets on a regular basis to consider management issues. Records of the Executive Management Team's decisions are not maintained. A Management Committee, chaired by the chief officer, is made up of manager grades from the Planning Operations and Corporate Affairs Divisions at director, assistant director and senior administrative officer grades, with the deputy chairperson representing the Board. In total the Management Committee has 15 members. Meetings are held monthly and standing items include a review of progress of key performance indicators and planning casework targets. In terms of membership, there is overlap between the Executive Management Team and the Management Committee.
- 3.15 The current operating roles of the Board and the inspectorate are distinct, the former being responsible for appraisal and decision-making and the latter responsible for the assessment of case files and the making of recommendations to the Board. On occasion, inspectors have attended Board meetings to present complex files, however in

general, formal links between the inspectorate and the Board are not as full as they could be.

Recommendation 4: *The Executive Management Team, which currently operates on an informal basis, should be formally recognised and allotted specific responsibilities and performance obligations. The Team should also engage formally with the Board on a regular basis. The respective roles of the Executive Management Team and Management Committee should be clarified. Formal links between the inspectorate and the Board should be strengthened.*

The Quasi-Judicial Role of An Bord Pleanála

3.16 Whilst the Review Group agrees that the Board should ensure that An Bord Pleanála's staff are kept up-to-date on recent legislation and guidelines insofar as it impacts upon their particular work,⁶⁸ it considers that the Board has not fully utilised obvious strategic management tools to assist in the quasi-judicial decision-making process; for example, by seeking to establish guidance for inspectors on recurring procedural issues and other issues. As a consequence, as the Review Group has observed above, the Board has found it necessary to devote great attention to re-examining in considerable detail all matters relating to the inspector's reports and recommendations.⁶⁹

⁶⁸ Review response letter from IMPACT dated 17 November 2015.

⁶⁹ IMPACT puts its understanding of the role as follows: 'The role of Board members is to make decisions on planning appeals and other legislative case work, they are not appointed as directors or assistant directors or managers.' It is interesting to compare this understanding with paragraphs 3.18-3.22 and 3.28-3.30 of this Report. IMPACT considers that: 'General communication between the Board and the inspectorate should be conveyed via Inspectorate management'. IMPACT also states that there: 'Should be greater autonomy for ABP management in their day to day work.' Review responses letter from IMPACT dated 17 November 2015.

3.17 It is, of course, absolutely correct that the Board's decisions should be taken with care and due consideration. However, perhaps due to the functional separation of the Board and the inspectorate which currently exists and the manner in which cases are processed, Board members are often involved in preparing quite detailed technical assessments, which seem to duplicate, in part at least, the work of inspectors. This raises capacity and efficiency issues, particularly as the level of activity within An Bord Pleanála is expected to increase as macro-economic conditions improve. Chapter Four of this Report examines in detail the quasi-judicial decision-making process and makes recommendations for improvement.⁷⁰

Governance

3.18 The Board is primarily concerned with the making of decisions. Everything else should be facilitating that purpose. The Review Group notes that the Organisational Review of An Bord Pleanála of 2003⁷¹ recommended an enhanced role for Board members in matters of oversight, performance trends and the strategic development of the organisation. The Review Group considers it is important that the Board members also appreciate their responsibilities in terms of governance.

3.19 An Bord Pleanála is bound by the Code of Practice for the Governance of State Bodies (the Code of Practice).⁷² Board members and certain other staff are also subject to the Ethics in Public Office Acts of 1995

⁷⁰ Chapter Four, paragraph 4.5.

⁷¹ The IPC Report: 'An Bord Pleanála the Planning Appeals Board Organisational Review' (October 2003) at page 30.

⁷² Available online at:

<http://www.per.gov.ie/en/information-on-governance-frameworks/>

and 2001, which require yearly statements of registrable interests. The current chairperson has overseen the strengthening of various measures and processes to comply with this code, augmenting measures which were previously *in situ*. These include the establishment of an Audit Committee (which is independently chaired), the drafting of an Audit Charter, the preparation of an annual audit programme, the establishment of a Corporate Risk Register, the use of project teams and the regular review of governance reports at Board meetings. Training for Board members has been provided by the Institute for Public Administration in respect of corporate governance; the Institute also confirmed substantive compliance with the provisions of the Code of Practice in 2013. The Code of Practice requires that an annual compliance report is submitted to the Minister, which is provided with the statutorily-required Annual Report. An Bord Pleanála is also a member of the Governance Forum in the Institute of Public Administration and attends sessions regularly.

3.20 The Review Group understands that it was the current chairperson who introduced a written, informal role profile for ordinary Board members, which is used to conduct reviews of individual Board member performance by the chairperson. As stated below, the Review Group welcomes this initiative and considers that the informal role profile fairly summarises the general role and responsibilities of the ordinary member,⁷³ in particular, it makes clear the two principal roles of the ordinary member; namely, the quasi-judicial role and the governance

⁷³ Although as stated at paragraph 3.30 the Review Group considers that the competences and attributes section of the informal role profile which requires an existing good knowledge of planning would need to be amended slightly to reflect the Review Group's view that the role of the Board members should continue to be that of the 'educated layperson' rather than as a technical expert.

role. It explains the governance role of the ordinary member of the Board is 'leading and directing the activities of An Bord Pleanála', 'providing strategic guidance to An Bord Pleanála' and 'monitoring the activities and effectiveness of management to ensure that the objectives of the organisation are met, in line with the Code of Practice for the Governance of State Bodies.' It then goes on to give specific details in connection with what the governance work would entail. However, the Review Group understands from the chairperson that no written job description, informal or otherwise, existed previously. Accordingly, the Review Group appreciates that there well may be some current ordinary members who may have been recruited to the Board upon a different understanding as to the full extent of their role as an ordinary member. Care may therefore need to be taken to ensure that those ordinary members are given further appropriate training in their governance and strategic leadership role.

- 3.21 The informal Executive Management Team and the Management Committee, referred to at paragraph 3.14, fulfil an executive role and act as a conduit between the Board and the wider organisation. Regular general Board meetings are held to consider strategic and operational reports relevant to Board members, including annual work programmes and associated performance indicators, financial reports etc.; however, notwithstanding a widened Board member role in recent years the Review Group considers that the Board should have greater engagement in governance and organisational oversight.
- 3.22 In the opinion of the Review Group there can be little doubt that governance is part of the role of a Board member. If however there

were any doubt about the matter the Review Group would recommend that legislation be added to make the matter clear beyond doubt.

Recommendation 5: *Ordinary members of the Board need to engage to a greater extent in governance to ensure effective oversight of the organisation and, where necessary, to be given appropriate further training.*

The Role of the Board Member

3.23 A number of consultation responses from specialist groups pointed to the need for greater expertise amongst Board members in a variety of areas of expertise. Whilst the ordinary members will inevitably require a relatively high level of education and technical ability, the task of the ordinary members is not that of an expert. As discussed in Chapter One, the 2000 Act which prescribes the selection process for ordinary Board members does not, and never has, required ordinary members to possess particular qualifications. This may be contrasted with tribunals or professional regulatory bodies, whose members are required to possess particular professional qualifications, such as those which pertain to medical members of the Medical Council.⁷⁴

3.24 Amending the 2000 Act to prescribe certain qualifications would change the whole nature and role of the Board. It is not something that the Review Group would recommend. Ordinary members are not expected to be technical planning experts. If they were, then there

⁷⁴ See for example those appointed to tribunals under the Medical Practitioners Act 2007.

would seem little point in their existence at all: one planning expert, the inspector, would be reporting to another planning expert, the Board. Indeed, if that were to be the case, it would be better if all decisions were simply delegated entirely to inspectors - something which the Review Group does not recommend.

3.25 Furthermore, given the wide range of necessary expertise which is required for the determination of the case load of An Bord Pleanála, it is simply impracticable to ensure that the Board contains ordinary members who are expert in each of the various disciplines that arise in the work of An Bord Pleanála. More fundamentally, it would risk undermining the work of the Board and render it more difficult to operate in divisions,⁷⁵ because it might be considered that decisions involving certain areas of expertise should only be taken by a division containing a Board member with that relevant expertise. The need for adequate expertise is a matter that the Review Group considers must be addressed within the inspectorate and wider staffing of An Bord Pleanála, and is discussed further in Chapter Four.

3.26 As stated above, the Review Group considers that the informal role profile⁷⁶ that has been drawn up by An Bord Pleanála for incoming ordinary Board members has been a useful and necessary tool, and should be used as the basis for a publicly available job specification, albeit that such a job description should not include prior planning or environmental experience as a prerequisite. In addition, should the recommendations of this Review be implemented, the Review Group

⁷⁵ The *quorum* of the divisions in which the Board sits are conveniently described at Section C of the 'Submission to the Review Group from An Bord Pleanála' dated 30 October 2015, at pages 38-39.

⁷⁶ An internal, An Bord Pleanála document.

suggests it would be helpful for An Bord Pleanála in consultation with the Department to draw up terms of reference for the roles of chairperson, ordinary member and inspector in the light of the Review Group's recommendations.

3.27 It is also the Review Group's opinion that the role of the chairperson, like that of the ordinary member, does not require the person to be possessed of particular technical expertise as a pre-requisite to appointment. Furthermore, notwithstanding the increased legal complexity of the work of An Bord Pleanála, the Review Group does not consider it a requirement for the chairperson to possess legal qualifications.⁷⁷ The Review Group also considers that An Bord Pleanála's high reputation for integrity is such that there is no need or desirability in returning to a requirement that the chairperson be a high court judge or similar. The role of the chairperson is similar in many respects to that of the ordinary member, save that it is the chairperson's role to provide the overall leadership and direction to An Bord Pleanála. The chairperson is also the most public face of An Bord Pleanála.⁷⁸ The job description of the chairperson should reflect the heightened leadership and governance role played by the chairperson. Although the Review Group considers that the chairperson should continue to participate in chairing case file decisions as part of the chairperson's quasi-judicial function, as discussed in Chapter Four, it

⁷⁷ In the view of the Review Group part of the solution, as discussed in Chapter Four, is for the appointment of suitably qualified in-house legal counsel to advise the Board. This appointment would have consequential implications for the internal structuring of An Bord Pleanála.

⁷⁸ See for example the letter by the current chairperson Dr Mary Kelly to the *Irish Times*, 3 February 2016. Available online at: <http://www.irishtimes.com/opinion/letters/an-bord-plean%C3%A1la-and-corrib-gas-1.2519803>

may well also be the case, that much of the day-to-day chairing of the case file decisions and supervision of the Board divisions is carried out by the deputy chairperson.

Recommendation 6: *That a formal job specification for ordinary Board members should be made publicly available and should reflect the Review Group's view that, whilst useful, ordinary members do not need to have prior knowledge of planning and environmental law and policy; the job specification should however make it clear that successful candidates would be prepared to achieve a working knowledge of these matters. A job specification for Board members should also ensure that emphasis on strategic management and governance of the organisation by Board members. A similar formal job specification for the chairperson should also be produced reflecting also the heightened leadership and governance role played by the chairperson. In addition, the Review Group suggests it would be helpful for An Bord Pleanála in consultation with the Department to draw up terms of reference for the roles of chairperson, ordinary member and inspector in the light of the Review Group's recommendations.*

Recommendation 7: *A suitable induction course and other necessary training should be arranged for new ordinary Board members and the chairperson followed as appropriate by continuing training.*

The Functions of the Chairperson and Ordinary Member

- 3.28 Legislation provides for the role of the chairperson and Board members as being responsible for the appraisal of case files and associated

decision-making. The chairperson, under section 110 of the 2000 Act has the function of ensuring the efficient discharge of the business of the Board and of arranging the distribution of the business of the Board among its members. The Review Group considers that there is, however, a growing necessity on the chairperson, with the support and assistance of the Board, to give greater weight to the managerial and governance functions in order to ensure the organisation fulfils its statutory remit effectively.

Chairperson

- 3.29 In recent years, the emphasis of the role of the chairperson has changed with a greater importance being placed on management and governance. The Review Group considers that the provisions of section 110 of the 2000 Act, and the fact that the chairperson is the accountable officer, gives the chairperson primary responsibility for the management, governance and performance of An Bord Pleanála and the legislative flexibility to undertake these tasks. As discussed in Chapter Two, the Review Group considers that current and future challenges facing An Bord Pleanála require clear lines of authority in order to effectively lead the organisation in responding to and delivering on its public service mandate. The chairperson's authority as the leader and manager of An Bord Pleanála is, in the opinion of the Review Group, beyond question. However, should there be any doubt concerning the chairperson's leadership platform, the Review Group would certainly recommend this should be addressed in legislation with a view to providing clarity. Full managerial authority should rest with the chairperson, with appropriate support functions and governance

obligations placed on the Board members. This is necessary to ensure that the chairperson and Board members have adequate legal authority to deliver on their management and governance responsibilities.

Ordinary Member

3.30 As stated above at paragraph 3.23 the membership of the Board is intended to represent that person's role as the 'educated⁷⁹ man or woman on the street' (or the 'educated layperson') informed by the technical planning expertise and judgements provided by the inspectorate. Their decisions should be taken in accordance with the law and should take into account the same factors as those considered by the inspectors. Planning often involves making hard judgement calls between competing factors; the 2000 Act provides that the Board in making a decision may differ from the recommendation made by an inspector, and it is fundamental that the Board exercises its own judgement when coming to a view. However, the Review Group considers that with greater managerial oversight of, and of strategic direction given by the members of the Board to, the inspectorate, as per Recommendation 16, the instances of disagreement should become less frequent.

⁷⁹ The word 'Educated' is used only in the sense that the technical nature of some of the work means that the person would need a certain level of academic ability in order to perform the role.

Appointment Process

- 3.31 Existing Board membership skills include professional expertise in spatial planning, environmental matters, engineering, architecture and the law. These are, of course, useful skills, but as the Review Group has already made clear, it is of the view that the Board is not intended to be a panel of technical experts and that possession of a particular technical skill should not be a prerequisite for becoming a Board member.⁸⁰
- 3.32 The Review Group considers that the role of, and method of nomination by, prescribed bodies in the appointment of Board members by the Minister is outdated. At present, the chairperson generally has minimal input to the Board member selection process, despite the chairperson's responsibilities and that Board members operate within An Bord Pleanála under full-time contracts.
- 3.33 The sequencing of terms of office of Board members is not adequately managed to avoid significant numbers of vacancies potentially arising within a short time frame, thereby harming continuity of knowledge and expertise among the Board. Four members of the Board were appointed in May 2012 and therefore will, in the normal course, hold office for a term of five years, potentially resulting in a somewhat depleted Board in 2017.⁸¹

⁸⁰ Newly appointed Board members would be expected to be able and willing to participate on an induction course on matters related to planning and to be updated on developments in the field as appropriate.

⁸¹ The Minister may specify the exact term of office of a Board member, however it may not exceed five years. Re-appointment of Board members is provided for in the 2000 Act.

Recommendation 8: *The list of prescribed bodies that nominate candidates for appointment by the Minister, as set out in section 106 of the 2000 Act, is outdated and should be reviewed to include representation of society's wider interests. The system by which prescribed bodies nominate persons for membership of An Bord Pleanála should continue, subject to the following recommendations, but all nominated persons should be subject to a selection process by the Public Appointments Service in a manner broadly consistent with appointments to other public bodies.*

Recommendation 9: *Two Board members should be recruited through open competition and should be selected for Board membership by the Public Appointments Service in a manner broadly consistent with appointments to other public bodies.*

Recommendation 10: *To encourage engagement in the appointment process from a wider pool of candidates, the process concerning the selection of Board members should be amended, with a view to greater transparency and public awareness of Board member duties and required qualifications.*

Recommendation 11: *Consideration should be given to an advisory or more expanded role to the chairperson or deputy chairperson in the recruitment process for all ordinary Board members.*

Recommendation 12: *Termination of contracts of employment for the Board members should be sequenced to achieve an approximate 20% turnover on an annual basis.*

The Overall Structure of the Divisions of Planning and Corporate Affairs

- 3.34 The contribution of inspectors to the activities of An Bord Pleanála is a crucial aspect of the organisation's overall performance. In general, inspectorate teams and administrative processing and drafting teams are responsible for dealing with cases from specific geographical areas of the country; cases are distributed to teams assigned on a county basis.
- 3.35 Sitting under the director of planning are 46.7 inspectorate staff⁸² comprising three assistant directors of planning, 25.2 senior planning inspectors and 18.5 planning inspectors. The Strategic Infrastructure Development Section has one assistant director of planning whilst the Appeals Section has two assistant directors of planning.
- 3.36 The Review Group considers that the lines of reporting and boundaries of responsibility between the assistant directors of planning, senior planning inspectors and planning inspectors are unclear. Whilst the role of the assistant director of planning is clear in the management and day-to-day organisation of Strategic Infrastructure Development cases and appeals, the role of senior planning inspectors is less so. The job description for a senior planning inspector suggests significant management functions in terms of the day-to-day operations of Area Teams and the mentoring of planning inspectors. However the Review Group has been advised during its consultations that in practice the typical day-to-day work of a senior planning inspector and planning inspector are often directly comparable. In part, these arrangements

⁸² References to staff numbers are to whole-time-equivalents.

appear to reflect a manifestation of the over-emphasis on internal independence within An Bord Pleanála, as discussed at paragraphs 3.7 to 3.9.

3.37 The Review Group considers that appropriate oversight and mentoring of junior staff by more senior staff is necessary to ensure effective and consistent report writing and assessment. Oversight and mentoring would ensure a more effective structure to ensure the dissemination of knowledge and information as well as facilitating regular feedback on team performance.

3.38 It would appear that senior planning inspectors and planning inspectors prepare reports and make recommendations with little oversight from the relevant assistant directors of planning.⁸³ Reports and recommendations do not formally pass through the assistant directors of planning for oversight prior to consideration by the Board. There is no formal review to ensure consistency in presentation, of conditions or of the recommendations being made. However, assistant directors of planning and the director of planning do provide the link between the Board and the inspectorate in terms of clarifying planning matters and disseminating information.

3.39 The 'main block of staff' in the Secretariat/Legal team is 'wholly engaged in the drafting of Board decision orders relating to planning decision (drafting section)'. 'Legal work derives directly from

⁸³ See also the Review response letter from An Bord Pleanála's 'Remotely-Based' planning inspectors, dated 17 November 2015 which suggests that the mentoring and management role carried out by senior planning inspectors is limited. The remotely-based inspectors were the only expressly identified grouping of inspectors to engage with the Review consultation and the Review Group appreciates that other inspectors may not agree with the perspective of the remotely-based inspectors.

operational case work.⁸⁴ The Review Group notes that there is no professionally qualified lawyer⁸⁵ employed within the Secretariat/Legal section. The Review Group addresses this matter further in Chapter Four at paragraphs 4.69 to 4.71 in connection with Recommendation 65 that An Bord Pleanála should employ in-house legal counsel.

Recommendation 13: *Formal, hierarchical links and lines of reporting, oversight and management from assistant director of planning, to senior planning inspector, to planning inspector, should be strengthened considerably.*

Recommendation 14: *Regular and detailed briefing sessions are necessary within and between Area Teams to facilitate consistency and provide regular feedback on team performance.*

3.40 As noted previously, independence is an integral part of An Bord Pleanála's operations and has contributed to its reputation for professionalism and impartiality. However, to facilitate more effective and consistent decision-making, greater interaction both between the inspectorate and the Board and within the inspectorate itself is required to facilitate the sharing of knowledge, expertise and policy. The Review Group notes that the overturn rate of the substantive recommendations of the inspectorate ranges from 12.6% to 19.9% of all cases formally determined by the Board.⁸⁶ In recent years, the majority of overturn decisions involved a Board decision granting permission in

⁸⁴ Conveniently set out in the 'Corporate Affairs Profile' provided to the Review Group dated 13 October 2015.

⁸⁵ That is, a barrister or solicitor.

⁸⁶ Measured annually, from 2005 to 2014. Data provided by An Bord Pleanála to the Review Group.

circumstances in which a refusal was recommended by the inspector. Aside from the rate of overturn, the Board also frequently makes changes to the details of conditions, such that for cases which are not overturned, there are often substantial differences between the inspector's recommendation and the final decision made by the Board. The Review Group considers that high rates of overturn and of modification to inspectors' recommendations indicate internal inconsistency within An Bord Pleanála, which should be addressed, in particular, by measures to strengthen managerial oversight and direction, as per Recommendation 3 of this Chapter.

Recommendation 15: *Within the inspectorate, stronger oversight and management is required to ensure consistency of approach and recommendation, including report style and format, the wording of planning conditions and overall recommendations prior to issuing to the Board.*

Recommendation 16: *Biannual seminars should take place involving inspectors and the Board to disseminate An Bord Pleanála policy and to identify and address consistency issues, clarify approaches and brief on recent and forthcoming policy and legislative changes.*

- 3.41 The skills, education and expertise of An Bord Pleanála's inspectors are an important resource. Planning is a dynamic discipline and it is necessary for planners to up-skill as the nature of An Bord Pleanála's business evolves. In this regard the Review Group notes that several of An Bord Pleanála's inspectors are qualified in a range of other disciplines including Environmental Impact Assessment, Environmental

Engineering and Coastal Zone Management, in addition to their professional planning qualifications.⁸⁷

3.42 While the continuing professional development of inspectors is important to maintain a robust appeals system, inspectors must primarily remain professional planners, the core skills of which are based on the technical analysis of files and the making of recommendations. The planner is distinguished from other sectoral professionals by his or her primary focus on the interests of society as a whole. The primary obligation of planners is to serve the common good and this facilitates balanced decision-making. However, it is widely accepted that the operations of An Bord Pleanála in determining cases can be extremely complex and often require specialist environmental expertise. Professional planners cannot be expert in every discipline and there is a need to secure relevant professional expertise from time to time.

Recommendation 17: *Having regard to the approach already pursued in local authorities where internal expert reports are secured from different sections of the local authority in question, An Bord Pleanála should retain (consistent with any legal procurement and other requirements) a framework panel of professionals with expertise across all relevant areas. Such resources can then be called upon, when and if required, in a timely manner.*

⁸⁷ The Review Group notes that there is no statutory requirement for inspectors to be 'professional planners' (see section 146 of 2000 Act) although the Review Group understands that only one non-planner has been employed as an in-house inspector by An Bord Pleanála (that post was filled by an engineer). Other non-'professional planners' have reported to An Bord Pleanála on cases in the role of external consultants. A number of non-planners continue to fulfil a 'reporting inspector' role in Fire Safety and related cases as distinct from consultants advising an in-house reporting professional planning inspector on a particular aspect of a case.

3.43 There is precedent for such an approach as An Bord Pleanála has on occasion procured external expertise to advise on particular cases. This approach would be supported by independent expert reports from the statutory prescribed bodies, such as the National Parks and Wildlife Service. Other specialist bodies, some of which maintain their own panels of specific expertise, can also assist An Bord Pleanála in its identification of appropriate experts.⁸⁸

3.44 Given the very considerable environmental considerations currently influencing planning decisions there may be a need for more regular access to technical environmental specialists. This issue was raised by some responding to the Review Group's public consultation process and it was highlighted that An Bord Pleanála requires ongoing assistance in this area to make informed, quality decisions. Such expertise is necessary particularly having regard to the impending transposition of Directive 2014/52/EU which introduces changes in Environmental Impact Assessment requirements across the EU, in addition to the evolving interpretation of the requirements of the Habitats Directive. Technical specialists could contribute to the formation of an Environmental Division within An Bord Pleanála and be retained on a limited duration contract basis in the first instance. Their primary role would be to advise inspectors and the Board and provide necessary technical advice.

Recommendation 18: *A section comprising of environmental and other necessary specialists should be established within An Bord Pleanála to*

⁸⁸ See further in Chapter Five.

advise inspectors and the Board and to provide necessary technical advice.

3.45 Over the past 12 years An Bord Pleanála has operated a 'Remote Inspectorate Team' located outside of Dublin, based in different regions across the country, primarily working from home. The team brings many benefits including regional representation, maintains a strong link to rural Ireland, and has evident cost efficiencies when files are distributed on a locational basis. There has been a decline in the number of remote inspectors over the last year from a team of six to four inspectors. The diminished staffing level raises the question as to the standing of the team within An Bord Pleanála. The potential benefits of adopting more innovative forms of flexible working arrangements must be explored, particularly if An Bord Pleanála wishes to enhance its reputation as an employer of choice, with a cadre of inspectors from across the Country. Many public bodies operate flexible working arrangements, facilitated by ICT solutions which support remote working. Potential concerns regarding performance and oversight are often addressed using performance management measures to monitor performance and output.

3.46 It is important that 'remote' should not be equated to 'isolated.'⁸⁹ Regionally based inspectors have indicated a sense that promotion prospects can be limited because of a tendency to view regionally based staff as possibly not being able carry out the necessary

⁸⁹ See also the Review response letter from An Bord Pleanála's 'Remotely-Based' planning inspectors, dated 17 November 2015. The remotely-based inspectors were the only grouping of inspectors to engage with the Review consultation and the Review Group appreciates that other inspectors may not agree with the perspective of the remotely-based inspectors.

managerial and mentoring role required of a 'senior inspector'.⁹⁰ The Review Group is not aware of any specific evidence that points to actual difficulties in this regard given that recruitment follows public sector guidelines. Instead it is the Review Group's view that to the degree any issues with regard to development of regionally based staff might be perceived, such issues stand to be addressed in the context of the wider recommendations regarding the management of the Board's inspectorate and opportunities for professional and personal development therein. Moreover, the Review Group considers that the appellation 'remote' or 'remote based' for non-Dublin based inspectors is inconsistent with the collegiate ethos to be promoted within An Bord Pleanála and suggest that a better or more accurate title might be 'Regionally-based An Bord Pleanála Inspectors'. Flexible working arrangements are available to all other, non-regionally based inspectors with laptops, cameras and other devices provided as required to enable off site case assessment and report preparation. The Review Group understands from An Bord Pleanála that inspectors, other than regionally based inspectors, are required to attend the office three days a week. However, the Review Group has been informed by An Bord Pleanála that the potential benefits of PLEAN-IT in enabling more innovative forms of flexible working arrangements is being explored to ensure that An Bord Pleanála is an employer of choice with a *cadre* of inspectors from across the country. This should be included in the revised workforce plan which the Review Group has suggested (see Recommendation 23).

⁹⁰ The Review Group notes that An Bord Pleanála rejects the suggestion of any such promotion bar and has advised that a 'remote planning inspector' was promoted to a senior planning inspector post in 2015.

Recommendation 19: *The Remote Inspectorate Team would appear to add value from a service perspective and its purpose and position within the overall organisation, including the title of non-Dublin based inspectors, must be re-evaluated in order to ensure through innovative approaches to flexible working the members of the Team are a fully integrated part of the inspectorate.*

- 3.47 A theme which emerged during the Review Group's consultation process is that of limited career prospects for inspectors, particularly for those who may wish to move to senior positions beyond An Bord Pleanála. It has been suggested that inspectors have encountered difficulties competing for external positions due to a perceived lack of diversity in planning and management experience. Greater mobility for planning inspectors through secondment arrangements and lateral transfers could provide a wider institutional experience for inspectors, and facilitate inter-institutional understanding and links; recommendations in that regard are made in Chapter Five.

Recommendation 20: *The current organisational structure of An Bord Pleanála should be reviewed in order to meet expanding challenges and public expectations. In particular, a new dedicated unit should be established under the direct supervision of the chief officer (ultimately reporting through the chief officer to the chairperson and the Board) to lead and drive change initiatives, new centralised communications policies and practices, research facilities and to address the range of*

*additional expertise required to support the needs of the whole organisation.*⁹¹

Information and Communication Technologies Resources

3.48 Previous reports concerning An Bord Pleanála have highlighted the positive potential of renewed ICT systems. Currently, the processing of files by An Bord Pleanála is almost entirely paper-based. Many procedures have remained substantially unchanged for considerable periods of time, with high levels of administrative inputs dedicated to validation, screening and other checking processes, in addition to file assessment and reporting by the inspectorate. Lengthy manual processes have dictated the time frames for case management of files, including oral hearings and associated decision-making procedures.

3.49 Based on a completed feasibility study and needs analysis, An Bord Pleanála has drawn up an ICT strategy for the planning and implementation of a new system, known as PLEAN-IT, which is intended to improve the service it offers to the public, introduce efficiencies, and reduce costs and risks. The process commenced in 2014 and is intended to culminate in a fully integrated internal digital system by 2017, and will include:

- An online facility for the submission of planning appeals, applications and other related documents, which will replace outdated manual systems thereby affording more efficient and enhanced services for

⁹¹ Communications and research are themes which are discussed further in Chapter Five. The issue of secondment of An Bord Pleanála staff to other appropriate public sector organisations is also relevant and is discussed in Chapter Five.

internal and external users as well as improving the way tasks are structured and undertaken;

- A Case Management System to manage workflows, documents and records for processing and deciding of planning applications and appeals; and,
- GIS with interactive mapping functionality and support for geo-spatial analysis, available to An Bord Pleanála's staff and the public.

3.50 The new system will be supported by appropriate changes to policies, procedures and processes. Governance structures and an implementation team have been put in place to oversee the delivery of the PLEAN-IT project. A budget line of €2.9 million has been allocated to An Bord Pleanála to fund implementation. An Bord Pleanála anticipates that the automation of work flows will release resources to other activities or new functions. The extent and impact of change will be determined and managed as the project develops, commencing in 2016 and in tandem with detailed design of systems.

Recommendation 21: *The PLEAN-IT system is primarily intended to meet the needs of An Bord Pleanála and its customers. However, compatibility with the systems used by statutory and other stakeholders will be an important element of its effectiveness, given the extent to which An Bord Pleanála works with other organisations, as discussed in Chapter Five. Engagement with statutory and other stakeholders should commence as soon as possible to ensure that systems are developed in a co-ordinated fashion to facilitate the appropriate sharing and transfer of electronic data across institutional boundaries. The Department*

should oversee efforts to integrate PLEAN-IT with other institutional components of the planning and consent granting system.

Staffing

- 3.51 An Bord Pleanála currently employs approximately 130.1 whole-time-equivalent staff.^{92 93 94} Setting aside the Board, structurally An Bord Pleanála is divided into two units; the Planning Operations Division and the Corporate Affairs Division, with 77.5 and 49.7 staff employed in each Division, respectively. A Divisional breakdown of An Bord Pleanála's staff complement and an organogram is included in Appendix X.
- 3.52 Approximately 60% of An Bord Pleanála's employees work within the Planning Operations Division. The Division includes an inspectorate of 45 professional planners, many of whom are qualified in other disciplines including environmental assessment, environmental engineering and coastal zone management. The remainder of the Planning Operations staff provide managerial and administrative support to the inspectorate.
- 3.53 The Review Group notes that the Organisational Review of An Bord Pleanála, completed in 2003, placed considerable weight on an internal reorganisation using integrated teams comprising inspectors and administrative staff in the Planning Operations Division. Implementation of this recommendation to date seems to have been

⁹² References to staff numbers in this section are to whole-time-equivalents, unless otherwise stated.

⁹³ Some personnel work reduced or atypical hours, hence the fraction.

⁹⁴ An Bord Pleanála has, on 28 January 2016, received sanction from the Department to fill nine posts: three planning inspectors, three executive officers and three administrative assistants.

limited, as this Division remains divided along technical and administrative lines.

- 3.54 The Corporate Affairs Divisions incorporates the HR, ICT, Finance, Facilities and Environmental Management and Secretariat Sections, thereby providing support to the organisation as a whole and also supporting the work of the Board by providing secretarial and drafting services, and legal work.
- 3.55 A small, recently established unit of 1.9 personnel sits outside of the Divisional structure and reports directly to the chief officer; this unit is responsible for implementation of the PLEAN-IT project, in addition to audit and procurement functions.
- 3.56 The recruitment moratorium, which has applied across the public service until relatively recently, has had a marked impact on An Bord Pleanála. Staff numbers, excluding Board members, have reduced from a level of 172 in 2007 to a current level of *circa* 130, almost all of whom are over the age of 30. However, the Review Group notes that a certain degree of staff continuity is welcome; the 2003 report on An Bord Pleanála stressed the negative impact of high levels of staff turnover, including a 'haemorrhage' of experience and difficulties replacing skilled employees.⁹⁵ However, opportunities to engage senior inspectors (which now account for a large proportion of the inspectorate) in management functions have not been fully utilised.⁹⁶

⁹⁵ The IPC Report: 'An Bord Pleanála the Planning Appeals Board Organisational Review' (October 2003) at page 51.

⁹⁶ The consultation response to the Review Group made by the remotely-based inspectorate of An Bord Pleanála stated that senior inspectors are not engaged in staff development. The remotely-based inspectors were the only grouping of inspectors to engage with the Review

3.57 The contraction in employee numbers has reduced opportunities for internal mobility and development; however the Review Group considers that the challenge of reduced resources has not been used as an opportunity to introduce improvements to structures or processes as fully as it may have. A Partnership Committee, consisting of management and staff representation, meets monthly to consider existing challenges, emerging new ideas and proposed changes.

3.58 In the past, An Bord Pleanála has used 'fee-per-case' consultant planners and planning consultancy firms to supplement the capacity of the inspectorate at times of high volume. The Review Group considers that its recommendation concerning improved efficiency should generally avoid the need for fee-per-case inspectors and consultancies.

Recommendation 22: *In the event that An Bord Pleanála re-introduces the use of fee-per-case inspectors and the use of consultancies, appropriate mechanisms to ensure the highest standards of quality, integrity and consistency should be put in place; An Bord Pleanála should explore the procedures used elsewhere to secure these aims, such as the use of the fee-per-case Ombudsman employed by the UK Financial Services Ombudsman.*

3.59 During the consultation period, the remuneration package associated with certain senior management positions within An Bord Pleanála was raised as an issue. The Review Group has not been tasked with an examination of the remuneration packages associated with An Bord

consultation and the Review Group appreciates that other inspectors may not agree with the perspective of the remotely-based inspectors.

Pleanála's staff. Furthermore the results of ongoing ICT projects as well as implementation of the recommendations of this Report are likely to involve a detailed reconsideration of existing staff arrangements (see e.g. Recommendation 23). However, the Review Group considers that it is obviously important that all remuneration packages not only reflect the levels of technical skill, experience required, and the responsibilities associated with a post, but should also ensure that there are relative differentials among staff to reflect and encourage those with leadership responsibilities. Such differentials would also encourage career development.

Recommendation 23: *A revised workforce plan should be prepared by An Bord Pleanála and agreed with the Department, based on the need for additional expertise and the introduction of modernised structures and systems associated with the PLEAN-IT project. Consideration to be given to ensuring that all remuneration packages not only reflect the levels of technical skill, experience required, and the responsibilities associated with a post, but should also ensure that there are relative differentials among staff to reflect and encourage those with leadership responsibilities. The revised workforce plan should also reflect the Review Group's recommendation concerning in-house legal counsel and greater legal scrutiny of the reasons for Board decisions, as recommended in Chapter Four.*

Recommendation 24: *An Bord Pleanála should continually review the skills base of its inspectors and provide appropriate training and development through the Performance Management Development*

System to its inspectors, including targeting specific disciplines, which complement the planning discipline.

Recommendation 25: *In view of the reaffirmation of the Performance Management Development System under the Civil Service Renewal Plan, the full potential of the System should be pursued in the mutual interests of the organisation and staff.*

Financial Resources

3.60 The funding of An Bord Pleanála is met to a considerable degree by way of Exchequer grant, which amounted to 82% of total income in 2014.⁹⁷ Much of the remaining 2014 income arose from fees relating to normal appeals and strategic infrastructure. The following tables set out An Bord Pleanála's income and expenditure in 2014.⁹⁸

Table 2: An Bord Pleanála's Income 2014

Income	€
Oireachtas Grant	12,138,105
Fees (appeals & Referrals)	1,182,411
Strategic Infrastructure Fees and Cost Recoupment	1,427,545
Miscellaneous	6,469
Deposit Interest	3,908
Deferred Funding for Superannuation	3,450,000
Transfer from Capital Account	48,710
Total	18,257,148

⁹⁷ As the €3,450,000 deferred funding for Superannuation is a purely notional figure.

⁹⁸ An Bord Pleanála, Annual Report and Accounts 2014, page 107.

Table 3: An Bord Pleanála's Expenditure 2014

Expenditure	€
Salaries, Allowances and Superannuation	14,067,510
Establishment Expenses	1,897,058
Operating Expenses	3,499,155
Total	19,463,723

- 3.61 The deficit in 2014 was €1,206,575 and the accumulated budget at the end of 2014 was €1,381,685. An Bord Pleanála's accounts are audited on an annual basis by the Controller and Auditor General's Office.
- 3.62 Appeal fees do not cover the costs of appeals; the partial pass through of costs to appellants is intended to support the principle of access to the planning process. The fee regime for strategic infrastructure is based on full cost recovery.
- 3.63 Obligations arising under the Aarhus Convention and EU law, and the national measures aimed at implementing those obligations, have resulted in a situation where, in certain categories of cases, An Bord Pleanála will not always recover its costs in the event of defending judicial review proceedings successfully. Additional liabilities for An Bord Pleanála associated with increased legal costs are funded through the Exchequer grant. The Review Group understands that discussions between An Bord Pleanála and the Department are ongoing concerning the costs arising from legal proceedings.

3.64 As has been the case with most public bodies, payroll expenditure and other cost reductions were achieved in the period 2008-2014, driven in the main by centrally determined measures such as the recruitment moratorium. The reduction in development activity during this period also helped reduce An Bord Pleanála's costs. An Bord Pleanála anticipates that the PLEAN-IT ICT system, discussed above, will improve online systems and work practices, thereby achieving cost efficiencies, although formal estimates of such savings have yet to be determined or assessed.

Recommendation 26: *The approval of An Bord Pleanála's annual budget by the Department should include an incentive for the introduction of an agreed and measureable change programme, aimed at improving efficiency and performance.*

Recommendation 27: *A suite of performance indicators focused on cost efficiency should be put in place by An Bord Pleanála, as soon as possible, which should be used in the determination of annual budgets. When operational, the PLEAN-IT system should provide for the timely production of management information concerning performance standards across the organisation, including those of a financial nature, where possible.*

Recommendation 28: *In the absence, at this juncture, of a detailed analysis of potential savings considered likely to arise from the PLEAN-IT system, an exercise should be undertaken by An Bord Pleanála as soon as possible and subject to ongoing review, to identify and quantify such*

savings, resulting from changes in work practices, reduction in case-handling time frames and other procedural efficiencies.

Recommendation 29: *The Executive Management Team should enhance oversight of financial management within An Bord Pleanála, and should provide periodic financial performance reports to the Board as a matter of course.*

Chapter Four

The Determination Process

Chapter Four

The Determination Process

Introduction

- 4.1 The core function of An Bord Pleanála is to determine planning appeals, compulsory acquisition of land by local authorities and harbour authorities, appeals under the Water Pollution Act and the Building Control Act, Section 5 Exempted Development Referrals, Strategic Infrastructure Development applications and Strategic Development Zones.
- 4.2 The success or otherwise of An Bord Pleanála has been, and will continue to be, largely judged on the organisation's record of efficiently, impartially and transparently applying the principles of sustainable development. Caseload management is therefore a fundamental concern for an organisational review of An Bord Pleanála.
- 4.3 The process of decision-making has a number of facets, including the quality of analysis and reasoning, its compliance with relevant legislation and policy, consistency with other decisions in similar cases, and the need to deliver a transparent decision without undue delay. There are obvious tensions between some of these factors. Such tensions are, of course, common to all planning regimes operating within democratic systems of government.⁹⁹ How that balance is

⁹⁹ For obvious reasons, often the most useful comparator planning systems to that of Ireland are to be found in the United Kingdom. However it is important to appreciate the UK contains four different planning systems, as to which, see further 'Comparison of the planning systems in the four UK countries' at Research Paper 032-18, 19 June 2013. Available online at: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP13-39>. See also Review

ultimately struck needs to be fine-tuned to reflect the culture and history of the country and its people. To do otherwise, risks undermining public confidence in the planning system. Nonetheless, such things do not always stay static. Indeed, the public's view on the emphasis that should be given to various factors may well also alter over time. Given the changes which have taken place since An Bord Pleanála was first created, the ongoing improvement of An Bord Pleanála's ICT along with the future challenges outlined in Chapter Two, now is a particularly good time to reassess how that balance should be struck in respect of An Bord Pleanála's decision-making process.

- 4.4 Throughout this Report, the Review Group has stressed the importance of An Bord Pleanála as a whole, and the Board, in particular, providing strategic leadership through the adoption of guidance documents.¹⁰⁰ This is particularly so when seeking to ensure that a single collegiate approach exists to the decision-making process. The Board comprises a number of different individual members who often sit in separate divisions¹⁰¹ (and it is the view of the Review Group that this practice should be extended).¹⁰² The Board also relies upon its inspectorate to gather information including where necessary holding hearings, and to provide a considered report recommending an outcome. If the system is working properly, the inspectors should usually be aware of the

response letter dated 22 December 2015, from PEBA (the Specialist Bar Association of the Bar Council (England & Wales) for Planning Environment and Local Government.

¹⁰⁰ See, for instance, paragraph 3.10 of Chapter Three.

¹⁰¹ Current planning legislation provides that, generally, a *quorum* for a Board meeting is three members with an option for a two member meeting subject to Board approval in circumstances where the chairperson considers it necessary to ensure the efficient discharge of the business of the Board. Strategic Infrastructure Development applications are determined by the Strategic Infrastructure Division of the Board (five members including the chairperson and deputy chairperson with the *quorum* being three members). See 'Submission to Review Group from An Bord Pleanála' dated 30 October 2015 at page 30.

¹⁰² See, for example, Recommendation 66.

general approach of the Board, so that departures by the Board from the recommendations of inspectors should not be frequent. The production of published guidance helps quasi-judicial bodies ensure that there is consistency in decision-making and increased predictability for participants and stakeholders.

- 4.5 An Bord Pleanála is not a substantive planning policy making body but that does not mean it should not issue policy as to procedure or its approach to the implementation of planning policy. An Bord Pleanála has been historically reluctant to publish guidance, although matters are improving. An Bord Pleanála has published for example a number of practical guidance documents on its website explaining existing legislative provisions governing its functions and operations. The Review Group welcomes this development. Whilst An Bord Pleanála might be concerned that guidance documents could be subject to judicial challenge, this is not a good reason for not producing guidance. Such risks can be minimised if the guidance document is carefully drafted with the benefit of appropriate expert and legal advice, as the Review Group would recommend. The Review Group notes that planning authorities¹⁰³ in other jurisdictions have successfully made extensive use

¹⁰³ The Planning Inspectorate of England and Wales has published a series of advice notes that are intended to inform developers, consultees, the public and others about a range of process matters in relation to the Planning Act 2008 process (as amended by the Localism Act 2011). It also publishes good practice advice notes and other guidance relating to planning appeals and other casework under the Town and Country Planning Act 1990 (as amended) and related legislation. Each item of advice and guidance sets out the general type of casework and/or the legislation that is applicable to it, and is to be read and applied in that way. See for example, the suite of Advice Notes published by the Planning Inspectorate (England and Wales) in connection with 'Nationally Significant Infrastructure Projects' available online at <http://infrastructure.planninginspectorate.gov.uk/legislation-and-advice/advice-notes/>. The difference in approach is even greater when it is appreciated that An Bord Pleanála in many ways carries out some of the functions performed elsewhere by two bodies, see e.g. in England and Wales the Planning Inspectorate and the Secretary of State, both of whom issue guidance on procedural matters.

of guidance documents on a wide range of issues. The adoption of guidance by An Bord Pleanála in respect of various procedural and technical matters - some perhaps issued jointly with other prescribed bodies¹⁰⁴ - would help all participants, including inspectors, to assist An Bord Pleanála in carrying out its primary role as a quasi-judicial decision-maker. The Review Group understands that the current practice is that the Department is responsible for publishing guidance documents relating to, or concerning, the overall planning system. However, the existing Departmental guidance does not obviate the need for An Bord Pleanála to produce its own guidance tailored to its own functions; for example, the overarching Departmental guidance document 'Development Management – Guidelines for Planning Authorities'¹⁰⁵ has guidance for all planning authorities on a wide range of matters, including general guidance on the approach to planning conditions, but it does not contain model conditions. As noted at paragraph 3.10, An Bord Pleanála has found it necessary to produce its own guidance on types of model conditions for internal purposes only, although this internal guidance is not followed by all of its inspectors. Such guidance should be published and followed by its inspectors (see paragraphs 4.63 to 4.67 and Recommendations 64).

4.6 In this Chapter the Review Group expressly recommends the adoption of guidance governing certain key aspects of the decision-making process.¹⁰⁶ However, the potential scope is, of course, much wider and

¹⁰⁴ See further, Recommendation 79 of Chapter Five.

¹⁰⁵ Available online at:

<http://www.environ.ie/en/DevelopmentHousing/PlanningDevelopment/Planning/PlanningGuidance/>

¹⁰⁶ See, for example, at paragraph 4.38 concerning guidance governing the period prior to an oral hearing, to deal with the time-tabling of statements of evidence etc.; at paragraphs 4.63 to 4.67 in respect of guidance dealing with the imposition of planning conditions; and at paragraphs 4.9 to 4.12 dealing with the award of costs.

could include such matters as the preparation of environmental impact assessments and appropriate assessments. The Environmental Protection Agency, for example, also has specific functions in relation to providing guidance on certain environmental issues which can also arise in planning cases, including publishing guidelines on the preparation of Environmental Impact Statements. The Review Group understands that these guidelines are currently being updated. The Review Group considers that this could provide an opportunity for An Bord Pleanála to produce joint guidance with the Environmental Protection Agency or, else, have a strong role in cooperating in its production (see Recommendation 79). This is particularly important in light of the outcome of Case C-50/09 *Commission v Ireland* (see paragraph 5.17). More generally, such cooperation would also help to ensure that the status of any such guidelines and their applicability to An Bord Pleanála's decision-making function is clear and also that any possible conflicts in guidance issued by An Bord Pleanála and different statutory bodies are avoided. The Review Group considers the need for such guidance documents is particularly warranted in circumstances where An Bord Pleanála is effectively the first instance (and indeed only) decision-maker for example, in respect of Strategic Infrastructure Development¹⁰⁷ and for the approval of Compulsory Purchase Order applications.

Recommendation 30: *An Bord Pleanála should produce a suite of guidance documents covering the principal areas of its decision-making processes.*

¹⁰⁷ The Review Group suggests that An Bord Pleanála should examine the guidance issued by other National Planning Bodies such as the Planning Inspectorate of England and Wales in connection with Nationally Significant Infrastructure Projects; see footnote 103 above for further details.

4.7 The remainder of this Chapter is divided into three parts. Although inevitably there is a degree of overlap, Part One focuses on caseload management, Part Two on decision-making, and Part Three on timeframes for decision-making.

-Part One-

Caseload Management

4.8 The effective management of a caseload depends upon the ability of *An Bord Pleanála* to ensure that its own internal processes function properly and also that all parties cooperate with *An Bord Pleanála* in order to ensure that the system works efficiently and fairly. As stated above, the greater use of guidance will help to ensure that the system is both transparent and efficient but, as the legislation envisages (at least in part), there must be the possibility that non-cooperation by parties can be sanctioned by the award of costs.

The Power to Award Costs

4.9 At the outset the Review Group notes that the power of *An Bord Pleanála* to award costs is complicated in its legislative origin. The current position is set out in summary form at Appendix IX to this Report.¹⁰⁸ This complexity, of itself, reinforces the Review Group in its recommendation that guidance on the ability of *An Bord Pleanála* to award costs, and its approach to the award of costs, should be published.

¹⁰⁸ The Review Group is very grateful to *An Bord Pleanála* for providing an explanation of the legislative powers.

- 4.10 The current position is that the power of An Bord Pleanála to award costs against certain parties differs between An Bord Pleanála's various decision-making functions. In any event, even where An Bord Pleanála has the power to award costs it is not its normal practice to award costs against parties whose conduct during an appeal or application process has been unreasonable in favour of a party who as a result has been put to unnecessary additional costs.
- 4.11 An Bord Pleanála, with one exception, has no written policies on its approach to the award of costs. The exception is a policy adopted by the Board in 2004 in respect of Compulsory Purchase hearings and Strategic Infrastructure Development applications. The 2004 policy however is not published and is made available upon request. The Review Group notes that Recommendation 62 of the 'Strategic Infrastructure Division Review Group SID Report' urged that An Bord Pleanála 'draw up a clear and concise policy for the awarding of planning authority and observer costs in SIDs cases and publish this policy on the Board's website.'¹⁰⁹ The Review Group understands whilst there has been discussion at Board level, such a policy has yet to be adopted.¹¹⁰ Merely because someone has participated in an application or an appeal should not, of course, of itself warrant an award of costs against them. However, the Review Group considers that the ability to award costs where someone has behaved unreasonably can act as an important sanction of last resort for An Bord Pleanála. Without the possible imposition of such a sanction it is more difficult to enforce discipline in the case management process, particularly in the conduct of oral hearings. However, incidences of

¹⁰⁹ 'Strategic Infrastructure Division Review Group, Draft Final Report', February 2013, page 40.

¹¹⁰ See Appendix IX.

what might be considered unreasonable behaviour are not limited to conduct at oral hearings. Indeed, the Review Group is informed by An Bord Pleanála that the relatively few cases where costs have been awarded¹¹¹ were cases in which An Bord Pleanála had considered that unreasonable behaviour on the part of local authorities had been committed in the original determination of the cases. It is important that public and private money and time is not wasted (either in written or oral proceedings) by the unreasonable behaviour of parties. The threat of the award of an adverse costs order requiring a party who has behaved unreasonably to pay the unnecessary costs incurred by other parties should encourage local authorities to avoid unreasonable behaviour (including in its decision-making) and should also encourage all parties to adhere to procedural directions given by inspectors (which this Report recommends should be adopted in order to improve the efficiency and fairness of the oral hearing process). The need to make such awards should prove to be exceptional, but it is not only inefficient but also unfair if a party can behave unreasonably and put other parties to unnecessary expense without any fear of sanction. The Review Group considers the current position in respect of the limited power to award costs and the absence of a published policy by An Bord Pleanála as unsatisfactory and lacking in transparency.

- 4.12 The Review Group considers that a problem exists in the current legislation in respect of the scope of the power to award costs. In respect of the awarding of costs in planning appeals, the legislation governing third party costs provides that costs awards can only be made in the following ways: (a) the planning authority pays An Bord

¹¹¹ Under section 145 of the Planning and Development 2000 Act as amended by section 25 of the Planning and Development (Strategic Infrastructure) Act 2006.

Pleanála or an appellant in a case; or (b) the appellant pays An Bord Pleanála or any other party in the appeal (planning authority, applicant, other third party appellants). There is no provision in the legislation for an applicant, who is not an appellant, to pay costs to anyone else. In respect of Strategic Infrastructure Development cases, the costs regime is significantly more restricted than appeals in that it only provides for costs to be paid to An Bord Pleanála, the planning authority and any other participants (third party observers) by the applicant for the relevant permission/approval. There is no reverse provision for the payment of costs by third party observers or the planning authority to any other participants in the case. In short, the Review Group considers this situation to be unsatisfactory. Moreover, the Review Group understands that in attempting to draw up a costs policy for Strategic Infrastructure Development cases, the difficulties in the legislation have become very apparent to the Board. The Review Group considers that the whole costs regime should be reviewed to simplify the intention and the practice of awards of costs in all cases.

Recommendation 31: *An Bord Pleanála should publish and adopt policy guidance on the award of costs in respect of each of the powers it has to award costs, to include in addition to any other principle justifying the award of costs, the principle that where a party has behaved unreasonably leading other parties to suffer unnecessary costs they may be liable to pay that other party's costs.*

Recommendation 32: *The current legislative provisions need to be reviewed in order, amongst other things, to ensure that An Bord*

Pleanála may award costs against any party to proceedings before An Bord Pleanála who has acted unreasonably.

Third Party Rights of Appeal

4.13 Ireland is unique in its extensive right of third party appeals.¹¹² Third party rights of appeal have an obvious impact upon the caseload of An Bord Pleanála. Perceived delays caused to economic development by third party appeals also means that concerns of overseas investors, unfamiliar with the concept, often need to be carefully managed. Some Respondents to this Review have suggested that the rights of third party appeal should be restricted in some way, particularly in order to discourage those third party appeals which may be seen as anti-competitive or 'vexatious.'¹¹³ Certain powers already exist in respect e.g. of vexatious appeals. Views also differ as to whether third party appeals in Ireland are inherently more likely than applicant appeals to be without merit.¹¹⁴ The level of successful appeals from local planning authority decisions noted by the Review Group might suggest that they continue to serve a sound planning purpose. However, a

¹¹² Less extensive third party rights of appeal exist in Denmark, Sweden, New Zealand and Australia. Within the last 15 years, England, Northern Ireland, Scotland and Wales have independently considered and rejected its introduction into their respective planning systems.

¹¹³ See e.g. Review response letter from the Royal Institute of Architects of Ireland dated 18 November 2015. The Dublin Airport Authority suggests that third party rights might be restricted by a *locus standi* test related to the geographical location of the third party in relation to the proposed development or the potential effects of the development on the third party (Review response letter dated 18 November 2015).

¹¹⁴ 'There was no significant difference between the percentages of recommendations I made to allow or dismiss third party appeals and those in relation to first party appeals.' Evidence (Ref: PE1534/Q), Letter dated 12 January 2015 to Scottish Parliament, Frank Cosgrove BA ARIAS ARIBA FRTPI (retired), former consultant inspector to An Bord Pleanála. Available online at:

https://webcache.googleusercontent.com/search?q=cache:WIY_BlIBby0J:https://www.scottish.parliament.uk/S4_PublicPetitionsCommittee/General%2520Documents/PE1534_Q_Frank_Cosgrove_12.01.15.pdf+&cd=1&hl=en&ct=clnk&gl=uk

comprehensive review of the third party rights of appeal system is not within the scope of the terms of this Review, nor is it possible within the timeframe of this Review. The existence of third party appeals is, in part, linked to the confidence the public has in the operation of the decision-making process by local planning authorities - something which is certainly beyond the scope of this Review.

4.14 Notwithstanding the absence of a comprehensive review, the Review Group has nonetheless given some consideration as to whether the current scope for third party appeals on a *de novo* basis could be limited by restricting An Bord Pleanála's consideration on a third party appeal only to the grounds of appeal upon which the appeal is made. In the Review Group's judgement, it would be undesirable in terms of good administration for An Bord Pleanála to be so constrained. This would mean that An Bord Pleanála might be obliged not to uphold a third party appeal in circumstances where it considers the development proposal before it to be unsound in some other way, or should be modified by the imposition of a condition, unrelated to the original grounds of appeal. This could be particularly problematic where An Bord Pleanála considered that an application for the development under consideration breached an aspect of EU law, such as the Environmental Impact Assessment Directive or the Habitats Directive, but this was not a ground of the third party appeal.

4.15 In summary, the Review Group considers that in the absence of a comprehensive review of third party rights of appeal within the Irish planning system, a piecemeal restriction on the right of third party appeals would not be appropriate. As referred to above, the Review

Group notes that An Bord Pleanála already possesses the power, at its discretion, to dismiss an appeal where it is satisfied the appeal is vexatious, frivolous or without substance or foundation or where the appeal is made with the sole intention of delaying the development or of securing the payment of money, gifts, consideration or other inducement by any person. In addition, the Review Group does consider that parties, whether or not they are third parties, which behave unreasonably should in principle be liable to an adverse costs award.¹¹⁵ (See also Recommendations 31 and 32 above, concerning the award of costs).

Caseload Prioritisation

4.16 Unless otherwise directed by the Minister,¹¹⁶ any caseload prioritisation is a matter for An Bord Pleanála's discretion. Some consultees have suggested that particular categories or types of development should be given priority.¹¹⁷ However, subject to the ministerial control mentioned above, the Review Group considers that prioritisation of caseload quintessentially is a matter for An Bord Pleanála to manage itself. The Review Group understands¹¹⁸ that An Bord Pleanála adopts a policy of prioritisation¹¹⁹ 'in line with government focus on job creation,

¹¹⁵ See below at paragraph 4.44.

¹¹⁶ Under sections 37J(6), 126(5) and 221(5) of the 2000 Act, regarding Seventh Schedule Strategic Infrastructure Developments, standard appeals and referrals, and transferred functions and other Strategic Infrastructure Developments, respectively.

¹¹⁷ See, for example, the suggestion by the Local Authority Members Association that 'Local Authority Development proposals should be prioritised in the carrying out of An Bord Pleanála's functions', in the Association's Review response letter of 18 November 2015. See also e.g. paragraph 7.17 of the Review response letter from the Irish Planning Institute dated 18 November 2015.

¹¹⁸ See paragraph 5.6.1(a) 'Priority Cases' 'Submissions to Review Group from An Bord Pleanála' dated 30 October 2015 at pages 61-62.

¹¹⁹ In this context 'Prioritisation' relates only to the timeliness of An Bord Pleanála's processing and determination of these cases and not to the nature of its decision on such cases.

including the construction sector.’ Known as ‘Priority cases’ they include:

- Developments with employment or economic potential;
- Strategic infrastructure development;
- School buildings/educational facilities; and
- Housing.

4.17 A weekly review of the ‘priority list’ is carried out at the Executive Management Meeting to track and ensure cases are being progressed efficiently. The Review Group considers however that there should be transparency in the prioritisation of cases.

Recommendation 33: *An Bord Pleanála should publish and update as necessary its policy on the types of cases which will be ‘priority cases’.*

Recommendation 34: *An Bord Pleanála should make public whether a particular case is a ‘priority case’.*

Early Stage Engagement

4.18 Currently all case management, especially at the early stage, is heavily influenced by the paper dependency of An Bord Pleanála.¹²⁰ As discussed in Chapter Three, this should change with the ongoing benefits being realised through PLEAN-IT.¹²¹ Commenced in 2013, An

¹²⁰ ‘The internal process for handling all case types follows a similar process governed by varying business rules. The process is currently almost entirely paper based entered into a computerised case management system (LEX) to track and monitor case progress from receipt to decision.’ See paragraph 4.2 of ‘Submission to Review Group from An Bord Pleanála’ 30 October 2015, at page 35.

¹²¹ See further Recommendation 21 in connection with PLEAN-IT in Chapter Three.

Bord Pleanála is currently midway through the five-year ICT¹²² improvement strategy.¹²³ The current system in respect of all of the work of An Bord Pleanála (e.g. appeals, Strategic Infrastructure Development and Compulsory Purchase Orders) provides for a high level of detailed checking¹²⁴ but limited direct interaction and intervention.¹²⁵ Interaction is particularly important in all instances but especially where An Bord Pleanála is acting as the first and only decision-taker, such as in respect of Strategic Infrastructure Development applications.

Requests for Further Information on Planning Appeals

4.19 The Board has a power under section 132 of the 2000 Act, which it exercises from time-to-time, to request from any party or any person who has made submissions or observations to the Board in respect of a planning appeal, any further information which the Board considers would assist it in determining the appeal.¹²⁶ This power can also be

¹²² The existing Case Management System is over 20 years old and plainly requires replacement. See section 5 of 'An Bord Pleanála Briefing Material' to the Review Group, dated 16 September 2015.

¹²³ See section 5 of 'An Bord Pleanála Briefing Material' to the Review Group, dated 16 September 2015.

¹²⁴ See further below at paragraphs 4.93 to 4.98 in respect of timeframes.

¹²⁵ Review responses suggest that the lack of early engagement is present throughout all aspects of the An Bord Pleanála case management process. Examples of comments include, the Royal Institute of Architects of Ireland Review response letter dated 18 November 2015 which stated 'There is little or no engagement with either party during the appeal process'; The Bar of Ireland, Submission to Review dated 19 November 2015 stated that 'The necessity to build into the system a requirement that promoting authorities, particularly in CPO enquiries on behalf of Local Authorities, be required to engage with objectors in a meaningful manner prior to hearings' and the National Monuments Service Note for Information Gathering Meeting with the National Monuments Service dated 13 November 2015, commented that 'early and frequent consultation between developers and National Monument Service in relation to Strategic Development Applications, ...'.

¹²⁶ Section 132 of the 2000 Act provides that 'where the Board is of opinion that any document, particulars or other information may be necessary for the purpose of enabling it to determine an appeal or referral, the Board may, in its absolute discretion, serve on any party,

exercised by inspectors at an early stage in any appeal case. The Review Group has been informed by An Bord Pleanála that inspectors have exercised this power in planning appeal cases. The Review Group understands that this power is, in general terms, exercised where an inspector considers some enhancement of existing application drawings (which does not materially revise the application), or specific comments on a particular issue from a particular party, may be necessary. In cases where revised drawings which would materially alter the original application are considered necessary by the inspector then it is usually the case that the Board, as the ultimate decision-maker on the case, is first consulted or asked for a specific direction prior to activation of the section 132 process - this is intended to avoid applicants incurring unnecessary delays and expense preparing revised plans where the Board may not feel these are necessary, or that an alternative approach to the case should be followed. The Review Group is unclear as to how frequently this power is exercised by inspectors in practice. The Review Group however, is aware that the Board does exercise the section 132 processes where the inspector recommends a refusal of permission in the first instance. Whilst such actions are provided for in legislation greater clarity around the use of section 132 by both inspectors and the Board is warranted.

Recommendation 35: *An Bord Pleanála should publish guidance on the general approach to be adopted by the Board and inspectors in the exercise of their power to facilitate the provisions of Section 132 of the Planning and Development Act 2000 to require further information.*

or on any person who has made submissions or observations to the Board in relation to the appeal or referral, as appropriate.'

Ability to make early rulings on challenges to jurisdiction

- 4.20 The validation of appeals and applications is determined during the processing stage.¹²⁷ The Review Group also understands from An Bord Pleanála that certain issues are referred to the Board for an early direction, such as questions of invalidity or possible dismissal of an appeal as vexatious.¹²⁸ The Review Group has observed however that it is not uncommon for objectors to raise legal arguments at various stages of the process, including at the outset of a hearing, that there is a fundamental defect in the appeal or application which deprives An Bord Pleanála of jurisdiction. This type of argument arises particularly in respect of Environmental Impact Assessment developments or those engaging with the Habitats Directive. The Review Group understands that it is the practice of An Bord Pleanála not to address such issues until the final decision is made.
- 4.21 It is undesirable that the determination of that type of legal issue should *always* have to await a final decision by the Board. In some instances it may be better that such issues are addressed before further costs have been expended and delays can be avoided. The Review Group recognises that it will not always be appropriate for such issues to be determined as a preliminary issue, but the Board should at least have the opportunity to make a preliminary ruling when it is appropriate to do so.¹²⁹ In so doing the Board would be able to consider whether to

¹²⁷ 'Invalid cases are concluded at the processing stage;' Section C at page 39 of the submission made by An Bord Pleanála to the Review Group, dated 30 October 2015.

¹²⁸ The Review Group also understands from An Bord Pleanála that both administrative and inspectorate personnel can, and do, refer matters to the Board for its consideration of making a preliminary direction on an issue (mediated also by senior management personnel).

¹²⁹ The appointment of in-house legal counsel in accordance with Recommendation 65 would obviously assist the Board in making such rulings.

request a modification to the scheme or further information to overcome any defect identified by objectors which in some instances might overcome a preliminary objection to jurisdiction.¹³⁰ The Review Group considers, where appropriate, that an inspector should be able to refer the matter to the Board for a preliminary ruling. As to case management, the ongoing appeal or application process may continue or be stayed depending on the circumstances whilst the Board gives a preliminary ruling.

- 4.22 It is currently not clear whether an amendment to the law would be necessary, but if it is, the Review Group would recommend that the legislation be amended accordingly.

Recommendation 36: *The legislation should be amended if necessary to enable where appropriate the Board to address objections to its jurisdiction to determine an appeal/application by way of a preliminary ruling. Subject to the necessary legal powers being in place, a practice should be adopted by An Bord Pleanála enabling inspectors, where appropriate, to refer to the Board objections to An Bord Pleanála's jurisdiction for possible determination by way of a preliminary ruling and An Bord Pleanála should publish guidance to its inspectors as to the circumstances where it considers such a referral to be appropriate.*

¹³⁰ For example, article 73 of the Planning and Development Regulations 2001, as amended, provides that "The Board may, when considering an appeal under section 37 of the Act, invite the applicant for the permission concerned to submit to the Board revised plans or other drawings modifying, or other particulars providing for the modification of, the development to which the appeal relates and an applicant so invited may submit to the Board such number of plans, drawings or particulars as the Board may specify.' See further at paragraph 4.69.

Limited Agenda Oral Hearings, and Meetings

- 4.23 The Board has various powers to call limited agenda oral hearings, and meetings but it is understood that these provisions are rarely used.¹³¹ The limited agenda oral hearing option was first provided for in the Environment (Miscellaneous Provisions) Act 2011 amendment of section 135 of the 2000 Act. The Review Group understands that it has been used on occasion, but not on a widespread basis.¹³²
- 4.24 The Review Group considers that the restrictive use of limited agenda oral hearings is a missed opportunity. This may be due to there being some doubt as to the legal scope and purpose to which such meetings may be held.
- 4.25 Informal hearings could be usefully convened where appropriate in place of, or in addition to, formal oral hearings to focus on particular aspects or topics of an appeal or application. The Review Group would envisage that such meetings could take the form of informal round table hearings/meetings, less formal than oral hearings. The

¹³¹ The relevant provisions as regards oral hearings are found in section 135 of the 2000 Act. The Board has a wide power to convene a meeting under section 136: '(1) Where it appears to the Board to be expedient or convenient for the purposes of determining a referral under section 34(5), 96(5) or 193(2), the Board may, in its absolute discretion, convene a meeting of the parties.' In respect of Strategic Infrastructure Development, Article 218 of the Planning and Development Regulations 2001-2015, as amended, provides that the Board may at any time hold meetings with the applicant for approval or any other person, (i) where it appears to the Board to be expedient for the purpose of determining the application, or (ii) where it appears to the Board to be necessary or expedient for the purpose of resolving any issue with the applicant for permission or any disagreement between the applicant and any other party, including resolving any issue.

¹³² The Review Group understands current legislation (section 135 of the 2000 Act) provides for limited agenda oral hearings to occur only following a recommendation from the reporting inspector. The legislation may need to be amended to make this a Board prerogative so that it may be exercised without the need for an inspector recommendation, and amendments required also in order for an inspector to convene such a hearing without needing the consent of the Board on an individual case by case basis.

Review Group considers that inspectors should be empowered to convene such hearings/meetings. The appointed inspector would have to have further training in taking an agenda-setting and proactive inquisitorial approach.¹³³ This type of hearing/meeting could be particularly useful in Compulsory Purchase Order cases as the meeting could be used to enable all the parties to meet and update the inspector with the progress of any negotiations.¹³⁴ This may require a change to the legislation. If so, the Review Group suggests that such changes might include giving the Board the power to delegate to an inspector the power to convene limited agenda oral hearings, and meetings in certain prescribed cases.

Recommendation 37: *An Bord Pleanála should review its powers and practice in order to facilitate greater use of limited agenda oral hearings and informal round-table hearings/meetings by the Board and its inspectors. If necessary the legislation should be amended to enable necessary powers.*

Strategic Infrastructure Development Cases

4.26 Although Strategic Infrastructure Development applications account for a small proportion of An Bord Pleanála's caseload,¹³⁵ their scale and complexity require considerable resources to process.

¹³³ The Review Group suggests that the meetings might be conducted along similar lines to what are called 'hearings' in England and Wales see for example 'A brief guide to planning hearings.' Available online at:

http://www.planningportal.gov.uk/uploads/pins/hearings_leaflet.pdf

¹³⁴ See Bar of Ireland, Notes from Review Group Information Gathering Meeting with the Bar Council, dated 19 November 2015.

¹³⁵ Of 1,979 cases received by An Bord Pleanála in 2015, nine were formal planning applications for 'Strategic Infrastructure Development cases.' In addition a number of other type cases were lodged in respect of Strategic Infrastructure Development, such as, pre-application consultation requests.

4.27 Strategic Infrastructure Development cases commenced in 2007 and whilst there were a few problems in the initial years as parties adapted to the system, the procedure is now well embedded within the planning system. There are however legislative and procedural aspects which have emerged which could be improved. An Bord Pleanála undertook an internal assessment of Strategic Infrastructure Development applications in 2012 and 2013 in the context of existing legislation and file handling and this assessment substantially informs the recommendations of the Review Group.¹³⁶

4.28 The Planning and Development (Strategic Infrastructure) Act 2006 introduced mandatory pre-application consultations for all strategic Seventh Schedule infrastructure proposals.¹³⁷ However, there is no provision for pre-application consultations for some classes of Strategic Infrastructure Development, including local authority Strategic Infrastructure Development proposals when the site is located within the local authority's own administrative functional area¹³⁸ or for proposals to amend strategic infrastructure permissions. Whilst the lack of provisions facilitating pre-application consultation for road development have been recently addressed by amendments introduced by the Roads Act 2015 (section 24) to facilitate pre-application consultations for such road projects, there still remains a gap in the legislation.

¹³⁶ An Bord Pleanála, Review of the Strategic Infrastructure Development Planning Process, 2013.

¹³⁷ See the definition of Strategic Infrastructure Development cases at section 2(1) of the 2000 Act, as inserted by section 6 of the 2006 Act, which indicates the categories of Strategic Infrastructure Development cases other than Seventh Schedule Strategic Infrastructure Developments. All cases, other than Seventh Schedule cases, have separate provisions relating to pre-application consultations and other matters.

¹³⁸ As per section 175(1) or 226(6) of the 2000 Act.

Recommendation 38: *Pre-application discussions should be mandatory for all potential Strategic Infrastructure Development applications including all Local Authority Strategic Infrastructure Development proposals or for proposals to amend Strategic Infrastructure Permissions under Section 146, and legislation should be amended accordingly.*

4.29 The Planning and Development Act 2000 and in particular the Seventh Schedule lists particular developments types as qualifying as Strategic Infrastructure Development. Most projects either fall clearly within or outside the definition in the Seventh Schedule. However, in certain particular cases (electricity and airport developments), the definitions are unclear and introduce an unnecessary procedural step for the applicant. The applicant has to 'ask the question' through a pre-planning consultation, which requires payment of a fee of €4,500, and usually receives the anticipated answer, i.e. that the proposed development is not a Strategic Infrastructure Development. This is an unnecessary procedural step which imposes additional time and financial constraints on a project.¹³⁹

Recommendation 39: *The definition of qualifying Strategic Infrastructure Development developments should be clarified to avoid unnecessary mandatory pre-application consultation on small project types which are known to fall outside the scope of Strategic Infrastructure Development.*

¹³⁹ €3,500 of the €4,500 fee is refunded if not more than one pre-application consultation meeting is held in such cases – in straightforward cases one meeting is usually sufficient to dispose of the matter. The Review Group understands from An Bord Pleanála that it has requested the Department to amend the Schedule to make the relevant definitions clearer/appropriate and to remove the necessity for this question to be asked in cases which are clearly not Strategic Infrastructure Developments, having regard to the underlying intention of the legislation.

4.30 While the intention of pre-application discussions may have been to streamline the Strategic Infrastructure Development process, the main purpose as set out in the legislation is to decide whether the proposed development is indeed Strategic Infrastructure Development, with the effect that any proposed development deemed to be Strategic Infrastructure Development must then be subject to a direct planning application to An Bord Pleanála and not to the local planning authority.¹⁴⁰ A further objective is to raise any considerations which might have a bearing on the Board's decision in determining the application along with advising on procedures to be followed. These two objectives of the pre-application process are presently interlinked and need to be separated in order to ensure that constructive and meaningful pre-application discussions take place. Legislative amendments shall be required to facilitate a two-stage process. Stage one includes the issuing of a Notice from the Board stating whether or not the proposal constitutes a Strategic Infrastructure Development. Stage two commences where the project has been deemed to be Strategic Infrastructure Development and detailed pre-application discussion commences on the procedures to be followed and the considerations which might have a bearing on the Board's decision in determining the application. It is this second element of the pre-application process which the Review Group considers requires significant review. In this respect, the Review Group notes the view expressed by the Planning Inspectorate of England and Wales concerning the Development Consent Order procedure in England

¹⁴⁰ The statutory provisions relating to the purpose of the pre-application consultations are set out at section 37B of the 2000 Act (as inserted by section 3 of the 2006 Act). Similar provisions are set out for the other types of Strategic Infrastructure Development cases outside the 'Seventh Schedule cases'.

which is very broadly comparable to the Strategic Infrastructure Development procedure in Ireland:

*'In a front loaded system... [H]aving a robust pre-application procedure is absolutely fundamental to ensure all issues have been tested, at least to such an extent that it is possible to conclude the examination within a six month period.'*¹⁴¹

Given that the aim and purpose of pre-planning applications is to streamline the Strategic Infrastructure Development process, participative and pro-active pre-application discussions should be mandatory for all potential Strategic Infrastructure Development applications.¹⁴²

- 4.31 There is no timeframe specified between the closing of pre-application consultations and the issue of Notice or a letter from the Board stating whether or not the proposal constitutes a Strategic Infrastructure Development, which results in uncertainty and restricts the ability of an applicant to schedule timeframes. Furthermore there is no statutory timeframe guiding the submission of a follow-on application. Such a timeframe is necessary as consultations, and the advices given, have regard to existing policy in addition to the existing planning and environmental conditions pertaining to the site and its environs at the time of the consultations. These factors may change over time. The Review Group is of the view that a time limit should be specified

¹⁴¹ Review response letter from the Planning Inspectorate of England and Wales, dated 12 November 2015.

¹⁴² See for example the following support for the need for greater pre-application discussion respect of Strategic Infrastructure Development applications: National Monuments Service Notes for Review Group Information Gathering Meeting with the National Monuments Service, dated 13 November 2015.

between the closure of consultations and the submission of an application under Strategic Infrastructure Development.

Recommendation 40: *The pre-application provisions relating to Strategic Infrastructure Development should be formally broken into a two stage process to facilitate constructive and meaningful pre-application discussions such that (i) Stage one includes the issuing of a Notice from the Board stating whether or not the proposal constitutes a Strategic Infrastructure Development; and, (ii) Stage two commences where the project has been deemed to be Strategic Infrastructure Development and detailed pre-application discussion commences on the procedures to be followed and the considerations which might have a bearing on the Board's decision in determining the application. In the interests of ensuring certainty statutory timelines should be introduced:*

- *Between the closing of Stage one pre-application consultations and the issue of Notice or a letter from the Board stating whether or not a proposal constitutes a Strategic Infrastructure Development; and,*
- *Concerning the submission of a follow-on planning application once Stage one pre-application consultations have closed and a notice is issued stating the proposal constitutes a Strategic Infrastructure Development.*

4.32 A number of pre-consultation cases remain live with An Bord Pleanála after three-to-four years, in circumstances where there have been no consultations for a considerable period. Such prolonged consultations run counter to the intent of the legislation and also affects An Bord Pleanála's caseload management. Furthermore, the pre-application

file cannot become 'public' until the consultation has formally ended.¹⁴³

Recommendation 41: *To avoid consultations remaining 'live' in circumstances where the prospective applicant is not pursuing a proposed development, but has not withdrawn from consultations, it is considered prudent that An Bord Pleanála is provided with the power to close off consultations unilaterally in appropriate circumstances.*

4.33 The Board's team for pre-application consultations has generally consisted of the director of planning or assistant director of planning, who acts as chair, a reporting senior planning inspector, a senior administrative officer or senior executive officer for procedural matters, and an executive officer to maintain records. All meetings are recorded by the Board's team and these records are made available to the public on the completion of the consultation process. Although significant change in approach has developed since the first pre-application consultations were held in 2007, it is the considered view arising from the public consultation process undertaken as part of this review, that pre-planning consultations need to be further strengthened. Initial consultations were held exclusively with the prospective applicants with advice being given to consult with the relevant planning authority (or authorities) and relevant Prescribed Bodies. More recently the Board has extended its own consultations to meeting with these authorities and bodies to help guide and steer the making of a comprehensive planning application, and this change in

¹⁴³ The Review Group has been informed by An Bord Pleanála that it has requested the Department to amend the legislation to allow An Bord Pleanála close those applications and is awaiting a response.

direction has to be welcomed although it does increase workload substantially.

- 4.34 Currently there is no obligation on the applicant to demonstrate compliance with technical requirements and necessary consultations raised at pre-planning. This potentially nullifies the value of pre-planning. The onus should be on the applicant to demonstrate fulfilment with the pre-planning requirements (survey requirements, technical detail provision, consultation with prescribed bodies) at planning application stage, thereby making it an important stage within the overall planning application process. The requirement for a pre-application technical compliance report should be considered and be prepared by the applicant. The technical compliance report should demonstrate that an adequate level of consultation, with the relevant planning authority and prescribed bodies, has been undertaken and also that the surveys and technical detail required to provide an informed opinion on the development project is provided, in advance of lodging a Strategic Infrastructure Development application.

Recommendation 42: *The role and purpose of pre-application discussions (Stage two as referred to in Recommendation 40) needs to be clarified and expanded, in the context of the establishment of a Consents Service Unit as per Recommendation 94 of Chapter Five. It is recommended that a 'contact plan' is agreed between the applicant and the inspectorate setting out a framework for support, with the aim of helping to improve certainty concerning timescales and the level of inputs required, and to minimise risks to the effective operation of the Strategic Infrastructure Development process.*

Recommendation 43: *Measures to enforce applicant compliance with the pre-planning requirements at planning application stage, such that relevant consultations and necessary surveys have been undertaken, should be strengthened. Only when such compliance is demonstrated through the preparation of a pre-planning technical compliance report should a Strategic Infrastructure Development application be deemed to be valid and of a certain standard to be a planning application.*

- 4.35 The process of scoping an Environmental Impact Statement takes approximately 12 weeks and this period includes the time taken by the Board to seek the views of relevant Prescribed Bodies. Most Strategic Infrastructure Development applications require an Environmental Impact Statement yet formal scoping cannot occur until pre-application discussions have been concluded and a notice has issued determining the project as a Strategic Infrastructure Development. In circumstance in which the intention of the legislation is to streamline and expedite processes the current situation is not optimal. Accordingly scoping should be kept as a separate process to pre-application consultations but it should be allowed to run parallel with the consultation process.

Recommendation 44: *A scoping request for an Environmental Impact Statement to proceed alongside pre-application consultations should be permitted once the Board has decided that the proposed development constitutes a Strategic Infrastructure Development. Scoping should be kept as a separate process to pre-application consultations but should be allowed to run in parallel with the consultation process.*

Oral Hearings

Introduction

4.36 Oral hearings perform a valuable role. They help an inspector gather and examine evidence as a pre-requisite to preparing the inspector's report to the Board members. Oral hearings enable the public to engage directly with the development process providing a public forum for testing the merits and demerits of the proposed development. Whatever the result of an appeal or application, hearings can contribute to a greater public acceptance of the outcomes of the planning system. Oral hearings are however expensive and time consuming. It is critical therefore that the hearing time is used effectively and that opportunities for public participation are not more apparent than real. It is to be noted that oral hearings are required to be carried out both 'expeditiously' and 'without *undue* formality' (emphasis added). It is the opinion of the Review Group that greater direction is needed in the conduct of oral hearings¹⁴⁴ in order to ensure that the first requirement is achieved. The Review Group is also of the view that implementation of its recommendations of themselves would not lead to *undue* formality and would aid fairness and meaningful participation.¹⁴⁵

¹⁴⁴ The published guidelines on oral hearings produced by An Bord Pleanála (available online at http://www.pleanala.ie/publications/2012/oh_procedures.htm) is limited in scope and usefulness and the Review Group considers it should be expanded upon.

¹⁴⁵ See e.g. Review response letter from Dublin Airport Authority, dated 18 November 2015 which calls for stronger guidelines on oral hearings to ensure that time is used effectively. Indeed, it is interesting to note that although the County and City Management Association in its Review response letter dated 20 November 2015 expressed support for the current arrangements for oral hearings it also called for stronger guidance to prevent excessive court room style cross-examination. The Irish Planning Institute at paragraph 7.15 of its Review response letter, dated 18 November 2015, also called for stronger guidance for the conduct of oral hearings.

4.37 The general intention underlying the planning appeal system is that the substantive position of all participants in a case should be established in writing early on in the process, by way of the planning application documentation, the planning authority's reports and decision, the grounds of appeal, observer submissions and the planning authority and applicant (in the case of third party appeals) appeal responses. The Review Group is informed by An Bord Pleanála that strict time limits are applied to all of these elements. The Review Group is also informed that this logic has also been applied to the Strategic Infrastructure Development application process-system, where the application is made available for public inspection for a minimum period of six weeks and it is open to all observers to lodge written submissions within that period. However, it is evident to the Review Group that improvements can be made to the process to give it better focus and improve efficiency and fairness. The Review Group's opinion is reinforced not only by its own observations of the process in action, but by a number of consultees and other bodies who have strongly criticised the way in which the oral hearing process is sometimes carried out.¹⁴⁶ It is not the current practice of Board members to observe oral hearings.¹⁴⁷ The Review Group recommends that this should change. The Review Group would not recommend Board members should regularly attend oral

¹⁴⁶ 'The necessity to introduce some form of requirement whereby the procedures prior to the hearing of a Bord Pleanála enquiry [inquiry], would require the précis of evidence to be made available to the parties. The present system whereby the précis of evidence are only presented on the day of a hearing, leads to a very common refrain from members of the public, that they haven't sufficient time to grasp the complexities of the case being put forward by developers and thereby unable to deal properly with the issues of concern. This can gradually lead to a frustration on the part of the members of the public, and has the potential to lead to a loss of confidence in the process.' See Bar of Ireland, Submission to Review, dated 19 November 2015. Similar points were made orally in separate Review Information Gathering Meetings on 13 November 2015 by the Irish Planning Institute, Engineers Ireland, Royal Town Planning Institute Ireland, and the Irish Landscape Institute.

¹⁴⁷ Some Board members may have been previously employed as inspectors.

hearings. However, it is important that Board members do get to see how different oral hearings are actually operating in practice. Whilst it would not be appropriate for Board members to attend oral hearings in respect of cases in which the Board member is, or will be involved, they can attend other oral hearings¹⁴⁸ from time to time in order to get a feel for the adequacy of the oral hearing process.

Recommendation 45: *Board members should from time to time observe the conduct of oral hearings in cases in which they are to have no part in the decision-making process in order to assist the Board in the on-going assessment of the adequacy of the hearing process.*

Deciding Whether an Oral Hearing is Warranted

4.38 It has been suggested that the advent of the Strategic Infrastructure Development procedure, in which an oral hearing usually takes place, has led to a reduced number of oral hearings on appeals. It has not been possible for the Review Group to extrapolate from the available data reliable evidence to establish whether there is substance in this suggestion. However, the Review Group is of the view that there should be greater transparency concerning the factors which An Bord Pleanála generally takes into account when deciding whether an appeal warrants an oral hearing.

Recommendation 46: *An Bord Pleanála should expand its current policy so as to set out the types of factors it generally takes into account when deciding whether an appeal warrants an oral hearing.*

¹⁴⁸ This would avoid the risk of any possible legal challenge arising from a Board member's attendance at an oral hearing in respect of a case in which the Board member is involved.

Notification of Hearing Date

- 4.39 In order for oral hearings to operate in a fair and efficient manner, it is important that the period prior to the hearing is used effectively. This is not assisted by the notice period of the listing of hearings given by An Bord Pleanála.¹⁴⁹ Hearing dates should be determined as soon as possible following the validation of the appeal or application in order to allow the inspector time to give directions in respect of the case management actions to be taken by the parties in good time prior to the oral hearing taking place.
- 4.40 In the main part, such directions could be standardised and An Bord Pleanála should publish its standard directions on its web site and issue the directions in writing to the parties. Where the appeal or application is complex or complicated in some way the inspector should be expected to issue bespoke directions. In order to do this it may be necessary to schedule a very early pre-hearing.

Recommendation 47: *Longer notice should be given of hearing dates in order that prior hearing directions can be issued.*

¹⁴⁹ The Review Group appreciates that Article 76(1)(a) of the Planning & Development Regulations 2001 states that An Bord Pleanála should give no less than five working days notice of an oral hearing. This time period is too short for the requirements of almost all modern oral hearings. Notwithstanding the time limits for notification in the legislation, the Review Group has been informed by An Bord Pleanála that it is the long-standing practice of An Bord Pleanála to give more notice than legally required of the date of commencement of an oral hearing – in Strategic Infrastructure Development cases a minimum of three weeks' notice is given and in planning appeal cases a minimum of two weeks' notice is given, and that it is often the case that even longer notice is given. Nonetheless, the Review Group is of the view that An Bord Pleanála should always seek to give a minimum notice period that would accommodate the time frames the Review Group recommends should be contained in the standard prior hearing directions recommended by the Review Group, see Recommendation 47.

Recommendation 48: *An Bord Pleanála should publish standard hearing directions on its web site and issue the directions in writing to the parties.*

Recommendation 49: *Where the appeal or application is complex or complicated an inspector should be sufficiently trained to be able to issue bespoke directions.*

Prior Hearing Procedure and Directions

4.41 The Review Group notes that An Bord Pleanála publishes brief guidance on the conduct of oral hearings¹⁵⁰ The Review Group welcomes this publication but suggests that the guidance can be improved by expanding the guidance in particular by giving a firmer steer as to the conduct of oral hearings. This is most particularly the case in terms of the production of new evidence. Under the heading 'Submissions of Documents/Evidence' at paragraph 11 the current guidance states that all documents, other than those already in the public domain, 'will have been made available for inspection and purchase at the offices of the planning or local authority and the Board at least seven days prior to the opening of the oral hearing.' The guidance goes on to say that these documents should be 'taken as read.' The Review Group commends this approach. However, the next paragraph of the guidance envisages that parties might produce new evidence at the oral hearing itself.¹⁵¹ Some responses made to the

¹⁵⁰ See Guidelines on Procedures at Oral Hearings Available online at: http://www.pleanala.ie/publications/2012/oh_procedures.htm

¹⁵¹ It states that, 'Where it is proposed to submit written statements of evidence or other documentation at the hearing, two copies should be submitted to the Board, and sufficient other copies should be made available at the hearing that all the parties and observers in attendance are provided with a copy. *Such statements of evidence need not be provided in advance of the presentation by the persons concerned to the hearing, unless requested to do so by the Inspector, but should be made available when presenting information at the*

Review Group have complained that this frequently occurs with hearing time being spent by witnesses 'reading evidence into the record'. Members of the Review Group have also observed this practice occurring at oral hearings at which they have attended.

4.42 The production of new expert evidence during the hearing causes unnecessary delay and costs. It also risks undermining the ability of members of the public to participate fully in the hearing process, because they are less likely to be able to have access to the time, resources and expertise to respond to late changes in technical evidence. The Review Group also considers that opportunities in the pre-hearing to narrow issues and save hearing time are not being taken. This may require legislative change (see Recommendation 37) although the Review Group notes that under Section 135(2A) of the 2000 Act the Board may require persons intending to appear at the oral hearing to submit, in advance, the points or summary of the argument they propose to make at the hearing or, in default, to refuse to allow the person concerned to make the point or argument. The Review Group recommends that greater use of such powers is made by inspectors.

4.43 It will be a matter for the Board to draw up the details of its general approach to such standard directions given in advance of the oral hearing.¹⁵² The Board will need, of course, to draw up further guidance

hearing. It is a matter for the parties to make arrangements to have such copies provided, and the Board is not in a position to provide such copies. Where documents, etc. are submitted at the hearing, one of the copies will be placed with the other documentation available for public inspection at the hearing. If a presentation is made in Powerpoint format, hard copy versions of the presentation should also be submitted.' (Emphasis added).

¹⁵² The Review Group does not consider that the existence of third party rights of appeal in Ireland precludes the ability of An Bord Pleanála to impose this type of discipline.

specifically tailored to the Irish statutory system, however, there already exists useful guidance in Scotland and England & Wales¹⁵³ which accommodate the full participation of third parties appearing at hearings.

4.44 The Review Group can see no reason why An Bord Pleanála cannot issue such directions under its existing powers. A failure by a party unreasonably to comply with such directions might also provide the basis of a claim for costs from other parties (as to which see Recommendations 31 and 32 above, including the need to review the current legislation governing costs). The Review Group does note however that in England and Wales the underlying framework is supported by statutory 'Inquiry Procedure Rules.'¹⁵⁴ Whilst the Review Group considers that it should be possible to achieve more efficient case management under the existing legislation by the practice of issuing directions, if it subsequently does prove necessary, the Review Group would recommend that legislation is enacted to put in place statutory Oral Hearing Procedure Rules.

4.45 The Review Group highlights the following basic concepts, which should form part of any best practice guidance contained in 'prior-hearing directions.'

¹⁵³ See, for example, 'Guide to taking part in planning, listed building and conservation area consent appeals proceeding by an inquiry – England.' Available online at: http://www.planningportal.gov.uk/uploads/pins/taking-part_planning-inquiry.pdf

¹⁵⁴ An 'Inquiry' is the England and Welsh equivalent of an oral hearing in Ireland see for example, The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000/1625 (as amended).

Statements of Case

4.46 For oral hearings, appellants and applicants should be asked to provide a statement of case which should be a written statement containing the full particulars of their case and copies of any documents to which it refers and any other supporting evidence when they submit their appeal. Most of these supporting documents should have already been submitted to An Bord Pleanála. For appeals, the local planning authority should produce its own written statement of case within a given period following the lodging of the appellant's Statement of Case. In the case of a third party appeal, where the developer intends to take a fully active role in the proceedings, it should produce the same type of documentation¹⁵⁵ at the same time as the local planning authority.

Statement of Common Ground

4.47 The final signed version Statement of Common Ground should be submitted along with Statements of Evidence relied upon usually four weeks before the hearing date. The Review Group considers that a Statement of Common Ground¹⁵⁶ should include such things as:

1. Description of the site (including agreed dimensions);
2. Description of the area;
3. Planning history of site;

¹⁵⁵ E.g. Statement of Case, Statements of Common Ground, and Statements of Evidence.

¹⁵⁶ See, for example:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438894/statement_common_ground.pdf. See e.g. the Review response letter dated 18 November 2015 from the Irish Planning Institute at paragraph 7.16 which supports the introduction of Statements of Common Ground.

4. Development plans (including relevant policies) and any draft development plans (including stage reached and weight to be attached);
5. Relevance of any other planning guidance published by local planning authority or other bodies; and,
6. Others [e.g. where applicable, agreed traffic (and/or other) data and circumstances]. It would also be useful to identify matters which are the subject of specific disagreement.

Where possible, prescribed bodies and other main parties should be encouraged to enter into Statements of Common Ground,¹⁵⁷ even if only on a topic basis.

Statement of Evidence

- 4.48 Guidance should be provided on the format of statements of evidence produced by expert witnesses. If the Statement of Evidence exceeds a certain length (say 3,000 words) the witness should produce a short summary. The Statements of Evidence should normally be exchanged four weeks before the commencement of the oral hearing. Parties should therefore have had a full opportunity to read the statements of evidence of the expert witness before the hearing. This reduces the need for expert witnesses to read out long sections of evidence at the oral hearing or for there to be delay in experts being questioned by other parties.

¹⁵⁷ See e.g. the Review response letter from the Irish Planning Institute, dated 18 November 2015 which states at paragraph 7.16, 'It is recommended that where an Oral Hearing is to take place all relevant documents (e.g. First Party responses to Third Party Appeals) should be circulated in advance so that when the hearing opens issues can be taken "as read" and not re-iterated. This would expedite the hearing and focus it on its purpose of discussion of issues. Statements of Common Ground should also be required.'

Conduct of Oral Hearings

- 4.49 The Review Group considers that some aspects of the current practice employed by An Bord Pleanála are good. There is generally a good use of overhead powerpoint slide presentations (and current oral hearing guidance rightly requires parties to provide hard copies of any such presentations) and images in the presentation of evidence. Unless an application is made to introduce new evidence, slide presentations should not contain new evidence. However, overhead projections are not always clearly legible to everyone in the hearing venue.
- 4.50 Inspectors invariably treat all parties with courtesy and respect. Inspectors enjoy a good reputation for their integrity and this includes in their conduct of hearings. However, the oral hearing is intended to be an inquisitorial process and, notwithstanding the claims by An Bord Pleanála to the contrary, the Review Group considers, based in part upon its own observations that the practice of inspectors varies. All inspectors should lead the case management of the hearing. Consultees suggest that time is lost by inspectors not taking greater control of the proceedings. Without denying people a fair hearing, inspectors should be suitably trained to feel confident enough to interrupt advocates or witnesses who are straying from the issues or repeating points. The Review Group considers that the existing guidance whilst useful should be strengthened and recommends that An Bord Pleanála achieve the following:¹⁵⁸

¹⁵⁸ The Review Group notes Recommendations 47-54 made in respect of oral hearings in Strategic Infrastructure Development applications in the 'Strategic Infrastructure Division Review Group Draft Final Report' dated February 2013 at pages 38-39, are broadly similar to the recommendations made by this Review in respect of all oral hearings.

- At the outset of the hearing (or at a pre-hearing if one has been held), the inspector should identify on a 'without prejudice'¹⁵⁹ basis the matters which they consider are likely to be the principal subject matters in issue. They should ask the parties whether they agree. The inspector should request at the outset time estimates from the principal parties for the presentation of each part of the case, including the anticipated length of any questioning of the other parties.
- Witnesses should be introduced briefly to the oral hearing. If appropriate, the witness should be allowed to read from his/her summary statement of evidence and deal with any typographical corrections.
- The production of new expert evidence should not be the norm. The hearing should then move speedily to questioning. The current process of 'reading evidence into the record' should cease.
- The inspector should clearly establish the capacity in which a professionally qualified person is appearing (i.e. whether giving evidence as his/her professional opinion or making submissions as an advocate). The role and duties of an expert are different to those of an advocate and this may affect the weight to be given to what is said.
- There may, of course, be instances where further new evidence is produced at a late stage. The inspector will need to judge whether it is fair to the other parties to admit late evidence. Where late evidence is admitted into the oral hearing which should have been

¹⁵⁹ This is intended to provide some focus to the hearing but the statement is made 'without prejudice' to the fact that other issues may arise and the inspector may change his or her mind as to the identity of the key issues when the evidence has been fully heard and digested.

submitted earlier, the inspector should be entitled to recommend where appropriate that An Bord Pleanála award costs against the party responsible for the delay and additional costs being incurred by other parties.

- 4.51 The Review Group notes that the current guidance on oral hearings states in respect of planning conditions that:

“12. Discussion of Possible Conditions:

The Inspector may request the persons attending to make submissions on conditions which might be attached to any possible permission or approval. Such a request is totally without prejudice to the Inspector’s recommendation to the Board or the Board’s decision.”

The Review Group welcomes this guidance. However, it considers that greater use of this practice should be made than currently is the case. In the case of oral hearings concerning Strategic Infrastructure Development applications it should be the normal practice.¹⁶⁰

- 4.52 Where the third party appellant is a lay person, is unrepresented, or is not a member of a well-organised residents or amenity group, the value of the hearing process as a means of testing the merits and de-merits of the proposal may be diminished. The ability to understand technical evidence and to ask questions of an expert witness in a public forum

¹⁶⁰ In its Review response letter dated 11 November 2015, the Irish Aviation Authority, for example, has suggested that there should be a right of appeal against the imposition of conditions in respect of Strategic Infrastructure Development applications where An Bord Pleanála is effectively a first and only instance decision-maker. The Review Group does not adopt this as a recommendation in part because ‘without prejudice’ discussion at the oral hearing should address much of the basis for this concern.

are not skills universally held. The Review Group considers that in such circumstances, courtesy on the part of the inspector is not enough. The Review Group considers that there still exists a need for the inspector to be proactive and inquisitorial in testing the proposal in even greater detail than usual. This does not mean that the inspector becomes an advocate for the third party. But, in discharging the inspector's statutory role to An Bord Pleanála, the inspector must ensure that the case has been thoroughly examined and tested.

Recommendation 50: *Directions should be issued in all oral hearings addressing, amongst other things, the requirement for the production of Statements of Case, Statements of Common Ground and Statements of Evidence, in accordance with a fixed schedule set by the inspector prior to the commencement of the oral hearing.*

Recommendation 51: *Inspectors should be given further training in proactive oral hearing management.*

Recommendation 52: *An Bord Pleanála should strengthen guidance on oral hearings.*

Recommendation 53: *Care should be given to ensure that if overheads and power point slides etc. are used for the presentation of evidence during hearings they are legible from all parts of the venue at which people are seated.*

Recommendation 54: *Greater use should be made of the existing practice of discussing possible planning conditions on a 'without*

prejudice' basis at oral hearings. In the case of oral hearings concerning Strategic Infrastructure Development applications it should be the normal practice.

Administrative Support at Oral Hearings

- 4.53 Senior planning staff and administrative staff, including the director of planning, often attend oral hearings either entirely or on certain days. Sometimes this will be in order to provide assistance to the inspector if issues arise at the oral hearing, or for observing the performance of the inspector for training purposes. The presence of senior staff attending public hearings draws them away from performing their role in processing other applications and appeals. That absence is normally justified if it is for the purposes of training. However, ordinarily, inspectors should be capable of dealing with procedural issues which arise at the hearing and making appropriate rulings. If a point arises upon which the inspector requires legal assistance, the inspector should adjourn and make contact with head office. For exceptionally complex cases it may be appropriate to appoint an assistant inspector.
- 4.54 From time to time administrative staff attending oral hearings are seated next to the inspector. In the view of the Review Group this should be the exception rather than the rule. Generally speaking, in circumstances where it is necessary for an inspector to have administrative support at an oral hearing the administrative staff should be a point of liaison between the inspector and the public. If possible the administrative staff should be in a side room or at the back of the hearing room in order that they can be more readily available to the

public whilst the hearing is in progress. They will also be better placed to advise the inspector as to whether the sound and visual systems are operating effectively for all those attending the hearing.

- 4.55 Not all can be attending a hearing for all of the time and so it is important that parties are kept up to date with the hearing timetable particularly when it slips. It is sometimes difficult for those who have not been present on a particular day to find out the updated schedule for the next day.¹⁶¹

Recommendation 55: *For hearings of less than three days the Review Group would not generally consider it appropriate for senior staff to attend the hearing in order to provide on-site advice or support to inspectors.*

Recommendation 56: *For longer cases (more than three days) and/or where there is likely to be a large public presence where administrative support is required it should be in the form of an administrative officer performing the role of a liaison officer between the inspector and the parties and the public and helping to ensure that parties know when to attend the hearing. That person should ideally be generally available (perhaps in a side room or at the back of the hearing venue but not seated next to the inspector.)*

Recommendation 57: *As part of the improvement of An Bord Pleanála's website, the possibility should be considered as to whether daily*

¹⁶¹ This was also previously suggested in respect of oral hearings in Strategic Infrastructure Development applications in the 'Strategic Infrastructure Division Review Group Draft Final Report' dated February 2013, Recommendation 51 on page 38.

updates of oral hearing timetables can be posted and accessed by the public.

Oral Hearing Venues

4.56 The Review Group understands that in the past An Bord Pleanála has made use of local planning authority offices or other public buildings to hold oral hearings. An Bord Pleanála has informed the Review Group that the use of local planning authority offices for public local inquiries (as they then were) was a feature of such inquiries conducted by/on behalf of the Minister when the Minister had responsibility for assessing local authority Compulsory Purchase Orders. An Bord Pleanála discontinued this practice when it took over this work in 2001, although it has not been suggested to the Review Group that the Minister's practice was successfully challenged. In all planning appeal and Strategic Infrastructure Development cases the local authority is an active party to the case and An Bord Pleanála has informed the Review Group that for this reason An Bord Pleanála does not use local authority facilities out of concern for the maintenance of public confidence in the independence and impartiality of the process and/or concerns regarding suggestions of subjective and/or objective bias. Consequently, currently hearings take place in private hotels or similar venues.¹⁶² This has cost implications. Furthermore, sometimes local authority and public buildings are better equipped with certain facilities than commercial venues. The Review Group is not persuaded by the force of An Bord Pleanála's position. Whilst it will be a matter for legal advice, given that the oral hearing process is administered by An Bord

¹⁶² The Review Group is informed that Dublin case oral hearings, where possible, are usually held in the offices of An Bord Pleanála.

Pleanála, it is the view of the Review Group that the use of local authority and public buildings does not undermine the independence of An Bord Pleanála and notes that this practice is commonly adopted elsewhere, such as, in England and Wales.

Recommendation 58: *Subject to seeking appropriate legal advice, before booking a private venue, opportunities should be explored to see if local authority or other public sector offices can be used for oral hearings.*

Reporting

Reporting Templates

4.57 The potential 'for standardising of inspectors (sic) report formats' was a recommendation of the IPC Report.¹⁶³ A standard template now exists for inspectors.¹⁶⁴ However, the Review Group understands that not all inspectors follow the template. The Review Group also notes the comment by the authors of the 'Strategic Infrastructure Division Review Group Draft Final Report'¹⁶⁵ that 'different approaches have been used by Inspectors in the reporting of oral hearings to the Board [in Strategic Infrastructure Development cases]. This needs to be addressed with a view to adopting a consistent approach.' Whilst there has been much progress towards ensuring that reports follow a uniform format, which the Review Group commends, it is by no means universal.

¹⁶³ IPC Consulting, An Bord Pleanála the Planning Appeals Board Organisational Review, 2003, page 30.

¹⁶⁴ See Section B of the Submission to Review Group from An Bord Pleanála, 30 October 2015, page 37.

¹⁶⁵ Dated February 2013, page 26.

4.58 A good template ensures that users can more easily understand the report. It makes quality control easier and helps ensure critical elements required in the report are not omitted. The Review Group can see no good reason why a standardised format cannot be followed.

Recommendation 59: *All inspectors should be required to follow the template format in drafting their reports.*

-Part Two-

Decision-Making

Introduction

4.59 The Review Group was impressed by the rigour with which Board members examined the case files. However, as stated in Chapter Three,¹⁶⁶ the Review Group considers that there is a tendency of the Board members to micro-manage the decision-making process from afresh. The procedure by which a Board member presents the case to the rest of the Board for discussion is very time consuming.¹⁶⁷ It is unlikely to be sustainable should the work load of An Bord Pleanála continue to increase.

¹⁶⁶ See paragraph 3.10.

¹⁶⁷ For 'simple relatively straightforward files', six to nine cases can be taken in a meeting which lasts three to four hours. More typically, three to four decisions are made per meeting. Complex cases can take more than one meeting to decide, for example the redevelopment of Dublin Port took seven meetings, and may also involve site visits by Board members. See page 40 of 'Submissions to Review Group from An Bord Pleanála', 30 October 2015.

Presentation of Cases to the Board

- 4.60 The current practice is for a case file to be presented to the Board by another member of the Board. The principal source for the Board's expert assessment should come from the inspector's report, although it is of course imperative that Board members remain free to disagree with the recommendations of inspectors. Preparing to present a case is inevitably a time consuming exercise. A great deal of the time taken by the presenting Board member involves traversing ground already familiar to the inspector and also, although perhaps to a lesser degree, to officers employed in Planning Operations of An Bord Pleanála.
- 4.61 The Review Group considers that there is no reason in principle why the case inspector, if available, should not present the case to the Board members. The longstanding apparent reluctance of some inspectors to present cases to the Board is unfounded being predicated upon a false premise that inspectors are part of an independent body from the Board.¹⁶⁸ However, if the reporting inspector is not available, the Review Group considers that the case may be presented by another inspector or indeed by suitably qualified staff within An Bord Pleanála. The inspector or presenting staff member would not, of course, participate in the making of the decision. The Review Group is not persuaded this practice would give rise to a successful legal challenge, but if a real doubt exists, then the legislation should be amended expressly to allow for non-Board members to present case files to the Board.

¹⁶⁸ It is noted that on occasion the Board has requested an inspector to present a summary of the case once the report and recommendation has been completed. See page 41 of 'Submissions to Review Group from An Bord Pleanála' 30 October 2015.

Recommendation 60: *Cases should be presented to Board members by inspectors or suitably qualified staff members. If necessary the legislation should be amended to provide expressly for this.*

Drafting of Board Orders and Directions

4.62 Regardless of what is required as a matter of law, the discipline of providing intelligible reasons benefits the decision-making process itself as well as providing greater transparency, thereby increasing public confidence in the decision itself.¹⁶⁹ It is important that the Board makes clear in its directions by reference to paragraph numbers, those parts of the inspector's report with which it agrees and those parts with which it disagrees.¹⁷⁰ The Review Group does not see any good reason why the

¹⁶⁹ Good reasons can also address criticism of 'perceived inconsistency in decisions'; inconsistency is among the complaints identified by IPC Consulting in its 2003 Organisational Review of An Bord Pleanála, on page 62. In response to the present Review, The Irish Planning Institute also identified an alleged inconsistency of approach by the Board. At paragraph 8.3 of its Review response it states 'Members find it a particular source of frustration that repeat applications on the same site, when determined by [An Bord Pleanála] sometimes reach different conclusions where there have been no significant changes in policy related to the site.'

¹⁷⁰ See e.g. Review Response letter, from the Local Authorities Members Association dated 18 November 2015 which states, 'A more detailed report [is] required when the Board overturns [an inspector's] report.' In its Review Response dated 16 November 2015, the Construction Industry Federation also stated that, 'In cases where the decision of the Board is not in accordance with [the inspector's report], the Board, when giving its reason for its decision, should give full reasons as to why the Inspector's report was not accepted. A clear memorandum should be issued setting out the rationale for the Board decision. The current system lacks transparency.' The Irish Planning Institute drew particular attention to this issue in connection with the requirements concerning Appropriate Assessment ('AA') pursuant to the Habitats Directive, '... one potential source of litigation arises from circumstances in which the Board do not follow the recommendation of the relevant Inspector in making a decision on a particular file. While the current practice of including a paragraph or several paragraphs explaining the decision not to follow the recommendation of the Inspector is instructive, the absence of a more detailed consideration of a file (i.e. as is otherwise set out in the Inspector's Report) can lead to significant uncertainty for developers, members of the public and the Planning Authority. Given this, it is respectfully submitted that, in circumstances where the Board elects not to follow the recommendation of the Inspector, the Board be required to prepare its own report detailing its assessment. This is particular relevant in the area of AA where the Board make a decision to grant against the recommendation of the Planning Inspector but do not provide the necessary detailed scientific evidence to

provision of a detailed and transparent direction should not be provided for all determinations by the Board and it most certainly should be the case for all Strategic Development Infrastructure cases and all cases which have had oral hearings. The Review Group notes that this is the standard practice in England and Wales when a Minister gives a decision based on an inspector's report.¹⁷¹ The Review Group acknowledges that the Board's provision of reasoning has improved in recent years and welcomes this improvement.

Recommendation 61: *The Board must make clear in its direction, by reference to paragraph numbers, those parts of the inspector's report with which it agrees and those parts where it disagrees. Where the Board disagrees it should give its reasons for so doing supported, if necessary, by relevant evidence. The reasons should not be formulaic.*

Imposing Planning Conditions

- 4.63 The Review Group understands that An Bord Pleanála has some internal guidance containing model planning conditions. This document is not published and the guidance is not uniformly followed by all of An Bord Pleanála's inspectors. There is some concern that if published, the

complete the AA process.' (Paragraph 7.26 of Review response letter dated 18 November 2015). It also made a similar point at paragraph 7.34.7 of its review response letter, in respect of when the Board departs from an inspector's report in respect of a Strategic Infrastructure Development application. Indeed, as Mr John O'Connor, then chairperson of An Bord Pleanála noted, at an Irish Planning Institute Conference held on 6th May 2011, the requirement 'to ensure that reasons and considerations for decisions are clear to all parties and the general public [has] a particular onus...where the inspector's recommendation is not accepted or significantly changed.'

¹⁷¹ See 'Statutory Casework Functions of the Transport and Works Act Order Unit' sent to the Review Group under cover of email dated 12 November 2015, from Martin Woods, the Head of the Transport and Works Order Unit, Department of Transport Legal Advisers, Department of Transport, UK.

model planning conditions could potentially conflict with the guidance published by the Department.¹⁷² However, the Review Group considers that there should be no sound basis for this concern particularly if the guidance is drafted in consultation with the Department. The Review Group also notes the Departmental guidance does not set out or contain model conditions.¹⁷³ Whilst conditions may have to be adopted to fit particular circumstances of the case, it is undesirable for inspectors to adopt their own wording for conditions where there is no material difference in circumstance. If an inspector considers that a particular form of wording contained in the guidance is flawed, that matter should in general be better addressed through normal line management procedures. If however the inspector first identifies the flaw in the process of reporting to the Board then the report should set out the reasons why the inspector considers the model condition to be flawed and how the flaws can be overcome by a differently worded condition. The Board can then address the point in its own decision-making process and in its reasons. However, more generally, as stated elsewhere in this Report, inspectors should not operate as a separate body from the Board. The role of the inspector is to assist the Board in its decision-making process. Valuable time is lost if the Board has to redraft planning conditions back into its preferred form. The Review Group is recommending (see Recommendation 63 below) that An Bord Pleanála adopt and publish guidance on the approach to the imposition of planning conditions. Given their high level of technical skill inspectors will be well placed to assist in the production of the guidance and model conditions.

¹⁷² Development Management Guidelines (June 2007). Available online at: <http://www.environ.ie/en/DevelopmentHousing/PlanningDevelopment/Planning/PlanningGuidance/>

¹⁷³ See paragraph 4.4 on the publication of guidance generally.

Recommendation 62: *Inspectors when reporting should follow An Bord Pleanála guidance on the imposition of planning conditions and in exceptional cases give clear planning reasons for any departure from An Bord Pleanála guidance.*

- 4.64 A number of respondents to this Review complained about the nature of some planning conditions which have been imposed by the Board. The imposition of planning conditions is an important component of the decision-making process. Conditions should be reasonable in nature, relate to a legitimate planning purpose and be enforceable. It follows that they should be clearly drafted and understandable.¹⁷⁴
- 4.65 Sometimes, of course, there will be a need for entirely bespoke conditions to be drafted. However, for the main part, planning conditions are used to address recurring issues, such as, times of operation, noise restrictions, landscaping schemes etc. It is clearly desirable that these matters can be addressed by using conditions adapted from model conditions. This is not only less costly, speedier and fairer, but it also ensures that the conditions which are imposed are likely to be legally robust.
- 4.66 The Review Group considers that An Bord Pleanála should consult with the Department and local authorities (and other relevant specialist bodies) with a view to publishing a guidance or joint guidance document containing its general view on good practice to be applied when drafting bespoke conditions and also setting draft model

¹⁷⁴ For example, the Review response letter dated November 2015 from the County and City Management Association said conditions imposed by An Bord Pleanála should 'be in plain English and enforceable.'

conditions which can be adapted to the particular circumstances of an application. Such guidance would encourage consistency and transparency. It would also minimise the risk of conditions being imposed which prove subsequently to be unenforceable. The guidance would also provide a useful initial source for draft conditions for any discussions at a conditions session held 'without prejudice' as to the inspector's future recommendation as to whether consent should be granted or the respective parties' own position as to whether consent should be granted at all.

4.67 The Department's 'Development Management Guidelines' at paragraph 7.2 notes that local authorities have adopted 'standard conditions.' It is the Review Group's clear view that standard model conditions are plainly useful but they are better contained in a national guidance document rather than in a variety of different local authority guidance documents. Such guidance issued by An Bord Pleanála would also provide a national lead by giving assistance to local authorities in the imposition of their own planning conditions. This should help ensure a consistent and fair approach to the imposition of conditions throughout the country's planning system. The Review Group would expect the guidance to be reviewed and subject to consultation with the Department, local authorities, the public, prescribed and professional bodies (see further Chapter 5 at paragraphs 5.47 and 5.54) and updated from time-to-time in the light of experience gained.

Recommendation 63: *An Bord Pleanála should publish a guidance document containing its general view on good practice to be applied when drafting bespoke conditions and also setting a national template*

for conditions in consultation with the local government sector, as per Recommendation 80 of Chapter Five.

4.68 As noted in Part One of this Chapter the existing guidance for oral hearings already provides that an inspector may hold ‘without prejudice’ discussions on the imposition of conditions. However, the Review Group understands that the current practice is that if an inspector recommends that consent should not be granted for a proposed development, and if the Board disagrees with the inspector, the Board members are obliged to draft conditions from afresh. The Review Group considers that this is undesirable. Planning inspectors are highly qualified professionals and will be capable of producing conditions on a ‘without prejudice’ basis to their principal recommendation (i.e. as to whether consent should be granted).¹⁷⁵

Recommendation 64: *Generally, and certainly in the case of all Strategic Infrastructure Development applications, an inspector should draft on a ‘without prejudice’ basis a list of conditions which they would recommend to the Board if the Board decided to grant planning permission against the inspector’s principal recommendation.*

In-House Legal Counsel

4.69 As matters presently stand, there is no in-house person who is legally qualified to give legal advice the Board. It happens that a current Board member is also a qualified lawyer but his role is not to act as legal adviser to his colleagues. The Review Group considers that access to in-

¹⁷⁵ This is the general practice in England, Wales and Scotland.

house legal counsel would be particularly useful to the Board when it is dealing with legally complex matters,¹⁷⁶ including its powers to invite parties to amend their proposal in order to gain consent.¹⁷⁷ Board members are employed in this capacity for their judgement, not for their legal drafting skills, yet they have no access to in-house legal advice.

4.70 As noted in Chapter Two, the planning system has become legally more complex, not least with the requirements of EU environmental law. Moreover, the scope of public law and human rights law means that a decision-maker must be particularly astute to ensure that any decision is taken in accord with a process which is fair and legally robust. In addition, the role and function of An Bord Pleanála has expanded and will continue to expand (for example, the transfer of functions relating to the foreshore area). In the view of the Review Group, unless appropriate action is taken, the scope for complaint and legal challenge will only increase.

4.71 The Review Group notes that An Bord Pleanála applied to the Department in 2011 for approval to employ an in-house legal adviser. The Review Group has been informed by An Bord Pleanála that in

¹⁷⁶ The Review Group found support for An Bord Pleanála to have access to in-house legal advice amongst respondents to the Review, see e.g. Review response letter dated 18 November 2015, from the County and City Management Association and the Review response letter from the Irish Planning Institute, dated 18 November 2015.

¹⁷⁷ See e.g. Article 73 of the Planning and Development Regulations 2001, as amended, which provides that, "The Board may, when considering an appeal under section 37 of the Act, invite the applicant for the permission concerned to submit to the Board revised plans or other drawings modifying, or other particulars providing for the modification of, the development to which the appeal relates and an applicant so invited may submit to the Board such number of plans, drawings or particulars as the Board may specify." See also section 37F(1)(b) of the 2000 Act in respect of Strategic Infrastructure Developments and section 37M(1)(b) of the same Act in respect of Substitute Consent.

relation to the 2011 request no formal written response was received from the Department; however, An Bord Pleanála was verbally advised that, while the Department had no issue in principle with the idea, it could only be approved on the basis that funding of the post would have to come from within the existing funding parameters for An Bord Pleanála and be approved by the Department of Public Expenditure and Reform. This coincided with a period of significant retrenchment in both staffing and funding for the organisation, and for the wider public service, and in that context it was not further pursued at that time. However, the Review Group considers that the current absence of in-house legal advice and lack of specialist support in the craft of drafting of decisions, orders and directions¹⁷⁸ continues to represent a major weakness of the decision-making process.¹⁷⁹ The Review Group considers the appointment of in-house counsel to be a vital requirement.

Recommendation 65: *Whilst An Bord Pleanála should continue to retain external solicitors it should also recruit at least one in-house counsel (barrister or solicitor) of suitable specialist expertise with seven years or above post-qualification experience to advise. In-house counsel should*

¹⁷⁸ For example, according to John O'Connor, the then chairperson of An Bord Pleanála, 'lack of clarity in the reasons and consideration given for decisions' was one of the top two complaints from a customer survey, as remarked on in a speech given at an Irish Planning Institute Conference held on 6th May 2011.

¹⁷⁹ Whilst we appreciate that the two situations are not entirely comparable, since the Board members enjoy a greater degree of training than a Minister and are in place for a longer period of time on average, it is interesting to compare the much greater level of legal advice and specialist drafting assistance which the relevant UK Minister receives when carrying out a broadly comparable exercise for larger and more controversial developments. See 'Statutory Casework Functions of the Transport and Works Act Order Unit' sent to the Review Group under cover of email dated 12 November 2015, from Martin Woods, the Head of the Transport and Works Order Unit, Department of Transport Legal Advisers, Department of Transport, UK.

also be able to instruct the external lawyers and the Bar directly both in an advisory capacity and in litigation cases, where appropriate.

Decision-Making on Smaller Scale Development Case Files

4.72 The Review Group recognises the fundamental role that Board members play in the statutory planning process. However, the absence of any delegation of any decision-making to inspectors adds time and expense to the process. Delegating decision-making to inspectors plainly offers considerable opportunities to speed up the decision-making process, firstly, because the matter does not need to be passed to a higher tier to make a final decision and, secondly, because the process of preparing a report generally takes longer than preparing a written decision.¹⁸⁰ The Review Group notes that IPC Consulting in its Organisational Review of An Bord Pleanála in October 2003 noted that 'one or more sources' had suggested: 'The Board should delegate decision-making on small cases to senior planning inspectors with a specified minimum level of experience.'¹⁸¹ The authors of the IPC Report

¹⁸⁰ According to the Planning Inspectorate of England and Wales, whose senior inspectors have experience of both systems: 'The preparation of a decision takes an inspector, in very general terms, about half as long as s/he would take in the preparation of a report. This is because a decision only needs to broadly summarize evidence put forward in submissions, be they in writing or made verbally at a hearing or inquiry. But where inspectors are required to prepare a report, it must be a stand-alone document and accordingly must clearly set out site description, proposed development, planning policy, the respective cases etc. In turn the inspector must then draw his/her conclusions from the submitted evidence set out in the report. The greater level of detail required in a report is essential to fully inform the Secretary of State before he makes a decision, and adds to the time taken by the inspectors.' Planning Inspectorate of England and Wales Review response letter dated 22 November 2015. The Chief Reporter for the Scottish Government makes a similar point, "...it would be fair to say that [non-delegated decisions] are likely to take considerably longer than delegated appeals as the work involved in writing a report to Ministers is significantly greater than that involved in writing a delegated decision." Review response from the Chief Reporter of the Scottish Government, dated 10 November 2015.

¹⁸¹ IPC Consulting, An Bord Pleanála Organisational Review, 2003, page 63.

did not comment upon this suggestion, other than to point out that it would require an amendment of section 111 of the 2000 Act.

4.73 Clearly, there are some advantages to having as full a consideration of a planning appeal as practicable. If it is the case that the requirement to have every planning appeal, however minor, determined by Board members contributes to a delay in the determination of controversial and major appeals and Strategic Infrastructure Developments then, in the view of the Review Group, the balance of advantage may tip toward disadvantage. This is particularly the case in circumstances in which the Board is collectively under pressure, for instance due to a high volume of cases or due to a depleted number of Board members.

4.74 The Review Group notes that in most neighbouring jurisdictions the majority of planning appeal decisions are taken by inspectors under delegated powers.¹⁸² In Scotland inspectors are called 'reporters' but in 'the vast majority' of cases the reporters do not report but make decisions under delegated powers.¹⁸³ Whilst the systems in the UK are different in certain respects, the evidence from England & Wales and Scotland concerning the additional time taken by an inspector in the reporting role, as opposed to an inspector in the delegated decision-making role, is relevant to Ireland. It indicates very clearly that substantial efficiency gains could be achieved in the Irish planning system by introducing delegated powers to inspectors. However, the Review Group is of the view that it is important to balance these

¹⁸² For example in England and Wales for 2014-2015, 94.4% of planning appeals were taken by inspectors under delegated powers (see further the figures for the last five years in provided by PINS in its Review response letter dated 12 November 2015).

¹⁸³ See Review response letter from Ms Lindsey Nicoll, Chief Reporter to the Scottish Government, dated 10 November 2015.

matters against the need to ensure that there remains strong public confidence in An Bord Pleanála's decision-making processes. In this regard, the Review Group considers that historical and cultural differences between Ireland and other jurisdictions cannot be ignored. As matters presently stand, there is a widespread public expectation that all decisions will be taken by the Board.¹⁸⁴ Nonetheless, the Review Group did find some support in response to its current Review for delegating decisions to inspectors,¹⁸⁵ and that there was a wide desire for speedier decision-making processes.

4.75 After careful consideration, the Review Group considers that, as matters stand,¹⁸⁶ it would not be widely acceptable for a decision in relation to any development, however small in scale, to be delegated to inspectors. However, notwithstanding some views to the contrary, the Review Group is equally of the opinion that public confidence would not be undermined if the process of Board members sitting in divisions were to be extended to single member divisions for certain decisions involving smaller scale development proposals.

¹⁸⁴ For example, Review response of the Royal Town Planning Institute Ireland of 18 November 2015 states that: 'We would be opposed to delegation of determination of certain files to the Inspectorate as this could undermine the established and ethical decision-making process of the Board and erode public confidence.'

¹⁸⁵ See e.g. The Review response letter from Edna P. Conway, dated 17 November 2015; the Review response from the Construction Industry Federation, dated 16 November 2015, stated 'The current decision making process within An Bord Pleanála could be time consuming requiring a number of Board members to determine all appeals. All appeals received by the Board could be categorised so that they can fall into a range of categories ranging from major to minor. The decision making process on minor development appeals could be delegated to a Senior Inspector. This process should be supported by an internal organisation/communication process to ensure consistency in decision making.'

¹⁸⁶ As stated above, public opinion may change and the question of delegating smaller scale development proposals is a matter which the Review Group would expect to be revisited particularly if, in the future, notwithstanding the implementation of the Recommendations proposed by the Review Group, there are excessive delays in the decision-making processes of An Bord Pleanála.

4.76 The 2000 Act provides that the Board may sit in divisions and for the purposes of the business assigned to that division, it has all of the functions of the Board; for example, the Strategic Infrastructure Division of the Board has five members.¹⁸⁷ The Review Group notes that the use of divisions does not appear to have adversely affected confidence in An Bord Pleanála. In this regard the Review Group has also found the submission made by the Planning Appeals Commission of Northern Ireland particularly useful. The Commissioners are in effect professional planners. Although the planning system is different to that of the Republic of Ireland, Commissioners in Northern Ireland enjoy a similarly high reputation for personal integrity and independence as the Board members of An Bord Pleanála. Originally in Northern Ireland, all planning appeal decisions had to be taken by all of the Commissioners sitting as a single body. A system of divisions was introduced in 2003.¹⁸⁸ The Commission's submission sets out the advantages and disadvantages of allowing decisions to be taken by divisions. A division may be as small as a single Commissioner who may make a decision in respect of smaller scale developments. The experience of the Planning Appeals Commission has demonstrated that delegation to one Commissioner has been successful. It is to be noted that a division of a single Board member would be informed by an expert report prepared by An Bord Pleanála's inspectorate.

¹⁸⁷ Section 112 of the 2000 Act.

¹⁸⁸ 'Notwithstanding the disadvantages, the shift to delegated decision-making in the Commission has been successful and well received over time. This has been assisted by the setting of criteria which reserves the more significant decisions to the [whole] Commission and less contentious decisions to individual Commissioners. Over time the range of decisions taken by the Commission has reduced considerably and the proportion of delegated decisions [to Commissioners] has increased with no criticisms from participants.' Review response of the Northern Ireland Planning Commission, page 3, 11 November 2015.

4.77 The Review Group is of the opinion that a division of a single Board member for the decision-making process for smaller scale development cases would strike an appropriate balance.¹⁸⁹ Whilst An Bord Pleanála would have to develop its own published criteria for identifying appropriate development proposals, the Review Group considers the criteria adopted by the Planning Appeals Commission, provided with its response to this review, are a useful starting point for consideration. Those developments chosen for Project Freeflow, discussed further at paragraph 4.94 of this Chapter, for example single urban houses and house extensions, also form the basis for a possible set of criteria. In the opinion of the Review Group, public confidence in respect of smaller scale development proposals is likely to be better secured by the quality of the reasoning given by the Board than by the number of Board members involved in the decision-making process. Should a small scale development proposal involve matters of particular complexity or of controversy, it is to be recalled that at all times before a final decision is made, a Board member would be able to refer the case for a decision by the full Board or a Division of two or more Board members.

4.78 Board members would, of course, need to be trained further in the process of giving individual decisions and regular briefings among Board members, involving the inspectorate, would be required to ensure consistency of decision-making. An Bord Pleanála's policies on the type of development proposals which are likely to be determined by a single Board member would also need to be devised and

¹⁸⁹ It is interesting to note that both IBEC and the Irish Planning Institute suggested that consideration be given to some form of delegation. IBEC suggested delegation of vaild appeals in relation to smaller development proposals to a 'lower body however constituted' (see Review response letter, dated 17 November 2015) and the Irish Planning Institute suggested some form of delegation pilot project (see Review response letter, dated 18 November 2015).

considered. The Review Group also observes that the fact that inspectors do not have delegated decision-making functions emphasises that their single role is to assist the Board members in the Board's decision-making process. The Review Group makes recommendations elsewhere in this Report as to how greater strategic direction from the Board can be given to the inspectors which should improve and speed up the decision-making process.

Recommendation 66: *Smaller scale development proposals should generally be determined by a division comprising of a single Board member, unless that Board member disagrees with the inspector's recommendation, in which case the decision should be made by a three-member Division of the Board.*

Section 5 Referral Cases

- 4.79 Section 5 of the 2000 Act, provides that, where a question arises as to whether something is or is not development, or is or is not exempted development, any person may request a declaration from the relevant planning authority on that question. The decision of the planning authority may be appealed to An Bord Pleanála or a planning authority may refer such a question directly to An Bord Pleanála. The purpose of section 5 is solely to address one or both of the following questions: Is it development? Is it exempted development? Currently such referrals would normally be dealt with at a three-person Board meeting. Once the relevant facts are gathered the question as to whether or not a proposal is 'development' or is 'exempted development' is then a

matter of applying planning law and judgement to the facts.¹⁹⁰ The employment of in-house legal counsel, in accordance with Recommendation 65, should serve to assist in expediting this process and result in more legally robust decisions. Accordingly, the Review Group considers that given the legal nature of Section 5 Referrals there is not the same need to ensure that this category of case is considered by all Board members.

Recommendation 67: *Section 5 Referrals should be determined by a Division comprising of a single Board member, unless that Board member disagrees with the inspector's recommendation, in which case the decision should be made by a three-member Division of the Board.*

Decision-Making on Strategic Infrastructure Development

4.80 Unlike planning applications lodged with the local authority planning system, presently Strategic Infrastructure Development applications do not have to go through a pre-examination process prior to being accepted.

Recommendation 68: *A validation stage should be introduced to raise the standard and quality of Strategic Infrastructure Development applications generally and to ensure that the pre-consultation stage has been used to full effect. The technical report referred to at paragraph 4.32 (see recommendation 43) and which will demonstrate compliance with pre-application technical requirements and necessary*

¹⁹⁰ The Irish Planning Institute, for example, identified section 5 referrals as an area where the time for determination could be speeded up (see Review response letter, dated 18 November 2015).

consultations raised should be a significant influencing factor on whether a Strategic Infrastructure Development application is of an appropriate standard.

- 4.81 All Strategic Infrastructure Development applications are assigned to a senior planning inspector for assessment and recommendation. There is always a different senior planning inspector to the one involved in pre-application consultations in order to protect the independence and integrity of the process. On very large and complex cases a second in-house inspector, who has not participated in the pre-application consultation process, may be appointed to report on specific issues. He or she reports to the reporting inspector. Whilst the integrity and independence of the process is recognised and supported, it is unclear how or why an inspector engaged in pre-application consultation could be compromised in subsequently assessing the application. This process is engaged at local authority level with little impact on the independence and integrity of the process. Consistency in approach and the making of recommendations is necessary. It is considered that the allocation of case files to a reporting inspector who has not been involved in the process from the outset not only results in time inefficiencies and a duplication of work but also has the potential to result in inconsistencies. It is considered that this approach should be revised in the interest of consistency and timeliness.

Recommendation 69: *In the interest of consistency and timeliness, the senior reporting inspector on Strategic Infrastructure Development cases should be involved from the outset in the determination of the case, including attendance at pre-consultation meetings and meetings*

associated with prescribed bodies. Team meetings with the Board can be facilitated by the director of planning and/or the assistant director of planning and necessary information disseminated to the reporting inspector as necessary.

Reasoning for not Accepting a Recommendation

4.82 In relation to planning appeals, legislation provides that where a decision by the Board to grant or to refuse permission on appeal is different from the recommendation made by an inspector, the Board is required to indicate the main reasons for not accepting the recommendation to grant or refuse permission.¹⁹¹ At present the provisions of section 34(10) of the 2000 Act do not apply to Strategic Infrastructure Development cases although the Board, in practice, does state reasons for not accepting the recommendation.¹⁹² For reasons of consistency and transparency, legislation should be amended and the provisions of section 34(10) should apply to Strategic Infrastructure Development cases.

Recommendation 70: *For reasons of consistency and transparency legislation should be amended and the provisions of section 34(10) of the 2000 Act, which require the Board to indicate the main reasons for not accepting the recommendation to grant or refuse permissions, should apply to Strategic Infrastructure Development cases.*

¹⁹¹ Section 34(10) of the 2000 Act.

¹⁹² Sections 37G(2) and 37H(2) of the 2000 Act are also of relevance to Strategic Infrastructure Development decisions, in terms of requiring the Board to consider inspector reports and requiring a statement of main reasons and considerations upon which a Strategic Infrastructure Development decision is based.

4.83 In the consideration and determination of Strategic Infrastructure Development applications, communication, other than that specified in legislation, with local authorities should be reviewed and enhanced. Public consultation feedback suggests that general correspondence and communication appears to be almost *ad hoc* at times, particularly in relation to pre-planning outcomes, formal receipt of decisions on applications, and the scheduling of oral hearings. Significant material alterations submitted as revised plans are sent to the local authority and publicly advertised during the course of determining the application, in accordance with the legislative requirements. Nevertheless, it has been highlighted to the Review Group that it would be extremely beneficial if a copy of the plan and drawings on which the determination is made, was forwarded to the local authority. This is particularly necessary as it is the role of the local authority to ensure compliance with conditions and enforce that development is undertaken in accordance with plans and particulars submitted.

Recommendation 71: *In the consideration and determination of Strategic Infrastructure Development applications, communication with Local Authorities should be reviewed and enhanced. A Memorandum of Understanding should be developed between An Bord Pleanála and the County and City Management Association to enhance the communication network and pattern.*

4.84 Due to the long lead-in time with preparation, lodgement and assessment of Strategic Infrastructure Development applications, it is considered vital that where the Board is minded to grant planning permission, that potentially technical complex conditions can be further

explored with relevant parties. The purpose is to, amongst other things, highlight any potential unworkable conditions before a final decision is made and to ensure that conditions are technically implementable. Whilst this would generally apply to Strategic Infrastructure Development cases it could also be of relevance in appeal cases particularly when the Board is minded to overturn a decision of the planning authority to refuse planning permission. This procedure would allow applicants to propose alternative plans or amendments to make the project viable and resubmit before a final decision and it would also afford an opportunity to third parties to review and comment. This could lead to a reduction in costly rejections and reapplications for both the applicant and An Bord Pleanála.

Recommendation 72: *Section 37F(1)(b) of the 2000 Act should be amended to encompass all appeals which would allow the Board to state that it is minded to grant permission but to still seek further information on a specific item, thereby allowing the Board to explore specific technical items that remain unclear to ensure that, for example, conditions to a grant are technically implementable.*¹⁹³

Fees

4.85 When fees of €100,000 were introduced for Strategic Infrastructure Development applications this represented a significant increase from the maximum local authority planning fee of €38,000. With fees being

¹⁹³ Section 37F(1)(b), which applies to Strategic Infrastructure Development cases only, provides that 'before determining any application for permission the Board may, at its absolute discretion and at any time, indicate that it is considering granting permission subject to the applicant submitting revised particulars, plans or drawings in relation to the development.'

based on cost recovery, applicants often receive a refund of a portion of the fee and the public consultation process associated with the Review has confirmed that the Cost Orders provide a very clear picture of where the fee has been spent and the Review Group commends An Bord Pleanála in this regard.

- 4.86 However the cost recovery clause does not apply to Strategic Infrastructure Development applications which are being amended and it is considered that cost recovery clauses should be inserted into section 146B of the 2000 Act in the same manner as is applied to 'parent' strategic infrastructure cases. There can be circumstances where certain alterations can generate a requirement for a new Environmental Impact Statement and Environmental Impact Assessment for screening and/or appropriate assessment and possibly an oral hearing, thus resulting in Board costs in excess of the application fee paid. Legislation should be amended to provide for cost recovery to ensure that these additional costs can be recovered.

Recommendation 73: *It is recommended that cost recovery clauses should be inserted into section 146B of the Planning and Development Act 2000 in the same manner as is applied to 'parent' strategic infrastructures cases.*

-Part Three-

Timeframes

Introduction

4.87 Although the circumstances may change over time, the speed of decision-making has been a longstanding issue for An Bord Pleanála.¹⁹⁴ Timeframes for determination of cases are an important issue for all parties involved in the planning system.¹⁹⁵ As discussed at paragraph 3.49 of Chapter Three, An Bord Pleanála is developing a new ICT system, PLEAN-IT, which is expected to deliver improved internal and external services. The Review Group anticipates that the introduction of the new system, along with the implementation of the Recommendations contained within this Review Report, will improve efficiency for the public and for An Bord Pleanála's staff, thereby reducing timeframes, and will release existing resources, principally staff, to other areas which warrant additional resources.

4.88 Presently, there are no mandatory timeframes but rather it is an objective of the Board to decide planning appeals within 18 weeks of receipt and to determine Strategic Infrastructure Development within

¹⁹⁴ See footnote 21 in Chapter One, which records that Minister Tully when addressing the very first meeting of the Board focused on the time it would take to make decisions. Some 34 years later Mr John O'Connor, then chairperson of An Bord Pleanála, at an Irish Planning Institute Conference held on 6th May 2011, acknowledged that delays in decision-making was one of two critical areas identified by customer surveys.

¹⁹⁵ See, for example, Review response letter from Irish Aviation Authority dated 11 November 2015 at page 2 paragraph 1; Review response letter from Royal Institute of Architects of Ireland dated 18 November 2015 under the heading 'The Timescale for Adjudicating on Appeals'; Response letter from the Local Authority Members Association dated 18 November 2015 under heading 'Question 7' states that 'There are major issues regarding the time it takes to make a decision'.

18 weeks after the statutory observation period. In 2015 An Bord Pleanála received 1,979 planning cases and disposed of 1,966, 80% within the statutory objective period. 83% of all cases received were 'normal' planning appeals.

Publication of Processing and Drafting Timeframes

4.89 Whilst quality decision-making should take precedence over arbitrary time limits,¹⁹⁶ the Review Group does consider that timeframe certainty, insofar as reasonably practicable, is absolutely necessary if the public are to have confidence in the planning system. Providing guidance on processing timeframes and procedures and publishing a generic week-by-week guidance timeframe for different cases would be a simple and immediate step that could reduce the uncertainty around timeframes.

Recommendation 74: *An Bord Pleanála should publish a week-by-week processing and drafting timeframe for the different categories of cases it determines.*

Mandatory Timeframes?

4.90 Timeframes were among the most prominent issues arising from the public consultation process undertaken by the Review Group.¹⁹⁷ Whilst

¹⁹⁶ To that extent the Review Group agrees with the view expressed by the Glenties Windfarm Information Group in its Review response dated 17 November 2015. However, the Review Group believes that timeframes for decision-making should be set and generally adhered to.

¹⁹⁷ Such as Mr Peter Thomson, Mr Oliver Cassidy, Mr Richard Morton, Mr Peter Stafford, the Royal Institute of Architects of Ireland, the Clare Manor Hotel, the County and City Management Association, the Department of Education and Skills, the Dublin Airport Authority, the Irish Aviation Authority, the Irish Planning Institute, and the Local Authority Members' Association.

a number of the responses indicated satisfaction with the current timeframes,¹⁹⁸ there was support for making these timeframes mandatory in order to minimise the uncertainty associated with the planning process.¹⁹⁹

4.91 The local authority planning system has mandatory timeframes and it was considered by respondents that this establishes a relevant precedent for An Bord Pleanála.²⁰⁰ However, such an approach would need to be balanced with the priority of producing quality decisions, which should not be compromised as a result of restrictive timeframes. Unlike the case with local authorities, there is no right of appeal from an An Bord Pleanála decision. Accordingly, the imposition of mandatory timeframes would also raise the issue of case resolution in the event of timeframe breach. In addition, the requirements of EU law would mean that cases involving EIA development or the Habitats Directive could not be granted default consent, so the imposition of mandatory timeframes would, in any event, have limited practical effect, particularly in respect of Strategic Infrastructure Development applications which will mostly involve EIA development. Consequently, the Review Group does not recommend the adoption of mandatory timeframes.

4.92 However the Review Group does consider that An Bord Pleanála should undertake more effective communication with the public regarding timescales. Whilst the delayed timescale of An Bord Pleanála cases is a problem in itself, this is compounded by the lack of information

¹⁹⁸ Such as Mr Paul Mulville, and EirGrid.

¹⁹⁹ Such as Ms Sonja Reidy, the Construction Industry Federation, and the Irish Planning Institute.

²⁰⁰ Such as the County and City Management Association.

provided by An Bord Pleanála as to when a case might be determined. Presently legislation requires An Bord Pleanála to notify the applicant or appellant as soon as possible of a revised determination date, when it is established that the statutory objective period for making a decision cannot be met. However when the Board delays the making of a decision a second time they are not required to give a revised date and the timeframe for making a determination is left open-ended. This often results in multiple enquiries from parties to An Bord Pleanála seeking information on the progress of cases. Participants within the planning process require certainty and accordingly legislation should be amended to ensure that An Bord Pleanála provides a more realistic expectation for particular cases where it is considered at the outset that the timescales may run beyond the statutory objective period.

Recommendation 75: *Legislation should be amended to require An Bord Pleanála to give a realistic expectation for particular cases if it is considered at the outset that the timescales may run beyond the statutory objective period or any other revised timeframe provided.*

Statutory Objective Periods

4.93 Statutory objective periods are set out in planning legislation²⁰¹ and are also included as key performance indicators in Service Level Agreements proposed each year to the Department. It is an objective of An Bord Pleanála to decide most cases within the statutory objective period of 18 weeks. The Review Group considers it is important that all cases are determined effectively and efficiently within the shortest

²⁰¹ See sections 126, 37J, 37Q, 177P and 221 of the 2000 Act.

timeframe possible. The varying complexity of appeals must be considered in the context of timeframes and in this regard An Bord Pleanála has advised the Review Group that for certain complex cases, meeting statutory deadlines has proven difficult. Whilst the complexity of some cases is acknowledged, the Review Group also notes that only a very small proportion of planning appeals involve oral hearings and as such should require less time to determine than those warranting a hearing.²⁰²

4.94 Required timeframes and varying case complexity has been recognised by An Bord Pleanála as they conducted a pilot project, known as ‘Project Freeflow’, from February to October 2015. That project aimed to examine whether new procedures could be adopted to ensure that smaller cases could be dealt with more efficiently and with greater certainty in terms of timeframes. The stated objective was to issue formal decisions on minor appeal cases within 14 weeks. The outcome of the pilot project was positive and saw the average duration to formally decide minor cases reduced from the target of 18 weeks to actual performance of 13.1 weeks. The time savings were chiefly made owing to improved processing times at inspector and Board level, of 1.7 and 1.4 weeks respectively. An amended version of the project has now been extended across the country and the list of ‘smaller cases’ has been extended to include additional development types. Projects such as this support the case for variable timescales across appeals, determined by case complexity.

²⁰² From 2007 to August 2015 90 oral hearings were held in respect of normal planning appeals.

4.95 According to information received from An Bord Pleanála, up to 5 weeks of the 18 week appeal period is absorbed by the administrative processing of a typical planning appeal with little technical input. Whilst necessary time is required for the cross circulation of submissions at the outset, the Review Group considers that substantial time savings could be achieved during the initial five week period. The Review Group notes that the typical time period for the determination of appeals in Scotland is 12 weeks and no substantive reason has been presented to the Review Group as to why cases without oral hearings could not be determined within such a timescale. Having regard to the recommendations made earlier in this chapter on the notification and conduct of oral hearings, it is recognised that those cases, excluding Strategic Infrastructure Development, requiring oral hearings may necessitate a longer determination timescale. It is therefore reasonable to afford these complex cases more time for consideration, whilst bearing in mind that they will already have undergone a previous assessment by the planning authority and therefore there will be significant information available on file.

4.96 Strategic Infrastructure Development applications, which in most instances are large, complex projects of regional or national importance, generally require an oral hearing. All submissions received during the public consultation period agreed that the current timeframe of 18 weeks is insufficient, notwithstanding the additional minimum six week timeframe permitted for formal observations. Whilst the average number of weeks to dispose of such cases has reduced significantly in recent years and compares favourably with the UK's timeline for National Infrastructure projects at circa 75 weeks, there is

considerable timescale variance and uncertain timeframes continue to be a substantive issue. The length of time required to determine a Strategic Infrastructure Development application in 2014 was on average 24 weeks.²⁰³ It is clear that the two principal reasons for failure to meet the statutory objective period relate to requests for additional information and the length of oral hearings. Measures have been suggested by the Review Group to address these delays, including greater pre-planning consultation with An Bord Pleanála and prescribed bodies and the provision of a technical report and measures to ensure more effective oral hearings; pre-planning measures and oral hearings are the subject of Recommendations 42 and 51. Whilst these measures should assist in expediting the determination period for Strategic Infrastructure Development applications, the complexity of Strategic Infrastructure Development projects is acknowledged and a more realistic timeframe for the determination of such applications is considered necessary.

- 4.97 The other area where the Review Group considers that a significant reduction in timescales could be achieved is Section 5 referrals. Section 5 referrals can often be complex, with, in some instances, significant enforcement issues pending on the determination. Given the nature of these referrals and the fact that further decisions are dependent on their determination, it is essential that Section 5 referrals are dealt with as expeditiously as possible. Once the relevant facts of the case are gathered it is then a matter of applying planning law and judgement. The employment of in-house legal counsel, as per Recommendation 65 of Chapter Four, should expedite this process and result in more legally

²⁰³ This figure excludes pre-application consultation cases. An Bord Pleanála, Annual Report and Accounts 2014, page 29.

robust decisions. This consideration along with the final determination by a Division of a single Board member, in certain circumstances, as per Recommendation 67, should expedite the process

Recommendation 76: *The following statutory objective timeframes should apply to An Bord Pleanála's work, with a view to their progressive realisation:*

- *General cases not requiring oral hearings* 12 weeks
- *General cases requiring oral hearings* 14 weeks
- *Strategic Infrastructure Development cases* 22 weeks²⁰⁴
- *Section 5 Referrals, including where an oral hearing is held* 8 weeks

The Statutory Objective Period for all other cases, including Compulsory Purchase Orders, Licencing appeals, etc. should remain at 18 weeks.

4.98 At paragraph 4.87 of this Chapter, the Review Group has referred to the anticipated efficiency dividend of the PLEAN-IT project. The Review Group also considers that the implementation of many of the recommendations it makes in this report will lead to improved processes and work practices. Accordingly, the Review Group is of the view that the timelines set out above may need to be revised in time with a view to enhancing customer service and public satisfaction, provided of course that the quality of An Bord Pleanála's decision-making is not diminished. This will be a matter for the Minister to consider in due course.

²⁰⁴ Excluding the consultation period, which shall not be less than six weeks.

Chapter Five

External Relationships and Interactions

Chapter Five

External Relationships and Interactions

Introduction

- 5.1 An Bord Pleanála is one of a large number of public authorities tasked with operating the State's spatial planning and environmental consent and licencing regime. Many of the other consenting bodies involved in this wider process also have important roles to play in assisting An Bord Pleanála in its own decision-making processes by providing expert consultation responses.
- 5.2 A number of consultees to this Review have highlighted the need for An Bord Pleanála to have access to expert technical expertise and advice.²⁰⁵ The Review Group agrees and considers the consultation role of the other expert bodies to be a very important element in ensuring the proper functioning of An Bord Pleanála. As such, An Bord Pleanála is an important component of a wider system. Consequently, it is necessary not only that An Bord Pleanála works well with other elements of that system but that it is transparent in how it does so.
- 5.3 An Bord Pleanála's 2014 Annual Report²⁰⁶ notes the practice of maintaining contact with public authorities and other representative organisations, whose functions impact on the planning process. The agreement of Memoranda of Understanding between An Bord Pleanála and some other organisations is further recognition by An Bord

²⁰⁵ This issue is addressed further at paragraph 3.44 of Chapter Three.

²⁰⁶ Available online at:
<http://www.pleanala.ie/publications/>

Pleanála of the need to put in place formal, structured arrangements between public authorities. The growing complexity and sophistication of the planning system, particularly in respect of measures intended to protect the environment, provides an additional impetus for greater cooperation between relevant public authorities.

5.4 To a very considerable degree, the institutions, organisations and individuals which the Review Group has consulted with have acknowledged An Bord Pleanála's record of achievement in its role as an independent, impartial body²⁰⁷ and the extent to which An Bord Pleanála strives to work well with other public authorities, in particular noting a strengthened focus on the making of formal agreements between authorities, for example Memoranda of Understanding and Service Level Agreements. Insofar as consultees have stated that relationships and interactions have in the past not always been perfect,²⁰⁸ several bodies have noted that any such imperfection is a shared challenge for An Bord Pleanála and the relevant public authority or organisation to surmount and that it would be inaccurate to assign responsibility for any shortcomings solely to An Bord Pleanála. The Review Group concurs and notes that all relevant public authorities have a responsibility to strengthen performance across institutional boundaries.

²⁰⁷ All three Regional Assemblies, (namely the Northern and Western Regional Assembly, the Southern Regional Assembly and the Eastern and Midland Regional Assembly) noted in their Review response letters that the additional functions given to An Bord Pleanála in part is a reflection of 'the esteem with which the Board is held in the system and wider society arising from the manner in which it has discharged its quasi-judicial role.' (Review response letters, dated 17, 11 and 18 November 2015 respectively).

²⁰⁸ See for example, the Review response letter dated 19 November 2015 from the Department of Agriculture, Food and the Marine, and National Parks and Wildlife Service (NPWS) Speaking Notes in respect of Review Group Information Gathering Meeting with NPWS on 12 November 2015 and in particular 'Role of the Department in conditions attaching to Consent.'

5.5 While acknowledging the improvements An Bord Pleanála has instituted in recent years, the Review Group considers that there is scope to improve the relationships, interactions and communications of An Bord Pleanála and that such improvements can be made, which are in accord with the need to ensure the operational impartiality and independence of An Bord Pleanála and other consent-granting public authorities. In forming its recommendations in this Chapter, the Review Group has been guided by the goal that An Bord Pleanála should play a full and effective role in the wider consent and licencing regime and also should improve its communications with organisations and interests which are customers of the consent and licencing regime, in keeping with An Bord Pleanála's core organisational values of participation and transparency.²⁰⁹

General Recommendations

5.6 Before turning to certain specific bodies and organisations with which An Bord Pleanála works, it is appropriate to address some topics which have a general application.

Conditions

5.7 Whilst on the whole, there is a positive working relationship between An Bord Pleanála and statutory consultees, some concern was expressed regarding the imposition of conditions by An Bord Pleanála which impose a duty on statutory consultees to agree details in the discharge

²⁰⁹ See also: An Bord Pleanála, Annual Reports and Accounts 2014, Dublin, page 140.

of the consent.²¹⁰ This is a matter of concern to the Review Group; quite apart from any legal issues which might arise, the Review Group does not consider this to be good practice. However, the Review Group considers that its recommendations concerning the development of a national conditions template, as discussed at paragraphs 4.63 to 4.67 of Chapter Four, as well as the completion of a Memoranda of Understanding between An Bord Pleanála and relevant bodies, as discussed immediately below, should minimise future such occurrences.

Memoranda of Understanding

5.8 The Review Group notes that a Memorandum of Understanding was agreed by An Bord Pleanála and the Environmental Protection Agency in September 2014, the objective of which is 'to set out a framework for co-ordination on areas of mutual responsibility and shared interest' and 'to facilitate the efficient co-ordination of the statutory functions of An Bord Pleanála and the EPA.'²¹¹ Specifically, the Memorandum seeks to:

- Integrate approaches to environmental issues which the bodies are required to consider;
- Foster a holistic approach to Environmental Impact Assessment;
- Provide a framework for the exchange of information between both organisations;

²¹⁰ See e.g. National Parks and Wildlife Service Speaking Notes in respect of Review Group Information Gathering Meeting with National Parks and Wildlife Service on 12 November 2015 and in particular 'Role of the Department in conditions attaching to Consent?'

²¹¹ Memorandum of Understanding: Environmental Protection Agency and An Bord Pleanála, September 2014, Available online at:

http://www.pleanala.ie/publications/2014/MOUEPAAN_BORD_PLEANÁLA.pdf

The 2014 Memorandum is the result of a joint review of a previous Memorandum agreed between An Bord Pleanála and the Environmental Protection Agency in 2009.

- Eliminate, where practicable, avoidable delays in the delivery of services; and,
- Facilitate liaison concerning the attachment of conditions designed to protect the environment to a consent from An Bord Pleanála, in relation to aspects of a proposed development not covered by a licence or certificate.

5.9 The Memorandum sets out a wide range of practical measures aimed at delivering efficient co-ordination, ranging from operational liaison arrangements, to exchanges of documentation, to specific procedures for requests for information and Environmental Impact Assessment cases.

5.10 The Review Group welcomes the work done by An Bord Pleanála in seeking to address the complexities of the consenting and permitting systems with the agreement of a detailed Memorandum of Understanding with the Environmental Protection Agency. The Review Group notes that An Bord Pleanála has agreed Memoranda of Understanding with the Health and Safety Authority and the Commission for Energy Regulation, and also notes that An Bord Pleanála is in the process of finalising a Memorandum of Understanding with the National Parks and Wildlife Service. The Review Group commends the importance of such initiatives and considers that efforts should be made by An Bord Pleanála to agree Memoranda of Understanding with other relevant organisations and prescribed bodies, including with the local government sector, to enable the free flow of information during the planning consent process. Memoranda of Understanding with prescribed bodies are particularly important and

the process of agreeing a Memorandum should not be allowed to stall. They should be regularly reviewed and kept up to date.

- 5.11 It is important that the agreements reached by An Bord Pleanála and other bodies are published. This aids transparency and efficiency and enables other stakeholders in the planning process to understand the working relationships between the various bodies.

Recommendation 77: *An Bord Pleanála should agree Memoranda of Understanding with other relevant consent, consultation and prescribed bodies, including with the local government sector.*

Recommendation 78: *All Memoranda of Understanding agreed by An Bord Pleanála should be published online.*

Recommendation 79: *A timetable should be set by An Bord Pleanála for the agreement of Memoranda of Understanding. Memoranda of Understanding should also identify policies and practices which would benefit from the publication of joint guidance documents, a matter which is discussed further below. All Memoranda agreed by An Bord Pleanála with other organisations should be jointly reviewed, as appropriate but within a three year period and revised as necessary to address issues where they arise.*

5.12 The Review Group notes that An Bord Pleanála has published 'Guidelines for Local Authorities for submission of proposals to An Bord Pleanála in relation to Appropriate Assessments'²¹³ and considers that the provision by An Bord Pleanála of further guidance documents to local government and other participants in the planning system would be very beneficial, particularly in respect of topics such as the imposition of conditions; see further at paragraphs 4.66 and 4.67 of Chapter Four.

Recommendation 80: *An Bord Pleanála should as a matter of priority agree a publication sequence of detailed guidance documents regarding specific topics, based on an analysis of stakeholder needs, including the development of a national template for conditions as per Recommendation 63 of Chapter Four, and in addition should pursue opportunities for the issuing of joint guidance as per Recommendation 79.*

Sectoral Staff Mobility

5.13 Career prospects for An Bord Pleanála administrative staff and inspectors appear to be somewhat limited, particularly for those who

²¹² Note that the Review Group intends that all An Bord Pleanála guidance or joint guidance should be concerned with the provision of procedural clarity and interpretation of policy by An Bord Pleanála, and should not in any way conflict with Section 28 (of the 2000 Act) Guidelines or Section 29 (of the 2000 Act) Policy Directives, or future Office of the Planning Regulator recommendations on planning policy matters. See paragraphs 1.3 and 3.7.

²¹³ Available online at:
www.pleanala.ie/publications/2013/aaenglish.pdf

may wish to move to senior positions beyond An Bord Pleanála.²¹⁴ In respect of inspectors, this may be due to a perception that inspectors may lack diversity in their planning experience, or management experience. A single recruitment and staffing arrangement for planning inspectors and similar roles across the public service would provide improved access to promotional opportunities, lateral transfers and secondment arrangements. Whilst such arrangements may take some time to put in place, an interim solution could be for greater secondment of staff among public bodies, and the development of joint training and professional development programmes. Such arrangements could also apply to An Bord Pleanála's administrative staff.

Recommendation 81: *An Bord Pleanála, the local government sector and other relevant bodies²¹⁵ should explore options concerning the secondment of staff; the Review Group considers that there is ample scope to put in place secondment arrangements which would not compromise the overriding requirement for operational independence and impartiality. Such arrangements would also benefit An Bord Pleanála, local authority and other staff in terms of their professional development. In addition, the coordination of specialist planning and related training across public authorities, including An Bord Pleanála, would likely result in efficiencies and valuable opportunities to strengthen links among the staff of the various organisations and provide further opportunities to staff for their professional development.*

²¹⁴ See, for example, the Review response made by the An Bord Pleanála Partnership Committee of 9 December 2015, which states that 'all staff feel that career progression opportunities are limited both within An Bord Pleanála and externally.'

²¹⁵ Such as the Department and, on its establishment, the Office of the Planning Regulator.

Bodies and Organisations

5.14 A number of bodies and organisations are identified as 'prescribed bodies' under planning legislation which must be consulted as part of the planning application process in certain instances.²¹⁶ As a result, An Bord Pleanála has an ongoing relationship with certain Departments, State Agencies and other bodies. Much of the remainder of this chapter examines the relationship of An Bord Pleanála with some of these organisations, considered to be of particular importance having regard to the challenges facing An Bord Pleanála and the Terms of Reference set for the Review Group. The Review Group has not sequenced the presentation of the following organisations and bodies in order of importance; the structure of this Chapter does not reflect any order of priority in terms of An Bord Pleanála's responsibilities or the perspective of the Review Group. Nor does the inclusion of a specific body within this Chapter indicate any special weight given to the perspectives of some organisations over others. The Review Group, in considering the issues within its remit and in formulating its recommendations, has been mindful of all of the perspectives expressed during its consultation activities.

The Department of the Environment, Community and Local Government

5.15 The relationship between the Department and An Bord Pleanála is plainly very important; the Department is the 'parent' in the sense that it advocates for, oversees the work of, and channels a considerable proportion of An Bord Pleanála's funding. The Department also

²¹⁶ See Articles 28 and 213 of the Planning and Development Regulations 2001-15.

determines national planning policy and is responsible for the planning code. The Department's production of technical guidance can also impact upon the work of An Bord Pleanála.²¹⁷ The Review Group understands contact and communication between the Department and An Bord Pleanála is currently extensive.²¹⁸

Recommendation 82: *Building on the arrangements already in place, contact between senior management of the Department and An Bord Pleanála should be formalised; an annual meeting between the Department's Secretary General, the Assistant Secretary overseeing the planning function, and the chairperson of the Board should take place to provide a forum to discuss matters including:*

- *The performance of An Bord Pleanála including a review of agreed targets;*
- *The resourcing of An Bord Pleanála;*
- *The fees charged by An Bord Pleanála;*
- *Planning legislation, including the status of proposals from An Bord Pleanála to amend legislation;*
- *The issuing of joint guidance on procedural matters, perhaps in conjunction with other bodies such as the Environmental Protection Agency and the National Parks and Wildlife Service;*
- *Update on the status of Memoranda of Understanding with other bodies (see Recommendations 78 to 80 above); and,*

²¹⁷ See, for example, paragraph 3 of the Review response dated 17 November 2015 from Michael Quinn on behalf of the Glenties Windfarm Information Group.

²¹⁸ For example, the Service Level Agreement between An Bord Pleanála and the Department specifies an annual meeting between senior management of the two organisations.

- *The implementation status of those recommendations, which have been accepted, made by this and other such reviews.*

The Environmental Protection Agency

- 5.16 The Environmental Protection Agency is a public body with responsibility for a wide range of licencing, enforcement, monitoring and assessment activities associated with environmental and, more recently, radiological protection. Given that certain projects require planning permission from the relevant planning authority or An Bord Pleanála, in addition to a licence or certification to operate from the Agency, it is vital that An Bord Pleanála and the Agency adopt a co-ordinated approach when carrying out their respective functions. An Bord Pleanála and the Agency have separately advised the Review Group that they share a very productive working relationship.
- 5.17 An important element of the wider context concerning the relationship between An Bord Pleanála and the Agency is the outcome of Case C-50/09 *Commission v Ireland*, of 3 March 2011,²¹⁹ in which the Court of Justice determined that Irish law did not comply with the requirements of the Environmental Impact Assessment Directive. The Court of Justice considered that the sharply 'split' decision-making jurisdiction between An Bord Pleanála and the Agency resulted in no guarantee of an integrated environmental assessment being carried out. In the wake of this ruling, amendments were made to the legislative framework to address the deficiencies identified by the Court of Justice and to underpin greater co-ordination and co-operation between An Bord

²¹⁹ Case C-50/09 *Commission v Ireland* EU:C:2011:109. Available online at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-50/09>

Pleanála and the Agency. These legislative measures formalised the Agency's role in relation to Environmental Impact Assessment for licensable activities and created mandatory consultation obligations between planning authorities, An Bord Pleanála, and the Agency as regards licensable activities that require Environmental Impact Assessment. An application for planning permission, where permission is required, must precede an application for a licence from the Agency and the Agency now has a specific role to undertake an Environmental Impact Assessment in relation to licensable activities. As discussed at paragraph 2.12 of Chapter Two, the Review Group supports the convening of an Environmental Impact Assessment working group to identify and address any issues arising from the implementation of Environmental Impact Assessment in practice. The convening of this working group also provides a valuable opportunity to examine how best to transpose and implement Directive 2014/52/EU which provides for significant amendments to the Environmental Impact Assessment Directive which must be implemented by May 2017.

- 5.18 A further impetus for closer working between An Bord Pleanála and the Agency has been An Bord Pleanála's designation as the competent authority for Projects of Common Interest. The role of competent authority in the permit granting process is to collate and co-ordinate the issuing of the consents and decisions required from all relevant authorities within specified time limits. An Bord Pleanála's role, as competent authority for Projects of Common Interest, has required that the relationship between An Bord Pleanála and the Agency be enhanced, over and above the liaison required to deliver the

organisation's other respective statutory planning and licencing functions.

5.19 The Review Group acknowledges that the relationship An Bord Pleanála has with the Agency is important among its institutional relationships. The relationship, whilst necessarily complex, must work as effectively as possible to ensure that both organisations are well positioned to deliver on their responsibilities. The Review Group acknowledges some concerns among consultees²²⁰ which indicate an element of duplication of the roles of An Bord Pleanála and the Agency, although it is inherently difficult for the Review Group to assess or quantify the extent to which these concerns are justified. However, the Review Group's Recommendation 94 concerning An Bord Pleanála's role in providing a Consents Service Unit should improve coordination and avoid any unnecessary duplication.

5.20 In its submission to the Review Group, the Agency indicated that consideration should be given to expanding the range of circumstances in which the Agency has a consultation role as a prescribed body under the planning legislation to include non-licensable activities (for example, in relation to abstraction, discharge of polluting matters to waters or works to watercourses and the right to take water from an identified source). As things stand, the Agency is a prescribed body in limited circumstances only. It also suggested that the planning legislation should be amended to provide that all applications for foreshore licences should be referred to the Agency for comment. Throughout its submission, the Agency highlighted, in

²²⁰ See for example, Review Response letter from the Local Authority Members Association dated 18 November 2015 which suggests having a single consenting body.

particular, the importance of considering how the implications of the Water Framework Directive will be assessed in the context of the overall planning process and the fundamental role of good consultation between the Agency and An Bord Pleanála in this context.

- 5.21 These matters are relevant to the general theme contained in Recommendation 2 of Chapter Two, which concerns wider environmental governance.

Recommendation 83: *That the Department, in consultation with An Bord Pleanála and the Agency, examines the current legislative framework and takes steps to expand, where appropriate, the range of applications for development consent where the Agency must be consulted formally.*

Department of Agriculture, Food and the Marine

- 5.22 The Department of Agriculture, Food and the Marine is a statutory consultee in respect of planning applications for development for the purposes of initial afforestation or the replacement of broadleaf high forest by conifer species. An Bord Pleanála engages in a variety of consent procedures relating to matters such as afforestation, forest roads, foreshore and aquaculture. The Review Group also notes that the extension of An Bord Pleanála's competence to maritime consents, discussed further at paragraph 2.5, means that this relationship will, if anything, become more extensive in terms of consultation.

5.23 The Department of Agriculture, Food and the Marine has expressed a desire for a formal consultation process with relevant bodies for all planning decisions affected by the Environmental Impact Assessment Directive to be established in order 'to avoid any unintended consequences' and 'difficulties.'²²¹ The Review Group considers it necessary that systems should be put in place to ensure that An Bord Pleanála not only has the full benefit of the Department's expert advice on matters within its purview, but also that unjustified inconsistencies in approach to the granting of different types of related consents are avoided where possible. The Review Group's Recommendation 93 of this Chapter in respect of the designation of An Bord Pleanála as the body responsible for collating and co-ordinating the issuing of all consents and decisions required from all relevant public authorities relating to Strategic Infrastructure Development should ensure that the necessary systems are in place in relation to applications comprising Strategic Infrastructure Development.

Recommendation 84: *An Bord Pleanála should meet as soon as practicable with the Department of Agriculture, Food and the Marine to examine whether additional formal consultation processes in relation to Environmental Impact Assessment development proposals relating to the Department's areas of interest are necessary and if so, whether any issues identified can be addressed by a Memorandum of Understanding agreed by An Bord Pleanála and the Department of Agriculture, Food and the Marine, and/or whether amendments to legislation are necessary.*²²²

²²¹ Review response letter dated 18 November 2015.

²²² The possible convening of an Environmental Impact Assessment working group by the Department of the Environment, Community and Local Government, as discussed at paragraph 2.12 of Chapter Two, may also afford an opportunity to improve formal

Regional Assemblies

5.24 In January 2015 the eight Regional Authorities were succeeded by three Regional Assemblies: the Eastern and Midland Regional Assembly, the Northern and Western Regional Assembly, and the Southern Regional Assembly. The Regional Assemblies have a considerable role in the planning system, being responsible for regional spatial planning and sustainable development, although they do not have operational responsibilities. In their submissions to the Review Group, the Regional Assemblies have identified that the decision-making processes of An Bord Pleanála play a useful role in identifying regional and national planning trends.²²³ These decisions are obviously useful to the work of the Regional Assemblies in their plan-making functions. Equally, the Regional Assemblies may well have access to information, such as concerning regional planning trends, which would assist An Bord Pleanála in carrying out its own decision-making functions. Moreover, given that Regional Assemblies are broadly responsible for regional policy and coherence, it is important that links and communication between the Regional Assemblies and An Bord Pleanála be maintained.

Recommendation 85: *In view of the important role of the Regional Assemblies in the planning system, An Bord Pleanála should liaise regularly, on an annual basis at least, with the Assemblies to discuss pertinent issues.*

consultation processes regarding Environmental Impact Assessment among relevant public bodies.

²²³ The Southern Regional Assembly, the Northern and Western Regional Assembly and the Eastern and Midland Regional Assembly in their Review response letters dated 11, 17 and 18 November 2015 respectively.

The Department of Arts, Heritage and the Gaeltacht

5.25 Two components of the Department of Arts, Heritage and the Gaeltacht are of particular relevance to the work of An Bord Pleanála; the National Parks and Wildlife Service and the National Monument Service.

The National Parks and Wildlife Service

5.26 The National Park and Wildlife Service now sits within the Heritage Division of the Department of Arts, Heritage and the Gaeltacht. Whilst the Review Group is not in a position to offer a fully considered opinion particularly in respect of wider considerations, it is not clear to the Review Group that the location of the Service within the Heritage Division of the Department of Arts, Heritage and the Gaeltacht currently best facilitates its statutory role within the planning system in terms of nature conservation.

5.27 The National Parks and Wildlife Service is a statutory consultee in respect of planning applications for developments where it appears that the development might have significant effects in relation to nature conservation. The Service examines an application with reference to its impact on nature conservation and specifically designated sites whilst taking into account the provisions of domestic and European legislation. Having regard to its statutory consultee function, the Service has considerable interaction with An Bord Pleanála in providing expert advice and guidance on the natural environment.

- 5.28 The role of the National Parks and Wildlife Service therefore touches on some crucial aspects of the work of An Bord Pleanála and the Review Group's own terms of reference, in particular, the Service has an obvious role in assisting An Bord Pleanála in ensuring that decisions comply with the requirements of EU law in general, and the Habitats Directive in particular.
- 5.29 The Review Group understands that An Bord Pleanála has a positive and progressive working relationship with the National Parks and Wildlife Service, although the Service and An Bord Pleanála did express concern regarding instances in which the Service declines to provide a comment on a relevant planning application or such comment is not complete. The Review Group acknowledges that the Service, as a prescribed body, makes its submissions and provides its inputs as an independent prescribed body in the manner of other such bodies, and does not as such operate as a 'service provider of expertise' to An Bord Pleanála. However, whilst it is acknowledged that resourcing is a critical issue for the Service, which impacts on its capacity to comment on all relevant planning applications, the Review Group considers the input of the Service in providing ecological expertise to An Bord Pleanála's determinative process to be valuable.
- 5.30 As stated above, the Review Group welcomes the steps being taken to secure a Memorandum of Understanding between An Bord Pleanála and the National Parks and Wildlife Service, although the Review Group is concerned at the time taken in securing agreement of the Memorandum. The Review Group would expect the Memorandum of Understanding to address in particular, but not only, the issue of

consultation and the imposition of conditions involving issues of nature conservation etc. The Review Group anticipates that a Memorandum of Understanding should be put in place as soon as possible in line with Recommendation 86 of this Chapter.

- 5.31 As regards the ecological expertise available to An Bord Pleanála, which was a topic representatives of the National Parks and Wildlife Service raised, the Review Group considers that the establishment of an environmental team within An Bord Pleanála, as discussed at paragraph 3.44 of Chapter Three, will strengthen An Bord Pleanála's technical resources in this area. However, the Review Group is of the view that the Service retains an important and unique role as a prescribed body in providing ecological expert advice to An Bord Pleanála, notwithstanding the point raised in paragraph 5.29 that the Service is not a 'service provider of expertise' to An Bord Pleanála. In addition the Review Group's Recommendation 2 contained in Chapter Two concerning a wider review of environmental governance is of relevance, as the distribution of expertise across the consent granting system is an obvious aspect of wider environmental governance.
- 5.32 Consideration should be given as to whether the current departmental location and/or structure of the National Parks and Wildlife Service best facilitates its ability to carry out its statutory functions in respect of evaluating the impact of certain planning applications on protected areas of nature conservation and in particular in respect of securing compliance with EU environmental law (such as the Habitats Directive). Whilst the Review Group considers that the functioning of National Parks and Wildlife Service as it impacts upon An Bord Pleanála is within its

Term of Reference, the Review Group has not made this suggestion a formal recommendation because the Review Group appreciates that there are wider issues arising from the suggestion. Accordingly, the fact that it is not a formal recommendation is not intended by the Review Group to weaken the strength of the view expressed.

Recommendation 86: *The Memorandum of Understanding between An Bord Pleanála and National Parks and Wildlife Service should be agreed as soon as possible clarifying and setting out the role of Service as a consultee in evaluating the impact of certain planning applications on protected areas of nature conservation and in particular in respect of securing compliance with EU environmental law (such as the Habitats Directive), including whether the Service should be further engaged either as a consultee or as a partner in drawing up joint An Bord Pleanála technical guidance on the approach to nature conservation issues (such as Appropriate Assessment).*²²⁴

Recommendation 87: *Notwithstanding the establishment or otherwise of an analogue to the UK Planning Inspectorate's Consents Service Unit within An Bord Pleanála,²²⁵ a Memorandum of Understanding and/or other appropriate measures should be put in place by An Bord Pleanála to avoid circumstances in which a prescribed body is unaware of a planning appeal, in circumstances in which a planning authority has refused permission based on a prescribed body's*

²²⁴ See by analogy the guidance given in the Advice Note 10 by the Planning Inspectorate for Nationally Significant Infrastructure Projects in England and Wales. The Review Group notes that it would be desirable to adopt of possible a similar system which allows the public to subscribe for free for automatic updates in change of policy: see e.g. <http://webcache.googleusercontent.com/search?q=cache:LTyqHL3EYaAJ:infrastructure.planningportal.gov.uk/wp-content/uploads/2012/10/Advice-note-10-HRA.pdf+&cd=2&hl=en&ct=clnk&gl=uk>

²²⁵ As per Recommendation 94.

recommendation. An Bord Pleanála should routinely advise a prescribed body of a planning appeal in such instances.

The National Monuments Service

5.33 The National Monuments Service, a statutory consultee under planning legislation, has advised the Review Group that it considers that the decision-making process of An Bord Pleanála ‘in relation to archaeology is robust and transparent and in line with national policy.’²²⁶ It is satisfied that its concerns are fully taken into account by An Bord Pleanála.

5.34 The National Monuments Service raised a number of matters for consideration by this Review, some of which are addressed elsewhere in this Chapter and in this Report. The National Monuments Service has also highlighted, in particular, two concerns in respect of planning conditions. The first concern is in relation to third party appeals and the need for clarity in the wording of planning conditions for the range of archaeology-related interventions prior to and during the planning process. According to the National Monuments Service, this has led to confusion in respect of enforcement both among local authorities and developers. The Review Group notes that the UK has sought to address this point in a suite of recommended conditions in national advice on planning conditions.²²⁷ The Review Group considers that this issue can be addressed by our Recommendation 63 of Chapter Four on the

²²⁶ See National Monument Service Notes for the Review Group Information Gathering Meeting with the National Monument Service, dated 13 November 2015.

²²⁷ See for example, in Scotland, Planning Advice Note: PAN 2/2011, which is available online at: <http://www.gov.scot/Publications/2011/08/04132003/0> and in England, Circular 11/95: Use of conditions in planning permission, which is available online at: <https://www.gov.uk/government/uploads/system/uploads/.../324923.pdf>

development and publication by An Bord Pleanála of guidance on model planning conditions. This may also be an area in which an *ad hoc* technical group might be established in accordance with our Recommendation 103 in order to share and draw upon the experience of the UK on this precise issue.

- 5.35 The second issue raised by the National Monuments Service in respect of planning conditions related to the need for a clear distinction to be made between environmental and archaeological monitoring in planning conditions. Again, the Review Group considers that this is a matter which should be addressed in Recommendation 63 of Chapter Four for national guidance on model conditions.

Recommendation 88: *The National Monuments Service and other appropriate archaeological bodies should be consulted regarding the development of model conditions in relation to archaeology.*

Local Authorities

- 5.36 An Bord Pleanála, because of its role as a planning appellate body, has had direct engagement with local government since its establishment in 1976. While An Bord Pleanála's range of functions has expanded over the years, the majority of An Bord Pleanála's activity is concerned with the determination of appeals arising from decisions made by the 31 local authorities.²²⁸ Aside from the determination of planning appeals, An Bord Pleanála is also responsible for dealing with local authority strategic infrastructure developments and other local authority projects,

²²⁸ Arising from the recent reorganisation of local government structures, each of the 31 local authorities is also a planning authority.

such as proposals for the compulsory acquisition of land by local authorities. During its consultations, the Review Group was advised by representatives of the local government sector that An Bord Pleanála is widely acknowledged within the sector as a very professional organisation.²²⁹

5.37 In terms of case numbers, interactions with local authority decisions or projects account for almost 80% of An Bord Pleanála's operations.²³⁰ As such, the institutional relationship between local government and An Bord Pleanála is of paramount importance to the effective and efficient operation of the State's system of planning consent.

5.38 The Review Group observes that of the normal planning appeals received by An Bord Pleanála, 30% of the local authority decisions were reversed, 50% were varied and 20% were confirmed.²³¹ As such, An Bord Pleanála is overturning or varying a considerable proportion of the local authority decisions which are the subject of planning appeals. Naturally, one might expect that a certain proportion of appeals to An Bord Pleanála would result in a changed or modified decision; however the rate of overturn may be regarded as excessive. If so, this may

²²⁹ 'An Bord Pleanála has had an excellent record of achievement and its role as an independent, impartial national body should be endorsed in any review.' See the Review response provided by the County and City Management Association, 20 November 2015, page 6.

²³⁰ An Bord Pleanála disposed of 1,384 planning appeals in addition to 56 local authority strategic infrastructure developments and other local authority projects in 2014. See: An Bord Pleanála, Annual Reports and Accounts 2014, page 31.

²³¹ An Bord Pleanála, Annual Reports and Accounts 2014, page 132. An Bord Pleanála has advised the Review Group that the 50% varied figure can often relate to variances in the wording of conditions which, in effect, provide for the same substantive outcome. Therefore an 80% overturn statistic, composed of reversals and variations, is likely to be an overstatement. However, the variance of the wording of conditions supports the Review Group's view that there should be more uniform wording of conditions, as per Recommendation 63.

partially be explained by a lack of communication and shared understanding among local authorities and An Bord Pleanála. An Bord Pleanála management and representatives of the local government sector have acknowledged that arrangements for structured contact and engagement between their respective organisations could be more fully developed.²³²

5.39 Perfect consistency between An Bord Pleanála and local authority decision-making is not a practical objective. However the Review Group notes that the 2001 Value for Money Examination of Planning Appeals, referred to further in Chapter Three, found that ‘the outcome of third party appeals suggests a need to review the factors giving rise to the high overturn and variation rate’, although the Examination also noted considerable variance from local authority to local authority. As such, differences of judgement between the local government sector and An Bord Pleanála appear to continue to persist. The Review Group anticipates that its recommendations made elsewhere in this Report, such as the highlighting of key An Bord Pleanála decisions and the move towards national guidance on planning conditions should help to reduce the differences of approach between local authorities and An Bord Pleanála and thereby reduce the need for parties to appeal.

Recommendation 89: *Processes and practices should be put in place to help ensure that consistency is maximised, both to underpin public confidence and to buttress decisions against potential legal challenges. Engagement should take place at sectoral level between An Bord Pleanála, local government and relevant Government*

²³² See the Review response provided by the County and City Management Association, 20 November 2015, page 1.

Departments and agencies to improve communication and mutual understanding, to clarify interpretations of policy and to address emerging or potential issues regarding the decision-making process. Such engagement should be regular, occurring at minimum on an annual basis. In working to develop a national template of model conditions, An Bord Pleanála should work closely with the local government sector.

5.40 Statutory development plans made by each local authority are very important elements of the local planning framework, as each plan sets out a democratically agreed vision and direction for future development over a six year period. Local authorities must comply with the provisions of a development plan. Should a local authority wish to contravene its plan, it must secure ratification by the elected members of the council, must engage in a public consultation process, and must also notify the Regional Assembly. As such, the process at local authority level is transparent, participative and subject to a democratic mandate. However, in determining a planning appeal, it is open to An Bord Pleanála to depart from a development plan, for example in an instance in which An Bord Pleanála considers that an overriding national interest prevails. Such circumstances should be exceptional as development plans are required to comply with national and regional spatial planning policies. When departing from a development plan, there is no obligation at present on An Bord Pleanála to consult with the public.

Recommendation 90: *When considering departing from a local authority's development plan, An Bord Pleanála should in the first*

instance be obliged to consult with the public using an abridged form of public consultation. Should An Bord Pleanála decide to contravene a development plan, a detailed statement of the reasons for the contravention should be published as a matter of course.

- 5.41 Representatives of local government²³³ have advised the Review Group that the interpretation and enforcement of conditions imposed by An Bord Pleanála in appeal decisions can at times be problematic for local authorities. For instance, revised drawings may have been sought by An Bord Pleanála, which subsequently may not be forwarded to the relevant local authority as a matter of course. Local authorities are charged with enforcing planning decisions and it is therefore necessary that they be apprised of all necessary details of decisions.

Recommendation 91: *An Bord Pleanála should be required to accompany the notification of decision to the relevant planning authority with a full set of plans and particulars in order to facilitate any compliance processing and enforcement undertakings that may arise in a particular case.*

- 5.42 Representatives of local government have also advised the Review Group that a perception exists within local government of inconsistency on occasion between decisions made by An Bord Pleanála concerning similar developments or in relation to contraventions of development plans.²³⁴ Any such inconsistency would obviously pose a difficulty for a

²³³ County and City Management Association Review response dated 20 November 2015.

²³⁴ See the Review response made by Dun Laoghaire Rathdown County Council dated 18 November 2015.

local authority in calibrating its decision-making against previous An Bord Pleanála decisions. The Review Group notes that the recommendations it makes in this report concerning transparency, coordination, communications and ICT of An Bord Pleanála should benefit local authorities and other prescribed bodies in this regard.

Recommendation 92: *As discussed in Chapter Three, improved ICT provides considerable opportunities to improve outcomes. An Integrated ICT system to accommodate transfer of data and documentation, to include a database of legislation, case law, policy documents and position papers, particularly between An Bord Pleanála, the local government sector and other licencing and consent authorities should be put in place. If appropriate, this system could form an element of the PLEAN-IT ICT project which is currently underway.*²³⁵

Co-ordinating Consents and Enhancing Relationships

5.43 Following the enactment of the Local Government (Planning and Development) Act 1963, all consents were handled under the planning process and conditions were attached to planning permissions governing topics such as building standards, environmental protection, waste and often engineering issues. This arrangement began to change with the introduction of the building regulations in 1990 and subsequent requirements concerning fire certification and disability access. As the requirements of environmental legislation have developed, a wider variety of other consent and permitting systems

²³⁵ And which is discussed further in Chapter Two.

have also been introduced. There is no doubt that these parallel systems of consent often involve considerable duplication of administrative effort, often across multiple public authorities, as well as effort and expense for the promoter of a project. The various consent systems also require a degree of expertise in various disciplines, which would be difficult to secure under the remit of one agency.

5.44 As discussed at paragraph 2.5 of Chapter Two, and in the preceding section of this Chapter concerning the Environmental Protection Agency, An Bord Pleanála has been designated as the Competent Authority in Ireland for Projects of Common Interest. Projects of Common Interest relate to the energy sector and are specific projects, designated by the EU, which interconnect electricity and gas networks across Member States' borders. An Bord Pleanála's role as the Competent Authority involves collating and co-ordinating the issuing of all consents and decisions required from the relevant public authorities and monitoring compliance with time limits. A similar role for An Bord Pleanála in relation to development consents for large scale projects, which require multiple consents from a variety of public authorities, is an option. Such an approach has been adopted by the Planning Inspectorate in the UK, which hosts the Consents Service Unit. The Unit works with applicants and consenting bodies in England, including during the pre-application stage, to coordinate the handling of a range of non-planning consents which may be required by applicants in addition to a Development Consent Order. The deployment of such an approach in Ireland should also ensure that all relevant bodies are identified and involved in the consultation process.²³⁶

²³⁶ This would address the concern of bodies such as the National Monuments Service that the 'Projects of Common Interest Manual' will include the Department of Arts, Heritage and

5.45 The Review Group considers that the function of a Consents Service Unit within An Bord Pleanála could be extended to coordinate and facilitate input from the relevant prescribed bodies. Given the complexity of the planning process and the valuable input that prescribed bodies can provide to the planning assessment process,²³⁷ the Review Group considers that greater interaction is required, particularly at the pre-planning stage. One function a Consents Service Unit could assist with is 'front loading', which requires the applicant to conduct extensive consultation prior to the submission of an application or scheme. The Consents Service Unit could encourage applicants and statutory consultees to develop technical reports at the pre-application stage and to submit these with a planning application, thereby speeding up the examination process. The issue of pre-application technical reports and the wider pre-application process is discussed further at paragraphs 4.28 to 4.35, 4.81 and 4.96 of Chapter Four. It would be a matter for the Minister to determine whether An Bord Pleanála should be empowered to make a charge to applicants for these services.

Recommendation 93: *An Bord Pleanála should be the designated authority for collating and co-ordinating the issuing of all consents and decisions required from all relevant public authorities relating to Strategic Infrastructure Development including monitoring compliance*

the Gaeltacht as a statutory consultee. See National Monuments Service Notes for Review Group Information Gathering Meeting with National Monuments Service dated 13 November 2015.

²³⁷ The National Monument Service, in particular, has highlighted the need for early and frequent consultation between developers and the National Monument Service in relation to Strategic Infrastructure Development applications, in particular where these applications involve large scale ground disturbance operations in greenfield areas or in sensitive urban historic towns. (As advised to the Review Group during its meeting with representatives of the National Monuments Service on 13 November 2015).

with time limits. This would be similar to the procedures for the permit granting process applicable to Projects of Common Interest and appropriate legislation and procedures would need to be put in place for An Bord Pleanála to fulfil this function.

Recommendation 94: *The Review Group considers that a dedicated unit, similar to the UK Planning Inspectorate's Consents Service Unit, should be established within An Bord Pleanála to facilitate communication with applicants, other consenting bodies, prescribed bodies and local authorities with the goal of improving communication and facilitating interaction.*

The Office of the Planning Regulator

5.46 Liaison between An Bord Pleanála and the Office of the Planning Regulator will be an important element of ensuring that both organisations are working to their fullest and in a manner which supports the operation of the planning system as a whole. The background and other issues arising from the establishment of the Office of the Planning Regulator are further discussed at paragraphs 2.16 to 2.20 of Chapter Two. The Review Group considers that it would be useful to have a dedicated staff member in An Bord Pleanála expressly tasked with liaison with the Regulator. Whilst it is a matter for any subsequent reorganisation within An Bord Pleanála, it would seem sensible to the Review Group if such a liaison officer reported to the in-house legal counsel, since part of the task would be disseminating information on important decisions etc. (See also Recommendation 98 concerning the highlighting of important An Bord Pleanála decisions.)

Recommendation 95: *An Bord Pleanála should appoint a liaison officer, whose tasks would include liaising directly with the Office of the Planning Regulator to disseminate information on important planning cases and legal judgements. A further task of the liaison officer will be to act as a point of first contact between An Bord Pleanála and the Office of the Planning Regulator.*

The Planning Sector

5.47 It is open to An Bord Pleanála to engage more fully with the planning sector, which comprises the other national, regional and local public bodies charged with spatial planning functions, the planning consultancy industry, and other stakeholders, private and public, which participate in the planning system, with a view to sharing experiences, improving customer service and enhancing coordination. The Review Group agrees with consultees to this Review that, with care, greater interaction can be achieved by An Bord Pleanála without compromising its independence.²³⁸

Recommendation 96: *An Bord Pleanála should undertake annual, structured engagement with the planning industry, non-governmental organisations, local authorities, relevant national bodies and other stakeholders, perhaps in the form of an annual conference.*

²³⁸ See for example Review response letter from the Arts Council dated 17 November 2015.

Communications with Wider Society

- 5.48 As noted elsewhere in this report, the nature of An Bord Pleanála's work ensures that it has a particular prominence in the public eye, especially when acting on behalf of society by adjudicating among competing interests. Given the importance of transparency in the performance of its functions, the Review Group considers that greater emphasis should be placed by An Bord Pleanála on communications with its primary customers, e.g. commercial endeavours, community interests and households.
- 5.49 The Review Group does not consider that better communication with the public at large would undermine the quasi-judicial status of An Bord Pleanála. The Review Group notes in particular the improvements which the UK Supreme Court has made following its creation in October 2009 following the abolition of the Judicial Committee of the House of Lords.²³⁹

Recommendation 97: *An informal advisory committee(s), representative of stakeholders, should be established to assist An Bord Pleanála in identifying and addressing high-level issues and challenges of common interest, and to act as a conduit for more effective communications between An Bord Pleanála and its stakeholders.*

²³⁹ See the Review response provided by the Head of Communications of the UK Supreme Court, letter sent by email dated 19 October 2015 dealing with the development of public communications following 1 October 2009 when the appellate jurisdiction of the House of Lords was transferred to the newly created Supreme Court of the United Kingdom under the Constitutional Reform Act 2005. It reflects in broad terms much of what is suggested by the Heritage Council at sections 2.3-2.5 in its Review response letter dated 18 November 2015 as to how *An Bord Pleanála* can improve the public engagement and outreach element of its work.

Recommendation 98: *To improve public outreach, communications and to enhance public understanding of its work, An Bord Pleanála should appoint a Head of Communications who would be responsible for tasks including:*

- *Media relations, including quarterly briefings detailing An Bord Pleanála's performance, monitoring press coverage, notification of forthcoming Board decisions of public interest, preparation of short press summaries of important Board decisions, facilitating engagement between the Board and the media, and otherwise working with journalists particularly to explain complex cases and decisions of public interest; and,*
- *Conduct and promote educational outreach activities.*

5.50 An accessible, informative, well-designed website is an important resource and tool for any public body, especially those which deliver services to the public such as An Bord Pleanála. The Review Group welcomes An Bord Pleanála's intention to develop a new website. The need for an enhanced website reflects a widespread view.²⁴⁰ In updating its website, it is important that decisions of An Bord Pleanála are made available on the website in a way which is easily searchable in respect of key variable topics, such as the interpretation of particular planning policy, the application of legal requirements and procedural issues. In particular, for example, Section 5 Referrals should be more easily accessible by reference to specific issues.

²⁴⁰ See for example, the Review response provided by the Arts Council, dated 17 November 2015, which suggests that An Bord Pleanála "might consider a radical redesign of its website to make it easier to navigate, engage with, understand the role and function of the Bord, and to provide access to information on planning applications under consideration".

5.51 Furthermore, whilst all cases are, of course, considered on their particular circumstances, there will inevitably be particular decisions by An Bord Pleanála which give important guidance as to how An Bord Pleanála approaches certain key recurring issues of planning policy and law. It is important for the purposes of transparency and consistency that such decisions are highlighted clearly by An Bord Pleanála and identified as such on its website.²⁴¹ The Review Group considers it would be useful to all stake-holders if a mechanism to highlight key decisions were to be adopted.²⁴²

5.52 As stated in Chapter Four, consideration should be given as to whether the day to day progress of oral hearings can be tracked on the An Bord Pleanála website in order for those wishing to attend on particular days to be informed of the updated time table for evidence etc.

Recommendation 99: *An Bord Pleanála should prioritise the development of a new website improving the range of content and making it more accessible, user-friendly and easily searchable, for the public and planning practitioners to include greater detail concerning planned oral hearings and if possible a day to day update of the oral hearing timetable, An Bord Pleanála joint guidance documents, process maps etc.*

Recommendation 100: *An Bord Pleanála should adopt a mechanism to highlight its key decisions which give important guidance as to how An*

²⁴¹ This is an area where assistance can be given in identifying key decision by the in-house legal counsel whom the Review Group recommends to be appointed, see recommendation 65.

²⁴² An example of such a mechanism which might be adapted is the starring system employed by the UK immigration tribunal; see, for example: <https://www.ein.org.uk/bpg/chapter/29>

Bord Pleanála approaches certain important recurring issues of planning policy and law.

Liaison with Neighbouring National Planning Bodies

- 5.53 The work of this Review Group has been assisted greatly by the submissions to this review exercise provided by public and professional bodies of the neighbouring jurisdictions. The Review Group welcomes the development of regular high level meetings between An Bord Pleanála and the planning bodies of the neighbouring jurisdictions and the leadership role which the chairperson and staff of An Bord Pleanála have taken in this initiative.
- 5.54 Whilst there are plainly differences between the various national planning systems, certain issues are common to each of these jurisdictions. There is thus a real opportunity to exchange experiences and solutions, including the possibility of setting up *ad hoc* multi-jurisdictional technical groups with prescribed objectives and timeframes tasked with seeking solutions to particular 'hot issues' common to several or all jurisdictions; for example, the approach to guidance on planning conditions, procedures for Environmental Impact Assessment and Appropriate Assessments, and guidance on the conduct of oral hearings. An objective of such technical groups would be to capture best practice and, where appropriate, incorporate the same in published An Bord Pleanála guidance. The Review Group would encourage participation by appropriately qualified An Bord Pleanála staff, such as, senior planning inspectors and in-house legal

counsel. Involvement of staff would also contribute to the career development.

Recommendation 101: *An Bord Pleanála should explore further opportunities to build upon existing high level exchanges with other National Planning Bodies including the possibility of setting up ad hoc multi-jurisdictional technical groups.*

Chapter Six

Summary of Conclusions, and Recommendations

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- 6.1 The problem that often arises when review reports and their conclusions are read is that they inevitably appear to emphasise those aspects where the authors consider improvements can be made. Too little space is devoted to the areas where the work does not require improvement, or is indeed outstanding. At the outset this Review Group would wish to emphasise that at all levels of its corporate structure An Bord Pleanála has a well-deserved outstanding reputation for its impartiality and integrity. A planning system operated with integrity is a cornerstone of democratic good governance and is a prerequisite to sustainable economic development and the encouragement of sound inward investment. However, in order for these objectives to be delivered, a structure which is efficient, flexible and responsive to change must be erected upon that cornerstone of integrity. In short, whilst integrity is vital, it is not enough.
- 6.2 An Bord Pleanála's Board and staff possess a high level of professional skills and dedication. This has been exemplified by the extraordinarily high quality responses the Review Group has received from the chairperson, chief officer, Board members, the Partnership Committee and staff, in addressing questions and queries posed by the Review Group. Nonetheless, certain key aspects of its operating culture must change if An Bord Pleanála is successfully to meet present and future challenges of an ever increasingly legally complex planning system and with its expanded areas of competence. As well as challenges, opportunities also arise. An Bord Pleanála currently operates within a

largely paper-based system supported by an outdated computer system. That deficiency is being addressed by the information and communications technology (or ICT) upgrade PLEAN-IT, which should produce efficiency gains, freeing up existing resources to better meet the new challenges faced by An Bord Pleanála.

6.3 For reasons that are understandable, An Bord Pleanála's emphasis on its independence has led to two unfortunate consequences; namely, a reputation for isolation from the public and stakeholders manifesting in a lack of transparency, and, an internal fragmentation within An Bord Pleanála itself, in particular, between the inspectorate and the Board. As to which, a misconception seems to have taken hold within some parts of the culture of An Bord Pleanála that inspectors and 'the inspectorate' must preserve a sense of independence from the Board members. Consequently, Board members have historically given limited strategic guidance to their inspectors on such key operating matters as the conduct of oral hearings, where the absence in particular of practical guidance on pre-hearing procedures is incompatible with what is commonly expected of modern quasi-judicial decision-making bodies.²⁴³ When such guidance is given (e.g. on the imposition of planning conditions and the adoption of standard reporting templates for inspectors) there is an apparent difficulty in securing implementation by all inspectors. As a result, Board members find it necessary to devote much of their time to addressing operational matters in respect of individual case file determination, a process made lengthier by the lack

²⁴³ An Bord Pleanála has published guidelines on procedures at oral hearings, however the guidelines, in the opinion of the Review Group, are somewhat brief and should be expanded on considerably with a view to improving the conduct of oral hearings for all concerned. Available online at:

http://www.pleanala.ie/publications/2012/oh_procedures.htm

of strategic guidance which is given by the Board and the practice by Board members of presenting individual case files to one another. The leadership and governance role of both the chairperson and the Board must be acknowledged within the whole of An Bord Pleanála.

6.4 Inadequacy in the Board's reasoning, particularly when it is departing from an inspector's decision (as in principle it must always be free to do so) and when imposing planning conditions have been long standing complaints from stakeholders. This is not the fault of the individual Board members as such. The Board members represent the judgement of the Irish lay-person. Although inevitably they must have a relatively high level of qualification, Board members are not part of a technical panel of experts. They are 'the honest planning brokers' of Ireland. The Review Group has rejected suggestions that this should change. The Board must therefore be supported by those with the relevant technical expertise. We have made recommendations accordingly. In particular, it is a severe weakness of the decision-making function of An Bord Pleanála that it possesses no professionally qualified lawyer to assist with the drafting of the reasons given by the Board and to advise Board members generally. An Bord Pleanála has previously sought and been refused funding for the appointment of in-house legal counsel. The Review Group considers such an appointment to be vital.

6.5 Whilst improvements have been made An Bord Pleanála has been somewhat reluctant to engage fully with stakeholders by creating policies as to how it expects its procedures to operate and where it

does have a policy, by not always publishing that policy. This does not aid efficient decision-making.

- 6.6 The caseload of An Bord Pleanála includes two features which distinguish it from most other planning systems. There are extensive third party rights of appeal and a requirement that all decisions, however small the proposed development involved, must be taken by the Board. There is no delegation of decision-making to inspectors. Reform of either of these two aspects would bring swift material benefits to the speed of decision-making. However these gains would have to be balanced against the impact such reform would have on the quality of planning decision-making and the public's confidence in the planning system. The Review Group is of the view that as matters currently stand, that balance is better struck instead by the recommendations for change which are suggested in this Report. The Review Group considers that implementation of these recommendations should also facilitate the attainment of the speedier decision-making timeframes proposed by this Report.
- 6.7 The Review Group's recommendations as set out below seek to address the issues we have identified.

Recommendation 1: *That a greater emphasis and commitment be made to addressing the complexity of planning law, by codification and consolidation of the legislative framework, with the aim that the planning system operates within a clear comprehensive code. The Government should consider as a matter of priority the setting up of a*

legislative review with a view to proposing a simplification of the legislation.

Recommendation 2: *That the recommendation of the Environmental Protection Agency Review Group concerning a wider review of environmental governance be implemented as a matter of urgency.*

Recommendation 3: *The Review Group is firmly of the view that stronger general managerial oversight and direction of the inspectorate, as described above, at paragraph 3.11, would be wholly beneficial and would not diminish the operational independence of inspectors when making reports and recommendations. In Chapter 4 the Review Group has set out recommendations as to how greater strategic direction can be given by the Board to improve the efficiency and effectiveness of the case management process.*

Recommendation 4: *The Executive Management Team, which currently operates on an informal basis, should be formally recognised and allotted specific responsibilities and performance obligations. The Team should also engage formally with the Board on a regular basis. The respective roles of the Executive Management Team and Management Committee should be clarified. Formal links between the inspectorate and the Board should be strengthened.*

Recommendation 5: *Ordinary members of the Board need to engage to a greater extent in governance to ensure effective oversight of the organisation and, where necessary, to be given appropriate further training.*

Recommendation 6: *That a formal job specification for ordinary Board members should be made publicly available and should reflect the Review Group's view that, whilst useful, ordinary members do not need to have prior knowledge of planning and environmental law and policy; the job specification should however make it clear that successful candidates would be prepared to achieve a working knowledge of these matters. A job specification for Board members should also ensure that emphasis on strategic management and governance of the organisation by Board members. A similar formal job specification for the chairperson should also be produced reflecting also the heightened leadership and governance role played by the chairperson. In addition, the Review Group suggests it would be helpful for An Bord Pleanála in consultation with the Department to draw up terms of reference for the roles of chairperson, ordinary member and inspector in the light of the Review Group's recommendations.*

Recommendation 7: *A suitable induction course and other necessary training should be arranged for new ordinary Board members and the chairperson followed as appropriate by continuing training.*

Recommendation 8: *The list of prescribed bodies that nominate candidates for appointment by the Minister, as set out in section 106 of the 2000 Act, is outdated and should be reviewed to include representation of society's wider interests. The system by which prescribed bodies nominate persons for membership of An Bord Pleanála should continue, subject to the following recommendations, but all nominated persons should be subject to a selection process by*

the Public Appointments Service in a manner broadly consistent with appointments to other public bodies.

Recommendation 9: *Two Board members should be recruited through open competition and should be selected for Board membership by the Public Appointments Service in a manner broadly consistent with appointments to other public bodies.*

Recommendation 10: *To encourage engagement in the appointment process from a wider pool of candidates, the process concerning the selection of Board members should be amended, with a view to greater transparency and public awareness of Board member duties and required qualifications.*

Recommendation 11: *Consideration should be given to an advisory or more expanded role to the chairperson or deputy chairperson in the recruitment process for all ordinary Board members.*

Recommendation 12: *Termination of contracts of employment for the Board members should be sequenced to achieve an approximate 20% turnover on an annual basis.*

Recommendation 13: *Formal, hierarchical links and lines of reporting, oversight and management from assistant director of planning, to senior planning inspector, to planning inspector, should be strengthened considerably.*

Recommendation 14: Regular and detailed briefing sessions are necessary within and between Area Teams to facilitate consistency and provide regular feedback on team performance.

Recommendation 15: Within the inspectorate, stronger oversight and management is required to ensure consistency of approach and recommendation, including report style and format, the wording of planning conditions and overall recommendations prior to issuing to the Board.

Recommendation 16: Biannual seminars should take place involving inspectors and the Board to disseminate An Bord Pleanála policy and to identify and address consistency issues, clarify approaches and brief on recent and forthcoming policy and legislative changes.

Recommendation 17: Having regard to the approach already pursued in local authorities where internal expert reports are secured from different sections of the local authority in question, An Bord Pleanála should retain (consistent with any legal procurement and other requirements) a framework panel of professionals with expertise across all relevant areas. Such resources can then be called upon, when and if required, in a timely manner.

Recommendation 18: A section comprising of environmental and other necessary specialists should be established within An Bord Pleanála to advise inspectors and the Board and to provide necessary technical advice.

Recommendation 19: *The Remote Inspectorate Team would appear to add value from a service perspective and its purpose and position within the overall organisation, including the title of non-Dublin based inspectors, must be re-evaluated in order to ensure through innovative approaches to flexible working the members of the Team are a fully integrated part of the inspectorate.*

Recommendation 20: *The current organisational structure of An Bord Pleanála should be reviewed in order to meet expanding challenges and public expectations. In particular, a new dedicated unit should be established under the direct supervision of the chief officer (ultimately reporting through the chief officer to the chairperson and the Board) to lead and drive change initiatives, new centralised communications policies and practices, research facilities and to address the range of additional expertise required to support the needs of the whole organisation.²⁴⁴*

Recommendation 21: *The PLEAN-IT system is primarily intended to meet the needs of An Bord Pleanála and its customers. However, compatibility with the systems used by statutory and other stakeholders will be an important element of its effectiveness, given the extent to which An Bord Pleanála works with other organisations, as discussed in Chapter Five. Engagement with statutory and other stakeholders should commence as soon as possible to ensure that systems are developed in a co-ordinated fashion to facilitate the appropriate sharing and transfer of electronic data across institutional boundaries. The Department*

²⁴⁴ Communications and research are themes which are discussed further in Chapter Five. The issue of secondment of An Bord Pleanála staff to other appropriate public sector organisations is also relevant and is discussed in Chapter Five.

should oversee efforts to integrate PLEAN-IT with other institutional components of the planning and consent granting system.

Recommendation 22: *In the event that An Bord Pleanála re-introduces the use of fee-per-case inspectors and the use of consultancies, appropriate mechanisms to ensure the highest standards of quality, integrity and consistency should be put in place; An Bord Pleanála should explore the procedures used elsewhere to secure these aims, such as the use of the fee-per-case Ombudsman employed by the UK Financial Services Ombudsman.*

Recommendation 23: *A revised workforce plan should be prepared by An Bord Pleanála and agreed with the Department, based on the need for additional expertise and the introduction of modernised structures and systems associated with the PLEAN-IT project. Consideration to be given to ensuring that all remuneration packages not only reflect the levels of technical skill, experience required, and the responsibilities associated with a post, but should also ensure that there are relative differentials among staff to reflect and encourage those with leadership responsibilities. The revised workforce plan should also reflect the Review Group's recommendation concerning in-house legal counsel and greater legal scrutiny of the reasons for Board decisions, as recommended in Chapter Four.*

Recommendation 24: *An Bord Pleanála should continually review the skills base of its inspectors and provide appropriate training and development through the Performance Management Development*

System to its inspectors, including targeting specific disciplines, which complement the planning discipline.

Recommendation 25: *In view of the reaffirmation of the Performance Management Development System under the Civil Service Renewal Plan, the full potential of the System should be pursued in the mutual interests of the organisation and staff.*

Recommendation 26: *The approval of An Bord Pleanála's annual budget by the Department should include an incentive for the introduction of an agreed and measureable change programme, aimed at improving efficiency and performance.*

Recommendation 27: *A suite of performance indicators focused on cost efficiency should be put in place by An Bord Pleanála, as soon as possible, which should be used in the determination of annual budgets. When operational, the PLEAN-IT system should provide for the timely production of management information concerning performance standards across the organisation, including those of a financial nature, where possible.*

Recommendation 28: *In the absence, at this juncture, of a detailed analysis of potential savings considered likely to arise from the PLEAN-IT system, an exercise should be undertaken by An Bord Pleanála as soon as possible and subject to ongoing review, to identify and quantify such savings, resulting from changes in work practices, reduction in case-handling time frames and other procedural efficiencies.*

Recommendation 29: *The Executive Management Team should enhance oversight of financial management within An Bord Pleanála, and should provide periodic financial performance reports to the Board as a matter of course.*

Recommendation 30: *An Bord Pleanála should produce a suite of guidance documents covering the principal areas of its decision-making processes.*

Recommendation 31: *An Bord Pleanála should publish and adopt policy guidance on the award of costs in respect of each of the powers it has to award costs, to include in addition to any other principle justifying the award of costs, the principle that where a party has behaved unreasonably leading other parties to suffer unnecessary costs they may be liable to pay that other party's costs.*

Recommendation 32: *The current legislative provisions need to be reviewed in order, amongst other things, to ensure that An Bord Pleanála may award costs against any party to proceedings before An Bord Pleanála who has acted unreasonably.*

Recommendation 33: *An Bord Pleanála should publish and update as necessary its policy on the types of cases which will be 'priority cases'.*

Recommendation 34: *An Bord Pleanála should make public whether a particular case is a 'priority case'.*

Recommendation 35: *An Bord Pleanála should publish guidance on the general approach to be adopted by the Board and inspectors in the exercise of their power to facilitate the provisions of Section 132 of the Planning and Development Act 2000 to require further information.*

Recommendation 36: *The legislation should be amended if necessary to enable where appropriate the Board to address objections to its jurisdiction to determine an appeal/application by way of a preliminary ruling. Subject to the necessary legal powers being in place, a practice should be adopted by An Bord Pleanála enabling inspectors, where appropriate, to refer to the Board objections to An Bord Pleanála's jurisdiction for possible determination by way of a preliminary ruling and An Bord Pleanála should publish guidance to its inspectors as to the circumstances where it considers such a referral to be appropriate.*

Recommendation 37: *An Bord Pleanála should review its powers and practice in order to facilitate greater use of limited agenda oral hearings and informal round-table hearings/meetings by the Board and its inspectors. If necessary the legislation should be amended to enable necessary powers.*

Recommendation 38: *Pre-application discussions should be mandatory for all potential Strategic Infrastructure Development applications including all Local Authority Strategic Infrastructure Development proposals or for proposals to amend Strategic Infrastructure Permissions under Section 146, and legislation should be amended accordingly.*

Recommendation 39: *The definition of qualifying Strategic Infrastructure Development developments should be clarified to avoid unnecessary mandatory pre-application consultation on small project types which are known to fall outside the scope of Strategic Infrastructure Development.*

Recommendation 40: *The pre-application provisions relating to Strategic Infrastructure Development should be formally broken into a two stage process to facilitate constructive and meaningful pre-application discussions such that (i) Stage one includes the issuing of a Notice from the Board stating whether or not the proposal constitutes a Strategic Infrastructure Development; and, (ii) Stage two commences where the project has been deemed to be Strategic Infrastructure Development and detailed pre-application discussion commences on the procedures to be followed and the considerations which might have a bearing on the Board's decision in determining the application. In the interests of ensuring certainty statutory timelines should be introduced:*

- *Between the closing of Stage one pre-application consultations and the issue of Notice or a letter from the Board stating whether or not a proposal constitutes a Strategic Infrastructure Development; and,*
- *Concerning the submission of a follow-on planning application once Stage one pre-application consultations have closed and a notice is issued stating the proposal constitutes a Strategic Infrastructure Development.*

Recommendation 41: *To avoid consultations remaining 'live' in circumstances where the prospective applicant is not pursuing a*

proposed development, but has not withdrawn from consultations, it is considered prudent that An Bord Pleanála is provided with the power to close off consultations unilaterally in appropriate circumstances.

Recommendation 42: *The role and purpose of pre-application discussions (Stage two as referred to in Recommendation 40) needs to be clarified and expanded, in the context of the establishment of a Consents Service Unit as per Recommendation 94 of Chapter Five. It is recommended that a ‘contact plan’ is agreed between the applicant and the inspectorate setting out a framework for support, with the aim of helping to improve certainty concerning timescales and the level of inputs required, and to minimise risks to the effective operation of the Strategic Infrastructure Development process.*

Recommendation 43: *Measures to enforce applicant compliance with the pre-planning requirements at planning application stage, such that relevant consultations and necessary surveys have been undertaken, should be strengthened. Only when such compliance is demonstrated through the preparation of a pre-planning technical compliance report should a Strategic Infrastructure Development application be deemed to be valid and of a certain standard to be a planning application.*

Recommendation 44: *A scoping request for an Environmental Impact Statement to proceed alongside pre-application consultations should be permitted once the Board has decided that the proposed development constitutes a Strategic Infrastructure Development. Scoping should be kept as a separate process to pre-application*

consultations but should be allowed to run in parallel with the consultation process.

Recommendation 45: Board members should from time to time observe the conduct of oral hearings in cases in which they are to have no part in the decision-making process in order to assist the Board in the on-going assessment of the adequacy of the hearing process.

Recommendation 46: An Bord Pleanála should expand its current policy so as to set out the types of factors it generally takes into account when deciding whether an appeal warrants an oral hearing.

Recommendation 47: Longer notice should be given of hearing dates in order that prior hearing directions can be issued.

Recommendation 48: An Bord Pleanála should publish standard hearing directions on its web site and issue the directions in writing to the parties.

Recommendation 49: Where the appeal or application is complex or complicated an inspector should be sufficiently trained to be able to issue bespoke directions.

Recommendation 50: Directions should be issued in all oral hearings addressing, amongst other things, the requirement for the production of Statements of Case, Statements of Common Ground and Statements of Evidence, in accordance with a fixed schedule set by the inspector prior to the commencement of the oral hearing.

Recommendation 51: *Inspectors should be given further training in proactive oral hearing management.*

Recommendation 52: *An Bord Pleanála should strengthen guidance on oral hearings.*

Recommendation 53: *Care should be given to ensure that if overheads and power point slides etc. are used for the presentation of evidence during hearings they are legible from all parts of the venue at which people are seated.*

Recommendation 54: *Greater use should be made of the existing practice of discussing possible planning conditions on a ‘without prejudice’ basis at oral hearings. In the case of oral hearings concerning Strategic Infrastructure Development applications it should be the normal practice.*

Recommendation 55: *For hearings of less than three days the Review Group would not generally consider it appropriate for senior staff to attend the hearing in order to provide on-site advice or support to inspectors.*

Recommendation 56: *For longer cases (more than three days) and/or where there is likely to be a large public presence where administrative support is required it should be in the form of an administrative officer performing the role of a liaison officer between the inspector and the parties and the public and helping to ensure that parties know when to attend the hearing. That person should ideally be generally available*

(perhaps in a side room or at the back of the hearing venue but not seated next to the inspector.)

Recommendation 57: *As part of the improvement of An Bord Pleanála's website, the possibility should be considered as to whether daily updates of oral hearing timetables can be posted and accessed by the public.*

Recommendation 58: *Subject to seeking appropriate legal advice, before booking a private venue, opportunities should be explored to see if local authority or other public sector offices can be used for oral hearings.*

Recommendation 59: *All inspectors should be required to follow the template format in drafting their reports.*

Recommendation 60: *Cases should be presented to Board members by inspectors or suitably qualified staff members. If necessary the legislation should be amended to provide expressly for this.*

Recommendation 61: *The Board must make clear in its direction, by reference to paragraph numbers, those parts of the inspector's report with which it agrees and those parts where it disagrees. Where the Board disagrees it should give its reasons for so doing supported, if necessary, by relevant evidence. The reasons should not be formulaic.*

Recommendation 62: *Inspectors when reporting should follow An Bord Pleanála guidance on the imposition of planning conditions and in*

exceptional cases give clear planning reasons for any departure from An Bord Pleanála guidance.

Recommendation 63: *An Bord Pleanála should publish a guidance document containing its general view on good practice to be applied when drafting bespoke conditions and also setting a national template for conditions in consultation with the local government sector, as per Recommendation 80 of Chapter Five.*

Recommendation 64: *Generally, and certainly in the case of all Strategic Infrastructure Development applications, an inspector should draft on a 'without prejudice' basis a list of conditions which they would recommend to the Board if the Board decided to grant planning permission against the inspector's principal recommendation.*

Recommendation 65: *Whilst An Bord Pleanála should continue to retain external solicitors it should also recruit at least one in-house counsel (barrister or solicitor) of suitable specialist expertise with seven years or more post-qualification experience to advise. In-house counsel should also be able to instruct the external lawyers and the Bar directly both in an advisory capacity and in litigation cases, where appropriate.*

Recommendation 66: *Smaller scale development proposals should generally be determined by a division comprising of a single Board member, unless that Board member disagrees with the inspector's recommendation, in which case the decision should be made by a three-member Division of the Board.*

Recommendation 67: Section 5 Referrals should be determined by a Division comprising of a single Board member, unless that Board member disagrees with the inspector's recommendation, in which case the decision should be made by a three-member Division of the Board.

Recommendation 68: A validation stage should be introduced to raise the standard and quality of Strategic Infrastructure Development applications generally and to ensure that the pre-consultation stage has been used to full effect. The technical report referred to at paragraph 4.32 (see recommendation 43) and which will demonstrate compliance with pre-application technical requirements and necessary consultations raised should be a significant influencing factor on whether a Strategic Infrastructure Development application is of an appropriate standard.

Recommendation 69: In the interest of consistency and timeliness, the senior reporting inspector on Strategic Infrastructure Development cases should be involved from the outset in the determination of the case, including attendance at pre-consultation meetings and meetings associated with prescribed bodies. Team meetings with the Board can be facilitated by the director of planning and/or the assistant director of planning and necessary information disseminated to the reporting inspector as necessary.

Recommendation 70: For reasons of consistency and transparency legislation should be amended and the provisions of section 34(10) of the 2000 Act, which require the Board to indicate the main reasons for

not accepting the recommendation to grant or refuse permissions, should apply to Strategic Infrastructure Development cases.

Recommendation 71: *In the consideration and determination of Strategic Infrastructure Development applications, communication with Local Authorities should be reviewed and enhanced. A Memorandum of Understanding should be developed between An Bord Pleanála and the County and City Management Association to enhance the communication network and pattern.*

Recommendation 72: *Section 37F(1)(b) of the 2000 Act should be amended to encompass all appeals which would allow the Board to state that it is minded to grant permission but to still seek further information on a specific item, thereby allowing the Board to explore specific technical items that remain unclear to ensure that, for example, conditions to a grant are technically implementable.²⁴⁵*

Recommendation 73: *It is recommended that cost recovery clauses should be inserted into section 146B of the Planning and Development Act 2000 in the same manner as is applied to 'parent' strategic infrastructures cases.*

Recommendation 74: *An Bord Pleanála should publish a week-by-week processing and drafting timeframe for the different categories of cases it determines.*

²⁴⁵ Section 37F(1)(b), which applies to Strategic Infrastructure Development cases only, provides that 'before determining any application for permission the Board may, at its absolute discretion and at any time, indicate that it is considering granting permission subject to the applicant submitting revised particulars, plans or drawings in relation to the development.'

Recommendation 75: Legislation should be amended to require An Bord Pleanála to give a realistic expectation for particular cases if it is considered at the outset that the timescales may run beyond the statutory objective period or any other revised timeframe provided.

Recommendation 76: The following statutory objective timeframes should apply to An Bord Pleanála's work, with a view to their progressive realisation:

- | | |
|--|-------------------------|
| - General cases not requiring oral hearings | 12 weeks |
| - General cases requiring oral hearings | 14 weeks |
| - Strategic Infrastructure Development cases | 22 weeks ²⁴⁶ |
| - Section 5 Referrals, including where an oral hearing is held | 8 weeks |

The Statutory Objective Period for all other cases, including Compulsory Purchase Orders, Licencing appeals, etc. should remain at 18 weeks.

Recommendation 77: An Bord Pleanála should agree Memoranda of Understanding with other relevant consent, consultation and prescribed bodies, including with the local government sector.

Recommendation 78: All Memoranda of Understanding agreed by An Bord Pleanála should be published online.

Recommendation 79: A timetable should be set by An Bord Pleanála for the agreement of Memoranda of Understanding. Memoranda of

²⁴⁶ Excluding the consultation period, which shall not be less than six weeks.

Understanding should also identify policies and practices which would benefit from the publication of joint guidance documents, a matter which is discussed further below. All Memoranda agreed by An Bord Pleanála with other organisations should be jointly reviewed, as appropriate but within a three year period and revised as necessary to address issues where they arise.

Recommendation 80: An Bord Pleanála should as a matter of priority agree a publication sequence of detailed guidance documents regarding specific topics, based on an analysis of stakeholder needs, including the development of a national template for conditions as per Recommendation 63 of Chapter Four, and in addition should pursue opportunities for the issuing of joint guidance as per Recommendation 79.

Recommendation 81: An Bord Pleanála, the local government sector and other relevant bodies²⁴⁷ should explore options concerning the secondment of staff; the Review Group considers that there is ample scope to put in place secondment arrangements which would not compromise the overriding requirement for operational independence and impartiality. Such arrangements would also benefit An Bord Pleanála, local authority and other staff in terms of their professional development. In addition, the coordination of specialist planning and related training across public authorities, including An Bord Pleanála, would likely result in efficiencies and valuable opportunities to strengthen links among the staff of the various organisations and provide further opportunities to staff for their professional development.

²⁴⁷ Such as the Department and, on its establishment, the Office of the Planning Regulator.

Recommendation 82: Building on the arrangements already in place, contact between senior management of the Department and An Bord Pleanála should be formalised; an annual meeting between the Department's Secretary General, the Assistant Secretary overseeing the planning function, and the chairperson of the Board should take place to provide a forum to discuss matters including:

- The performance of An Bord Pleanála including a review of agreed targets;
- The resourcing of An Bord Pleanála;
- The fees charged by An Bord Pleanála;
- Planning legislation, including the status of proposals from An Bord Pleanála to amend legislation;
- The issuing of joint guidance on procedural matters, perhaps in conjunction with other bodies such as the Environmental Protection Agency and the National Parks and Wildlife Service;
- Update on the status of Memoranda of Understanding with other bodies (see Recommendations 78 to 80 above); and,
- The implementation status of those recommendations, which have been accepted, made by this and other such reviews.

Recommendation 83: That the Department, in consultation with An Bord Pleanála and the Agency, examines the current legislative framework and takes steps to expand, where appropriate, the range of applications for development consent where the Agency must be consulted formally.

Recommendation 84: *An Bord Pleanála should meet as soon as practicable with the Department of Agriculture, Food and the Marine to examine whether additional formal consultation processes in relation to Environmental Impact Assessment development proposals relating to the Department's areas of interest are necessary and if so, whether any issues identified can be addressed by a Memorandum of Understanding agreed by An Bord Pleanála and the Department of Agriculture, Food and the Marine, and/or whether amendments to legislation are necessary.*²⁴⁸

Recommendation 85: *In view of the important role of the Regional Assemblies in the planning system, An Bord Pleanála should liaise regularly, on an annual basis at least, with the Assemblies to discuss pertinent issues.*

Recommendation 86: *The Memorandum of Understanding between An Bord Pleanála and National Parks and Wildlife Service should be agreed as soon as possible clarifying and setting out the role of Service as a consultee in evaluating the impact of certain planning applications on protected areas of nature conservation and in particular in respect of securing compliance with EU environmental law (such as the Habitats Directive), including whether the Service should be further engaged either as a consultee or as a partner in drawing up*

²⁴⁸ The possible convening of an Environmental Impact Assessment working group by the Department of the Environment, Community and Local Government, as discussed at paragraph 2.12 of Chapter Two, may also afford an opportunity to improve formal consultation processes regarding Environmental Impact Assessment among relevant public bodies.

joint An Bord Pleanála technical guidance on the approach to nature conservation issues (such as Appropriate Assessment).²⁴⁹

Recommendation 87: Notwithstanding the establishment or otherwise of an analogue to the UK Planning Inspectorate's Consents Service Unit within An Bord Pleanála,²⁵⁰ a Memorandum of Understanding and/or other appropriate measures should be put in place by An Bord Pleanála to avoid circumstances in which a prescribed body is unaware of a planning appeal, in circumstances in which a planning authority has refused permission based on a prescribed body's recommendation. An Bord Pleanála should routinely advise a prescribed body of a planning appeal in such instances.

Recommendation 88: The National Monuments Service and other appropriate archaeological bodies should be consulted regarding the development of model conditions in relation to archaeology.

Recommendation 89: Processes and practices should be put in place to help ensure that consistency is maximised, both to underpin public confidence and to buttress decisions against potential legal challenges. Engagement should take place at sectoral level between An Bord Pleanála, local government and relevant Government Departments and agencies to improve communication and mutual understanding, to clarify interpretations of policy and to address emerging or potential issues regarding the decision-making process.

²⁴⁹ See by analogy the guidance given in the Advice Note 10 by the Planning Inspectorate for Nationally Significant Infrastructure Projects in England and Wales: <http://webcache.googleusercontent.com/search?q=cache:LTYqHL3EYaAJ:infrastructure.planningportal.gov.uk/wp-content/uploads/2012/10/Advice-note-10-HRA.pdf+&cd=2&hl=en&ct=clnk&gl=uk>

²⁵⁰ As per Recommendation 94.

Such engagement should be regular, occurring at minimum on an annual basis. In working to develop a national template of model conditions, An Bord Pleanála should work closely with the local government sector.

Recommendation 90: When considering departing from a local authority's development plan, An Bord Pleanála should in the first instance be obliged to consult with the public using an abridged form of public consultation. Should An Bord Pleanála decide to contravene a development plan, a detailed statement of the reasons for the contravention should be published as a matter of course.

Recommendation 91: An Bord Pleanála should be required to accompany the notification of decision to the relevant planning authority with a full set of plans and particulars in order to facilitate any compliance processing and enforcement undertakings that may arise in a particular case.

Recommendation 92: As discussed in Chapter Three, improved ICT provides considerable opportunities to improve outcomes. An Integrated ICT system to accommodate transfer of data and documentation, to include a database of legislation, case law, policy documents and position papers, particularly between An Bord Pleanála, the local government sector and other licencing and consent authorities should be put in place. If appropriate, this system could form an element of the PLEAN-IT ICT project which is currently underway.²⁵¹

²⁵¹ And which is discussed further in Chapter Two.

Recommendation 93: *An Bord Pleanála should be the designated authority for collating and co-ordinating the issuing of all consents and decisions required from all relevant public authorities relating to Strategic Infrastructure Development including monitoring compliance with time limits. This would be similar to the procedures for the permit granting process applicable to Projects of Common Interest and appropriate legislation and procedures would need to be put in place for An Bord Pleanála to fulfil this function.*

Recommendation 94: *The Review Group considers that a dedicated unit, similar to the UK Planning Inspectorate's Consents Service Unit, should be established within An Bord Pleanála to facilitate communication with applicants, other consenting bodies, prescribed bodies and local authorities with the goal of improving communication and facilitating interaction.*

Recommendation 95: *An Bord Pleanála should appoint a liaison officer, whose tasks would include liaising directly with the Office of the Planning Regulator to disseminate information on important planning cases and legal judgements. A further task of the liaison officer will be to act as a point of first contact between An Bord Pleanála and the Office of the Planning Regulator.*

Recommendation 96: *An Bord Pleanála should undertake annual, structured engagement with the planning industry, non-governmental organisations, local authorities, relevant national bodies and other stakeholders, perhaps in the form of an annual conference.*

Recommendation 97: *An informal advisory committee(s), representative of stakeholders, should be established to assist An Bord Pleanála in identifying and addressing high-level issues and challenges of common interest, and to act as a conduit for more effective communications between An Bord Pleanála and its stakeholders.*

Recommendation 98: *To improve public outreach, communications and to enhance public understanding of its work, An Bord Pleanála should appoint a Head of Communications who would be responsible for tasks including:*

- *Media relations, including quarterly briefings detailing An Bord Pleanála's performance, monitoring press coverage, notification of forthcoming Board decisions of public interest, preparation of short press summaries of important Board decisions, facilitating engagement between the Board and the media, and otherwise working with journalists particularly to explain complex cases and decisions of public interest; and,*
- *Conduct and promote educational outreach activities.*

Recommendation 99: *An Bord Pleanála should prioritise the development of a new website improving the range of content and making it more accessible, user-friendly and easily searchable, for the public and planning practitioners to include greater detail concerning planned oral hearings and if possible a day to day update of the oral hearing timetable, An Bord Pleanála joint guidance documents, process maps etc.*

Recommendation 100: *An Bord Pleanála should adopt a mechanism to highlight its key decisions which give important guidance as to how An Bord Pleanála approaches certain important recurring issues of planning policy and law.*

Recommendation 101: *An Bord Pleanála should explore further opportunities to build upon existing high level exchanges with other National Planning Bodies including the possibility of setting up ad hoc multi-jurisdictional technical groups.*

Appendices

Appendix I
Meetings of the Review Group

The Review Group met on the following dates:

- 19 August 2015
- 16 September 2015
- 13 & 14 October 2015
- 11, 12 & 13 November 2015
- 20 November 2015
- 9 & 10 December 2015
- 14 January 2016
- 21 & 22 January 2016

Appendix II

Review Group Correspondents

The Review Group wrote to the following organisations, requesting their views:

Irish Organisations

An Taisce

Arts Council

Association of Consulting Engineers of Ireland

County and City Management Association

Chambers Ireland

Commission for Energy Regulation

Construction Industry Federation

Córas Iompair Éireann

Council of the Bar of Ireland

Department of Agriculture, Food and the Marine

Department of Arts, Heritage and the Gaeltacht

Department of Children and Youth Affairs

Department of Communications, Energy & Natural Resources

Department of Defence

Department of Education and Skills

Department of Finance

Department of Foreign Affairs

Department of Health

Department of Jobs, Enterprise and Innovation

Department of Justice and Equality

Department of Public Expenditure and Reform

Department of Social Protection

Department of An Taoiseach
Department of Transport, Tourism & Sport
Dublin Airport Authority
Dublin Docklands Development Authority
Eastern & Midlands Regional Assembly
EirGrid
Engineers Ireland
Environmental Protection Agency
ESB
Fáilte Ireland
Health & Safety Authority
Health Service Executive
Inland Fisheries Ireland
Institute of Professional Auctioneers and Valuers
Irish Architectural Archive
Irish Aviation Authority
Irish Business and Employers' Confederation
Irish Council for Social Housing
Irish Environmental Law Association
Irish Landscape Institute
Irish Planning Institute
Law Society of Ireland
Irish Tourist Industry Confederation
Local Government Management Agency
National Roads Authority
National Transport Authority
National Women's Council of Ireland
National Youth Council of Ireland

National Parks and Wildlife Service
Northern & Western Regional Assembly
Railway Safety Commissioner
Royal Institute of the Architects of Ireland
Royal Irish Academy
Royal Town Planners Ireland
Royal Town Planning Institute Ireland
Shannon Group
Society of Chartered Surveyors
Southern Regional Assembly
The Heritage Council
The Office of Public Works
Údarás na Gaeltachta
Waterways Ireland

Other Organisations

City of London Law Society
Planning & Environment Bar Association
The Planning Inspectorate
Department for Transport (United Kingdom)
Directorate for Planning and Environmental Appeals
Planning Appeals Commission
Director of Major Applications and Plans, Planning Inspectorate

Appendix III

Public Consultation Survey Questions

Public Consultation

The Public Consultation sought responses to a range of questions, divided into themes reflecting the Terms of Reference of the Review Group. These questions were as follows:

Respondent Details

Q: Name

Q: Organisation

Q: Address

Q: Email Contact

Anticipated Increase in Construction Activity

The Review Group is required to consider the anticipated increase in construction activity, including strategic infrastructure development (SID) and Strategic Development Zones (SDZs), and the related volume of planning applications and appeals as the economy recovers, including measures to ensure that appeal and non-appeal cases are discharged in an efficient and timely manner.

Q: Given the likely increase in activity, are there any particular legislative, organisational process related and / or other practical measures that should be considered to ensure the efficient and timely discharge of An Bord Pleanála's functions into the future? Please provide your reasoning.

Q: Do you have any comments and / or suggestions on the timeframe engaged by An Bord Pleanála in the determination of its functions (i.e. how long it should take to carry out its task)?

Q: Do you have any comments and / or suggestions on how An Bord Pleanála's functions should be prioritised, if at all?

Complex and changing national and EU legislative and policy context

An Bord Pleanála operates in an increasingly complex and rapidly evolving national and EU legislative and policy context and this situation creates significant challenges for the organisation.

Q: Do you consider An Bord Pleanála to be adequately informed of the challenging legislative and policy context in which it operates? Please provide your reasoning.

Q: What additional resources and expertise, if any, should An Bord Pleanála have to adequately inform itself of the complex and changing national and EU legislative and policy context?

Q: Do you have any further comments on this aspect of the review?

Co-ordination of the planning permission process with other development consent and licensing system

More effective co-ordination of the planning permission process with other development consent and licensing systems to facilitate, amongst other matters, compliance with the requirements of relevant EU directives.

Q: Are current arrangements for co-ordination of the planning permission process with other development consent and licensing systems operating effectively? If not, why not? Please provide your reasoning.

Q: Are there any particular legislative, organisational process related and / or other practical measures that should be considered in order to deliver more effective coordination of the planning permission process with other development consent and licensing systems? Please provide your reasoning.

Q: Do you have any further comments on this aspect of the review?

Litigation matters

Increase in litigation in the area of An Bord Pleanála's work and measures required to address this situation.

Q: Are there particular factors that are contributing to the increase in litigation in certain areas of An Bord Pleanála's work? Could any of these factors be avoided or mitigated against? Please provide your reasoning, supported by appropriate evidence / examples where possible.

Q: Are there any particular legislative, organisational process related and / or other practical measures that should be considered with a view to addressing the increase in litigation in certain areas of An Bord Pleanála's work? Please provide your reasoning.

Q: Do you have any further comments on this aspect of the review?

Current legislation governing the functions of An Bord Pleanála

Appropriateness of the current legislation governing the functions of An Bord Pleanála, its corporate governance structures and the Board appointment process.

Q: Are there any aspects of the current legislative framework governing An Bord Pleanála's functions that should be revisited or clarified? If yes, what specific amendments would you suggest? Please provide your reasoning.

Q: Are there any aspects of the current legislative framework governing the following matters that should be revisited:

- the process by which the Chairperson of the Board is appointed;
- the process by which ordinary Board members (other than the Chairperson) are appointed;
- the term of office of the Chairperson and Board members;
- the number of Board members?

If yes, what specific amendments would you suggest? Please provide your reasoning.

Q :Are An Bord Pleanála's corporate governance structures appropriate? If not, what changes / improvements would you suggest? Please provide your reasoning, supported by appropriate evidence / examples where possible.

Q: Do you have any further comments on this aspect of the review?

Increase in functions being assigned to An Bord Pleanála

Increase in functions being assigned to An Bord Pleanála, including foreshore licensing under the proposed Maritime Area and Foreshore legislation, co-ordination of "projects of common interest" (cross-border energy infrastructure projects) etc.

Q: The remit and functions of An Bord Pleanála are extensive. Is it appropriate that its functions should continue to expand? Please provide your reasoning.

Q: Are there any particular functions which you consider should be removed from An Bord Pleanála? If so, who should carry out those functions? Please provide your reasoning.

Q: Are there any particular legislative, organisational process related and / or other practical measures that should be considered to ensure the efficient and timely discharge of any new functions assigned to An Bord Pleanála into the future? Please provide your reasoning.

Q: Do you have any further comments on this aspect of the review?

The systems, procedures and administrative practices employed in An Bord Pleanála:

The systems, procedures and administrative practices employed in An Bord Pleanála, including decision-making processes in determining planning appeals and determinations.

Q: What are the strengths and weaknesses of An Bord Pleanála's existing systems, procedures and administrative practices? Please provide your reasoning.

Q: Are there any particular legislative, organisational process related and / or other practical measures that should be considered to improve the systems, procedures and administrative practices employed by An Bord Pleanála? Please provide your reasoning, supported by appropriate evidence / examples where possible.

Q: Do you have any comments and / or suggestions relating to how An Bord Pleanála makes information relating to its functions available to the public?

Q: Do you have any comments and / or suggestions on the provisions governing public participation that apply in relation to An Bord Pleanála's functions and on how these provisions operate in practice?

Q: Do you have any comments and/or suggestions on the rules governing oral hearings and on how oral hearings operate in practice?

Q: Do you have any comments or suggestions regarding An Bord Pleanála's power to contravene the provisions of a Development Plan in the determination of planning appeals?

Q: Do you have any further comments on this aspect of the review?

Optimal organisational structure

Optimal organisational structure, including required skillsets, ICT requirements, human resource development and capacity requirements, as well as financial resources, to enable An Bord Pleanála to carry out its functions effectively and meet its statutory remit, drawing, as appropriate, on the current internal business process review as part of the ongoing implementation of the its new ICT strategy.

Q: Having regard to the ongoing implementation of An Bord Pleanála's new ICT strategy, is there any other area of its operations which requires technological advancement?

Q: Are the fees charged by An Bord Pleanála appropriate? Please provide your reasoning and examples where possible.

Q: Do you have any further comments on this aspect of the review?

Proposed changes to the planning system, both legislative and structural

Implications of proposed changes to the planning system, both legislative and structural, including the establishment of the Office of the Planning Regulator.

Q: What do you consider to be the most significant likely implications for An Bord Pleanála of the establishment of the Office of the Planning Regulator? Please provide your reasoning.

Q: Do you have any further comments on this aspect of the review?

General legislative framework governing An Bord Pleanála and its operations

Q: What are the strengths and / or weaknesses of the legislative framework governing An Bord Pleanála and its operations? Please provide your reasoning.

(Please note that previous sections of the Response Template focused on particular aspects of the legislative framework, including: co-ordination of the planning process with other development consent and licensing systems; An Bord Pleanála's functions; and the process of appointment to the Board. You do not need to repeat the answers you gave in previous sections).

Q: Are there any specific legislative amendments that you would suggest to address issues that you have identified? Please provide your reasoning for any suggestions.

An Bord Pleanála: communication with the public

Q: Do you consider that An Bord Pleanála's communication with the public is satisfactory? Please provide your reasoning.

Q: What changes, if any, would you suggest? Please be as specific as possible and provide your reasoning.

Appendix IV
Public Consultation - Survey Responses

Responses to the online Public Consultation Survey were received from the following persons and organisations:²⁵²

<i>Name</i>	<i>Organisation</i>
Alice Whitaker	-
Andrew Clarke	Loughanleagh Heritage Group
Anne Flynn	-
Anthony Cohu	Ecological Planning, Landscaping & Design
Beverly Bate	-
Brain Dawson	Irish Wind Energy Association
Brian Rickwood	-
Caroline Goucher	Westport Environmental Sustainable Community
Chambers Ireland	-
Chris Byrne	-
Christina Murphy	-
David Malone	Environmental Action Alliance Ireland
David Wall	-
Dermot Breen	-
Donna Channing	-
Edel Grace	Kilcommon Upperchurch Wind Awareness Group
Eirgrid	-
Element Power Ireland	-
Elisha McGrane	-
Eugene McMahon	-

²⁵² Two further survey responses were received from an 'EB' and 'YD'.

European Platform	-
Against Windfarms	
Francis Clauson	-
James Price	-
Joanne Addie	-
Joe Miller	Royal Institute of the Architects of Ireland
Joe Noonan	-
Karin Dubsy	Coastwatch
Kieran Fitzpatrick	-
Lorcan Sirr	-
Marcia D'Alton (Cllr)	Cork County Council
Martin Sullivan	-
Mary Henchy	Dun Laoghaire Rathdown County Council
Mary Nollaig Martin	-
Michael Doran	-
Michael Leahy	-
Michael Muldoon	-
Nigel De Haas	-
Noeleen McHenry	Irish Water
Oliver Cassidy	-
Owen Martin	
Padraig McEvoy (Cllr)	Kildare County Council
Paul Mulville (Cllr)	Fingal County Council
Paula Galvin	-
Peter Crossan	-
Peter Stafford	Property Industry Ireland
Peter Sweetman	-

Peter Thomson	Peter Thomson Planning Consultants
Philip Martin	Kingscourt Residents Wind Information Group
Pierre Greijmans	Environmental Action Alliance – Ireland
Rahima Sayer	-
Ray Conroy	Laois Wind Energy Awareness Group
Richard Morton	Egmont Management
Rosemary Gibbons	-
Ruth Minogue	-
Sean Hennessy	-
Sonja Reidy	-
Stephen O'Byrne	-
Tara Buckley	Retail Grocery Dairy & Allied Trades Association
Terry Prendergast	Grangegorman Development Agency
Una Bagnall	Dublin City Council
Vivienne Kelly Keane	-

Appendix V

Public Consultation - Other Responses

Written responses were received from the following members of the public, bodies and groups involved in the planning process, and Government Departments and State Agencies (both from Ireland and from the United Kingdom).

Alison Hardiman
An Bord Pleanála
An Bord Pleanála Partnership Committee
An Bord Pleanála Remotely-based Inspectors
An Taisce
Arts Council
Council of the Bar of Ireland
Clare Manor Hotel Ltd
Construction Industry Federation
County and City Management Association
Department of Agriculture, Food and the Marine
Department of Communications, Energy and Natural Resources
Department of Education and Skills
Department of Jobs, Enterprise and Innovation
Department of Public Expenditure and Reform
Department of the Environment, Community and Local Government
Department of Transport, Tourism and Sport
Department of Transport - The Transport and Works Act Orders Unit
(United Kingdom)
Dublin Airport Authority

Eastern & Midland Regional Authority
Edel Grace
Enda Conway
Engineers Ireland
Environmental Protection Agency
Glenties Windfarm Information Group
Heritage Council
Irish Business and Employers' Confederation
IMPACT
Inland Fisheries Ireland
Irish Aviation Authority
Irish landscape Institute
Irish Planning Institute
Irish Tourist Industry Confederation
Laois County Council
Local Authority Members Association
Michael Leahy
Maureen Lynch
National Economic and Social Council
Northern & Western Regional Assembly
Planning and Environmental Appeals Division - Scotland
Planning and Environmental Bar Association - United Kingdom
Planning Appeals Commission - Northern Ireland
Planning Inspectorate - England and Wales
Royal Institute of the Architects of Ireland
Royal Irish Academy
Royal Town Planning Institute Ireland
Society of Chartered Surveyors of Ireland

Southern Regional Assembly

Transport Infrastructure Ireland

Údarás na Gaeltachta

United Kingdom Supreme Court (Head of Communications)

Vincent McGauran

Appendix VI

Information Gathering Meetings

The Review Group held meetings with the following organisations:

- Board of An Bord Pleanála
- An Bord Pleanála Management Team
- An Bord Pleanála Partnership Committee
- County and City Management Association
- Council of the Bar of Ireland
- Department of the Environment, Community and Local Government
- Department of Arts Heritage and the Gaeltacht
- Directorate for Planning and Environmental Appeals - Scotland
- Engineers Ireland
- Environmental Protection Agency
- Irish Planning Institute
- Irish Landscape Institute
- Law Society of Ireland
- National Parks and Wildlife Service
- Northern Ireland Planning Appeals Commission
- Royal Institute of Architects of Ireland
- Royal Town Planning Institute
- Scottish Directorate for Planning and Environmental Appeals (by teleconference)

Appendix VII

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Appendix VIII

Recommendations Organised by the Review Group's Terms of Reference

(Note: several recommendations are relevant to multiple aspects of the Terms of Reference, however recommendations have been assigned to specific terms based on the most relevant term)

Terms of Reference	Relevant Recommendations(s)
The anticipated increase in construction activity, including on strategic infrastructure projects and Strategic Development Zones, and the related volume of planning applications and appeals as the economy recovers, including measures to ensure that appeal and non-appeal cases are discharged in an efficient and timely manner.	26, 28, 77, 34, 40, 41, 42, 43, 44, 60, 66, 67, 68, 69, 74, 75, 76 & 82
The increasingly complex and changing national and EU legislative and policy context within which the Board operates.	1, 94, 96, 97 & 101
The need for more effective co-ordination of the planning permission process with other development consent and licencing systems to, inter alia, facilitate compliance with relevant EU Directive requirements.	2, 21, 63, 71, 77, 78, 79, 80, 81, 84, 85, 86, 87, 88, 89, 90, 91, & 92
The increase in litigation in the area of the Board's work and measures required to address same.	31, 32, 36, 37, 61, 65 & 100
The appropriateness of the current legislation governing the functions of the Board, its corporate governance structures and the Board appointment process.	5, 6, 8, 9, 10, 11, 12, 38, 39, 70, 73 & 83

The increase in functions being assigned to the Board, including foreshore licencing under the proposed Maritime Area and Foreshore Bill, co-ordination of “projects of common interest” (cross-border energy infrastructure projects) etc.	93
The systems, procedures and administrative practices employed in the Board, including decision making processes in determining planning appeals and determinations.	14, 15, 16, 27, 30 , 35, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 62, 63 & 72
The optimal organisational structure, including required skillsets, ICT requirements, human resource development and capacity requirements, as well as financial resources, to enable it to effectively carry out its functions and meet its statutory remit drawing, as appropriate, on the current internal business process review as part of the ongoing implementation of the ABP ICT strategy.	3, 4, 7, 13, 17, 18, 19, 20, 22, 23, 24, 25, 26, 29, 98 & 99
The implications of proposed changes to the planning system, both legislative and structural, including the establishment of the Office of the Planning Regulator	81 & 95

Appendix IX

Awarding Costs in Planning Cases

Note: The text contained in Appendix IX has been provided to the Review Group by An Bord Pleanála.

The power to award costs in planning cases determined by An Bord Pleanála can be generally categorised into two separate streams:

1. Normal planning appeal cases; and,
2. Strategic infrastructure development /compulsory acquisition cases.

A brief summary of both is set out below.

1. The Planning Appeal System

Section 145 of the Planning and Development Act 2000, as amended by section 28 of the Planning and Development (Strategic Infrastructure) Act, 2006, provides that the Board may direct either the planning authority or a person who made an appeal or referral to pay a sum to either An Bord Pleanála or to a party to the particular case (planning authority, appellant/referrer or, in the case of a third party appeal or referral, the applicant for planning permission or a person with whom the referral question arose etc) as compensation towards the expense incurred by that party in relation to the appeal. Note that the section does not provide, *in any circumstances*, that an applicant for planning permission who has not made an appeal but whose application is the subject of a third party appeal can be directed to pay costs to anybody under this section. It is only planning

authorities or appellants who can be directed to pay such costs. This is the current legislative provision in relation to the Board's powers to award costs in planning appeals and referrals.

Legislative Background/Context

Section 19 of the Local Government (Planning and Development) Act, 1976 was in force from 1977 to the commencement of section 145 of the 2000 Act and it gave the Board the same powers as are now set out in section 145. Section 19 of the 1976 Act was based on section 18 of the Local Government (Planning and Development) Act, 1963 which was in force from 1964 to 1977 (in respect of appeals/referrals to the then Minister for Local Government).

Insofar as the rationale of the current provision can be explained by reference to its apparent origin in section 18 of the 1963 Act notes prepared by the then Department of Local Government in 1964, in commenting on section 18, stated that the main purpose of the provision was "to discourage frivolous appeals and the bringing of appeals in a capricious or malicious manner". It appears, on that basis, that costs awards against appellants were originally conceived as a possible penalty mechanism on what would subsequently be characterised in later legislation as "vexatious" appeals with the power to so award acting as a deterrent against the making of such appeals.

Section 19 of the Local Government (Planning and Development) Act, 1976 (which was the enactment which set up An Bord Pleanála and transferred the planning appeal/referral functions to it from the Minister) substantially restated the section 18 provisions except it included an additional potential liability for

an appellant in that the Board could award costs of any other party against an appellant (this was presumably primarily inserted to cater for applicant (1st party) costs in a third party appeal).

Award of costs against a planning authority was still confined to the costs of an appellant and/or the Board only and did not extend to an applicant in a third party case who had not made an appeal. Nor was there any provision to award costs against an applicant who had not made an appeal in such a case.

Guidance notes issued by the Department of Local Government at the time of the enactment of the 1976 Act stated that:

“Section 19 enables the Board to direct any party to an appeal to pay to any other party, or to the Board, compensation for the expenses occasioned in relation to the appeal. The section does not cover costs arising because of or by reason of the appeal i.e. costs such as loss of profits suffered by a developer during the period taken to deal with the appeal, or interest charges on land which could not be developed during the period. It is envisaged that these powers will be used only in exceptional circumstances. The main purpose of the section is to encourage reasonable use of the planning machinery and reasonable decisions by planning authorities and to discourage frivolous or vexatious appeals. The Board is required to consult the Minister before directing the payment under the section of a sum exceeding £50.”*

* This clause in the note is technically in error in that the section does not provide for full cost awards against/in favour of all parties to a case – this does not however affect the thrust of the note.

In addition, the official explanatory memorandum accompanying the 1976 Act and Bill, in commenting on section 19 stated, inter alia, that “As in the case of section 18 of the 1963 Act, it is not envisaged that the new power would be used widely”.

An Bord Pleanála Practice

It is the case that the Board has rarely awarded costs under this provision notwithstanding that it does not have any policy to not so award. It is also the case that the Board has received very few explicit written or oral requests for costs under section 145 (or its precursors) from participants in appeals/referrals.

Insofar as an “approach” to this section can be deduced, the only material available is that already referenced as originating in the relevant policy making Department of Government (the notes and explanatory memorandum explaining to some degree the intent behind the provisions). The Board's general approach, heretofore, has been certainly aligned with the thrust of the legislator's intention as set out in that documentation while accepting that the actual legislation alone clearly gives the Board discretion to apply the provisions contained therein as it sees fit.

2. Strategic Infrastructure Development / Compulsory Acquisition

The origin of the costs claims regime for local authority projects and strategic infrastructure cases was section 219 of the Planning and Development Act 2000. This commenced in 2001 when the responsibility for determining local authority project cases including compulsory acquisition cases was transferred from the Minister for the Environment to An Bord Pleanála. That section was itself based on a similar general power given to the Minister under section 91 of the Local Government Act, 1946 in relation to persons attending public local inquiries undertaken on behalf of the Minister (such inquiries included but were not confined to compulsory acquisition cases).

Section 91 enabled the Minister to direct payment of costs as a contribution towards “the costs and expenses reasonably incurred by any person in relation to the inquiry”. In effect, section 219 (as subsequently amended by section 40 of the Planning and Development (Strategic Infrastructure) Act 2006) provides, inter alia, that the Board may at its absolute discretion direct the payment of such sum as it considers reasonable by the applicant in the case to any person (3rd party) appearing at an oral hearing held in relation to the matter as a contribution to the costs incurred by that person of appearing at that hearing. The amended version (2006 Act) follows the format of the original section 219 by applying the cost award power to certain categories of cases only i.e. those cases that were the subject of a transfer of function under the 2000 Act and subsequent amendments.

The original section 219 provision generated internal discussion/analysis concerning the need for a general policy against which claims received under the section for 3rd party costs could be assessed. A guiding policy for

these cases was adopted in 2004 in the terms as set out in Appendix IX(a) to this document. This policy is still used for the relevant section 219 cases and is made available to participants on request.

The 2004 Board policy reflected the Department's policy that contemplation of an award of costs would generally be confined to landowners whose objections to compulsory acquisition was sustained in the Board decision – it elaborated by specifically indicating, inter-alia, that general third party participants in oral hearings (i.e. those not directly affected by proposed compulsory acquisition of land in which they had a legal interest) would not generally be awarded costs.

Accordingly, the award of costs, both by the Minister and the Board, has traditionally been restricted to specific circumstances/conditions being operable while enabling discretion be applied to deviate from those general parameters where specific case circumstances justified same.

Costs claims in new Strategic Infrastructure Development cases under various sections of the Planning and Development Act 2000, as amended by the 2006 and 2010 Acts

In addition to the section 219 amendment, the Planning and Development (Strategic Infrastructure) Act 2006 introduced a new distinct statutory provision relating to 3rd Party costs claims – this was a 3rd Party costs award power in the case of S.37A strategic infrastructure development applications ("Seventh Schedule Cases"). The statutory provisions are contained in section 37H of the 2000 Act (as inserted by S.3 of the 2006 Act) and as subsequently amended by section 26 of the Planning and Development (Amendment) Act

2010. This again provides, inter alia, for the award of costs in such amount as the Board considers to be reasonable to any 3rd party “as a contribution to the costs incurred by that person during the course of consideration of that application”. It also provided for cost recovery of An Bord Pleanála's costs and the power to award costs to the planning authority. All of the costs are payable by the applicant for planning permission. The Board has been considering a written policy in relation to those strategic infrastructure cases not covered by the existing section 219 policy. The issue has been discussed at a number of Board meetings over the past 18 months and is now nearing completion subject to legal advice from An Bord Pleanála's legal agent. It is anticipated that the overall cost policy will be published on the website when approved and adopted. Similar provisions also now exist for other categories of strategic infrastructure. While the new types of cases under the 2010 Act (Substitute Consent and Appropriate Assessment cases) do have provisions for recovery of Board costs, and in the case of Substitute Consent, award of costs to the planning authority, there is no provision in either for the award of any third party costs.

An Bord Pleanála considers applications for costs in all of the above cases on a case by case basis.

Its general approach to such applications is guided by the 2004 policy and its understanding that there is no provision in either European or Irish law which requires or suggests any right or requirement that persons or bodies participating in the planning system by making submissions or observations including such participation in any environmental impact assessment procedure should be financially supported.

APPENDIX IX(a)

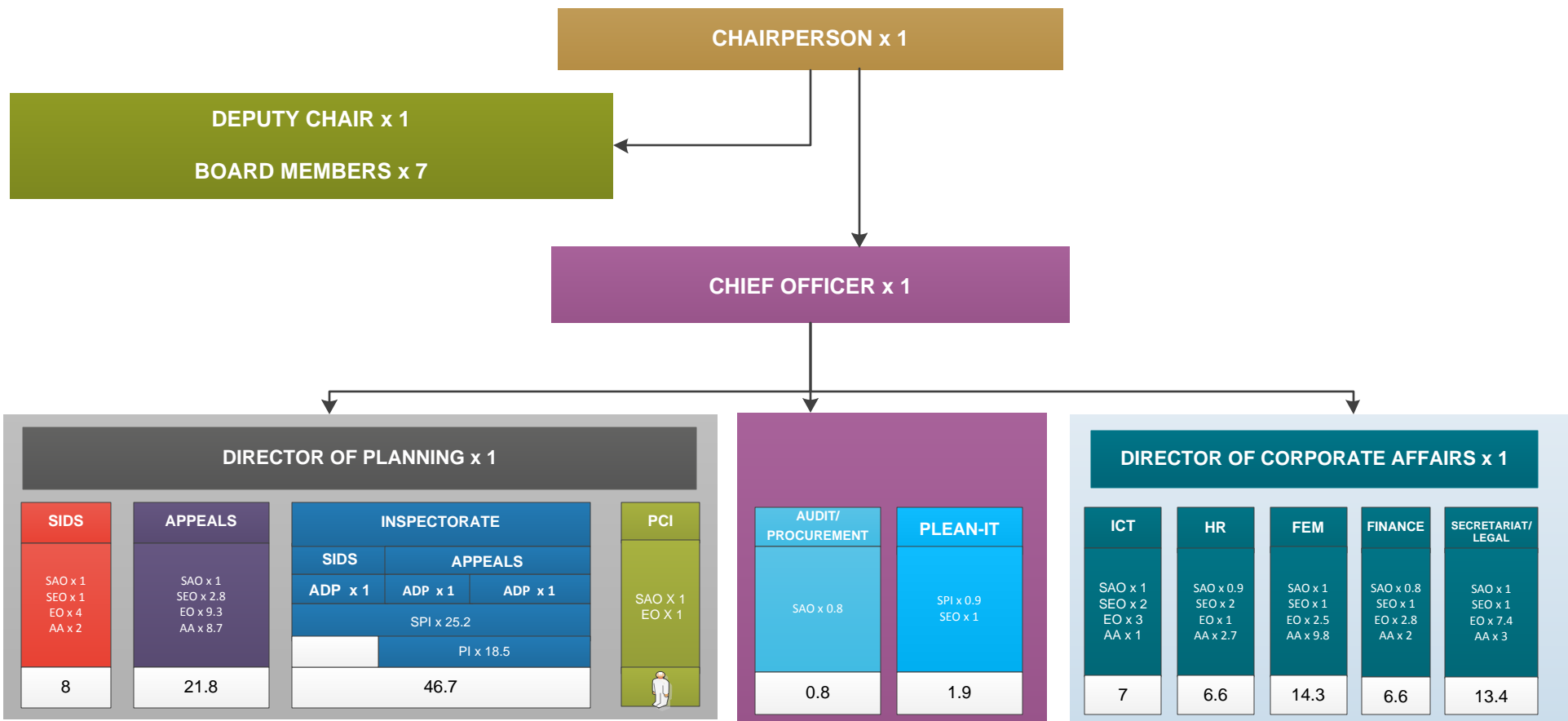
An Bord Pleanála Policy on claims for costs incurred by persons appearing at mandatory oral hearings / public local inquiries held under Section 218 of the Planning and Development Act 2000

The following general principles have been adopted by the Board in respect of claims for costs made under section 91 of the Local Government Act, 1946 or section 219(1)(b) of the Planning and Development Act, 2000 subject to the proviso that the Board reserves the right to depart from the policy in the exercise of its absolute discretion where it considers that the particular circumstances warrant a different approach in any case.

1. The award of costs will be dependent on the outcome of the substantive case which was the subject of the oral hearing (or public local inquiry). Costs will generally not be awarded in circumstances to the extent that the Board's decision does not uphold or support the case made by the claimant at the oral hearing or public local inquiry.

2. Notwithstanding (1) above, costs will generally not be awarded to participants in mandatory oral hearings/public local inquiries who are not directly affected by compulsory acquisition of land but whose submissions/observations relate to the implications of proposed development for the proper planning and sustainable development of the area and/or the likely effects on the environment of a proposed development. Land owners whose objections to land acquisition are not upheld will also generally not be awarded costs in this context.

Appendix X
An Bord Pleanála Organogram



Summary:

Planning Operational (Incl DP)	77.5
Corporate Affairs (Incl DCA)	48.9
Chief Officer	1
Projects/Audit	2.7
Board	9

WTE Staff/Board numbers 139.1

Legend:

- ADP = Assist Director Planning
- SPI = Senior Planning Inspector
- PI = Planning Inspector
- SAO = Senior Administrative Officer
- SEO = Senior Executive Officer
- EO = Executive Officer
- AA = Administrative Assistant



Made up of existing staff