



Submission to

The Consultation on the regulation of costs payable in matters prescribed on foot of section 294 of the Planning and Development Act 2024 (Scale of Fees)



January 15 2026

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0. The submission:

This submission has been prepared by the Manager and Law Officer of Environmental Law Ireland, Attracta Uí Bhroin, whose primary focus is the protection of the Environment through Environmental Law, at national, EU and international level. This involves a focus on compliance, progressive legislation, and capacity development, with discussion and engagement with a wide range of stakeholders. Stakeholders regularly engaged with include: the judiciary, the legal profession not limited to the Bar of Ireland and the Law Society, members of the Oireachtas, Local Representatives, Government departments, Public Bodies, State Agencies, the EU Commission and UN bodies and actors, a range of business and industry stakeholders, professional bodies, a wide cohort of eNGOs at local, national and European level extending beyond the EU member states, Civil Society Organisations, individual environmentalists, academics and students at an national and international level, and the media.

This is done largely in the context of Environmental Law Implementation Group Project, ELIG, a joint initiative between the Irish Government, An Taisce and the Environmental Pillar.

The positions expressed in this submission may, or may not reflect the views of the eNGO member organisations of the project. However, they may of course rely on it in full, and given the public nature of the consultation, and the public interest underlying its preparation, it should be able to be relied upon by the wider public.

Any questions on the submission should be directed to:

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File:Shadowofjustice.jpg [here](#) , with thanks to Author: [Temerarius](#), resized only.

1. Introduction.

This submission is made in response to the consultation launched by Minister Darragh O'Brien¹ on 3 December 2025 on a Scale Fees Under the Planning and Development Act 2024 (the 2024 Act) [here](#).

The consultation concerns a matter of significant public interest given: the implications for: fundamental rights, the rights of access to justice, and effective judicial protection; environmental protection and the public interest acknowledged in all of that, including by but not limited to - a wide body of case law of the EU Court of Justice, (“CJEU”), and which is clear from the Article 1 objective of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“the Aarhus Convention”). It is also most significant given the significant negative implications this proposal risks for the delivery of housing and critical infrastructure, at a time of multiple crises – including across housing, water, energy, climate change and biodiversity collapse.

This consultation and opportunity to comment on the proposed scale of fees are in principle therefore welcome. They are highly relevant to the constituency of and interests of the members of the Environmental Pillar, the members of the Irish Environmental Network, and indeed the wider eNGO community, particularly smaller local eNGOs whose role is so incredibly important in environmental protection, and of course the wider public.

The submission is made without prejudice to the concerns on the serious procedural and substantive flaws in the consultation detailed further below, and their implications compromising any reasonable and meaningful response.

This submission presents a general response to the consultation and to the open question 9 in the consultation document, together with the reasons for responding “no” to questions 1-8 in the rest of the consultation document. In summary the scale of fees proposed and as presented in this consultation is no basis on which to further consider the more detailed questions about it. Additionally, what is proposed is overly naïve, doesn’t reflect the complexities of environmental litigation and fails to reflect the developments under the new Planning and Environmental Court, its Practice Directions and the new Rules of the Superior Courts for that Court.

For the avoidance of doubt what follows is provided without prejudice to the position on the fundamental inadequacies of the consultation – a point expanded upon below.

¹ <https://www.gov.ie/en/department-of-climate-energy-and-the-environment/press-releases/consultation-on-scale-of-fees-under-the-planning-and-development-act-2024-opens/>

The calls to withdraw the consultation are fully supported and detailed recommendations are included under “Concluding Remarks and Recommendations” below.

In addition to: Core Issues and Concerns; an Outline of Relevant Legal Considerations and Architecture, the following further issues are set out:

- **The serious issues with the consultation and their implications**
- **The chilling and deterrent effect of these proposals on the pursuit of access to justice and the accessibility of effective judicial remedies**
- **The dysfunctional consequence that the quality of environmental decision-making will be lowered, impacting negatively across: environmental protection and on the associated public interest; the administration of justice; public order; and the rule of law.**
- **The dysfunctional effect of these changes on the delivery of housing and critical infrastructure, including sustainable climate change initiatives.**
- **The wider impact of these changes, including on costs and JR**

Concluding remarks and recommendations then follow.

2. Core Issues and concerns:

Ultimately, it is submitted here that the proposed scale of fees as set out across the consultation materials cannot be considered fit for purpose. This submission sets out below the most serious deficiencies and concerns including in respect of:

1. **The failure to evidence that the proposed scale of fees is legally compliant, and to set out the relevant legal context against which that has been examined, and the failure to demonstrate or even properly consider the chilling effect of the proposal on access to justice rights and effective judicial protection. That chilling effect is expanded upon specifically further below in the submission.**

In failing to set it out in full and examine how the proposed scale of fees complies with the legal obligations pertaining or indeed what was or wasn't considered – and irrespective of the scope of the McDaid report² – this could and should have been done – otherwise what is proposed on the scale of fees is effectively meaningless and aspirational without any sound legal basis for its implementation.

That is said naturally with the greatest respect to Mr Mc Daid whose terms of reference (“TOR”) for the primary report provided in the consultation³ have not been made clear to the public and which the department indicated to me when I urged them to share them were: ““The task given to the Consultant as outlined in the report was to identify and propose legal fees for public consultation” .So are ultimately not sufficiently clarified, but which appear clearly to have been limited as is evident from remarks in the report. The consultation document and further materials also then do not collectively operate to close the gap on the requirements necessary for any implementation of the monetary amounts and associated proposals on trigger points etc.

2. **The failure to evidence, consider and weigh if the scale of fees proposed presents an impingement on rights, if that is permissible, justified, proportionate and accompanied by the required safeguards – to the standard clarified by the EU Court of Justice in c-664/15 *Protect Natur*, and the case law cited therein on Puškár, C-73/16 para. 61-71 in particular.**

² Report on the Regulation of Costs Payable in Matters Prescribed on Foot of Section 294 of the Planning and Development Act 2024 [here](#)

³

This is a concern particularly in the context of effective judicial protection, rights under Article 47 of the Charter of Fundamental Rights of the European Union (“the Charter”), and the associated obligations under Article 52(1)

However, here with the inevitable consequences of restrictions on Judicial Review arising from this scale of fees as proposed, even if viewed alone and separate to further restrictions underway, there has been no weighing of the proportionality of the response in conformance with the obligations of Article 51(2) of the Charter of Fundamental Rights of the EU, as clarified by the CJEU.

In particular we submit the Government in advancing this legislation has failed to establish as is required that the proposed measures:

- a. genuinely meet objectives of the public interest recognised by the EU or the need to protect the rights and freedoms of others;
- b. respect the essence of the right of access to a judicial remedy;
- c. effectively achieve public interest objectives;
- d. are strictly necessary (i.e. that there are no less restrictive ways of achieving the same objective.

Ireland has instituted the current system of cost rules under s.50B of the Planning and Development Act 2000 (“PDA 2000”) and Part 2 of the Environment (Miscellaneous Provisions) Act (“EMPA 2011”) to comply with its European and International Law obligations.

Therefore, any departure from this as proposed in with this scale of fees needs to be weighed and justified very carefully. There is no evidence presented here to indicate this has been done, and which would enable the public comment thereon and input thereon.

Additionally and importantly, the scale of fees proposed here, does not stand alone in respect of changes to the rules on Judicial Review (“JR”), and needs to be weighed in the context of the further significant restrictions arising from a multiplicity of changes impacting on the right to effective judicial remedy. These include in particular ch1 Pt 9 of the 2024 Act.

However, there are also further significant changes being proposed to JR including:

- the [General Scheme of the Civil Reform Bill](#) published on the 6th of Jan it seems - just 9 days before the close of this consultation,
- the General Scheme of Planning and Development (amendment) (no. 2) Bill 2025, published on the Department of Housing Local Government and Heritage (“DHLGH”) website late on the day before the close of this consultation.

Further concerns on the above schemes detailed separately below also need to be considered here.

The total landscape for the pursuit of JR into which these scale of fees proposal will operate, and which is clearly envisaged by the Government, needs to be considered consequent on those further changes and further changes which have arisen under: the Rules of the Superior Court relevant for the Planning and Environmental Court, introduced earlier this summer; the Practice Directions for that court and further changes which may arise from them following a public consultation closing next week; and indeed the evolving body of case law on interpreting the legislation.

That critical point and related considerations thereto is expanded upon in the submission given the overall landscape for environmental JR and the cumulative context which needs to be considered.

In short – the scale of fees proposal cannot be considered in isolation of the effect of other restrictions facing applicants in the pursuit of JR through recent changes made, and indeed I would argue and the wider set of changes the Government is already clearly moving to put in place, including under:

- the General Scheme of the Civil Reform Bill and the profound reshaping that has for JR, and which was only published on Jan 6th – 9 days before the end of this consultation; and also under
- the General Scheme of Planning and Development (amendment) (no. 2) Bill 2025, published the day before the conclusion of this consultation.

3. The very problematic and clear reliance on the UK cost model for supporting a cap on costs awards and a scale of fees proposed in the main consultation report – “the McDaid report”

Mc Daid’s report [here](#) states in very strong terms (emphasis added)

“The presentations made to the Inter-departmental group on the 15th April 2024 by a number of legal practitioners in England / Wales in relation to their experience of cost capping **is worth noting and in particular their observations around managing cases to ensure that work was done in a manner that was achievable within the cost cap. Prior to that presentation, a number of those I engaged with made positive comment about the potential of cost capping to meet the State’s obligations on foot of the Aarhus Convention and in a manner that was likely to be prudent for the public purse.**

I am doubtful of the extent to which there are lessons to be learnt from other EU jurisdictions as most of those jurisdictions are civil law ones with a much stronger focus on judicial enquiry and greater direct investment in the justice

system, than the common law approach that we adopt which is essentially, party led.

This submission highlights the presentation of very contrary evidence on the UK cost cap experience in the submission from Leigh Day to this consultation, and in its response to the UK's call for evidence on the experience of its cost rules. Leigh Day is one of the foremost Legal Practices in environmental litigation in the UK, and whose submission and appended evidence to this consultation is adopted and relied on it full here.

Here, would simply highlight that the reliance on the UK experience in the McDauid report is highly problematic in circumstances where:

- i. That reliance and the consequential comfort indicated on a cap on awards, and which the McDauid report makes clear is based **on engagement on more than one occasion with unidentified set of experts, selected on an unclear basis, and whose evidence and materials were not included in the consultation**, as highlighted further below. It is alarming given it is also not clear why input was not sought from companies such as Leigh Day given its significance in the field, particularly in representing applicants from the public and eNGOs.
- ii. There is no apparent consideration **that the UK has failed to bring its cost regime in compliance with the Aarhus Convention, and a failure to make that clear in the consultation , and to effectively consequently mislead/misdirect considerations arising from the public.**

In respect of the UK's non-compliance on costs with the Aarhus Convention - this submission relies on in full:

- a) The report of the Aarhus Convention Compliance Committee ("ACCC") to the recent Meeting of the Parties ("MoP") on the matter of the UK's failure to bring itself into compliance on a range of areas where it has been found to be non-compliant with the Convention, including on costs.⁴
- b) It is also worth reflecting, the recent Meeting of the Parties was attended by two officials from the Aarhus Unit of the Department, and they would be fully aware of extensive concerns of the ACCC in

⁴ https://unece.org/sites/default/files/2025-11/ECE.MP_.PP_.2025.66.E.pdf

respect of the UK's compliance issue and the matters arising at that MoP.

- c) It is important to note also in this context, that the ACCC does not necessarily prohibit the idea of caps in respect of costs in its engagement with the UK. However it sets out (including in the MoP report referred to above) key conditions and safeguards which are required to be met. Even when such safeguards are set out in the context of consideration of cost exposure, they are relevant here given the similar logic applies on cost exposure for applicants on own costs even if they are successful. This is of course because the scale of fees being proposed, is to limit the award of costs to a successful applicant, and that is generally relied upon by most people of ordinary means, and eNGOs typically, to discharge their own legal bill when successful. But the cap proposed may result in a significant shortfall in covering the full set of costs incurred by an applicant in pursuing JR, their "own costs" and which are not limited to just legal costs (for lawyers) – while s.294 of the Planning and Development Act 2024 (the 2024 Act), and indeed s.293(4) would appear to exclude from being covered.

Additionally, in considering the issue of reliance on the UK's approach to capping costs awards, I wish to highlight:

- iii. There is no consideration in the McDaid Report of the context in which the EU Commission did not pursue the infringements on costs against the UK, including in the context of Brexit. Further highly relevant considerations arising from case c-530/11 (the EU Commission's infringement case on costs against the UK), and on the matter of caps on awards, public interest, the importance of incentives for public authorities in making lawful decisions – are also expanded upon throughout this submission.
- iv. The issues and restrictive and chilling effect on access to Justice with the UK cost regime as detailed in the Leigh Day submission to this Consultation, and which is relied upon and adopted in full here.
- v. The consultation fails to set out and consider the significant differences between the UK and Ireland relevant to the consideration of a scale of fees capping on awards, including for example -
 - Ireland's membership of the European Union, and the legal protections and obligations arising consequent on that.

- Relevant rights under the Irish Constitution not limited to Art 40.3, the role of our courts, and in respect of property rights, Legal differences in Ireland vs the UK in respect of crowd funding in Ireland, given crowd funding is relied upon significantly to close the gap between capped costs awards in the UK and bills for own costs. A range of highly relevant structural differences between the UK and Ireland, which even were the UK approach compliant, render it entirely unsuitable in an Irish context. For example - given the scale and nature of large eNGOs in the UK vs those in Ireland and population differences, and differences in the structures and arrangements for lawyers including the nature of practices for solicitors acting for the public and eNGOs in particular, and the implications of the UK Chambers model for Counsel.

Certain of these structural matters were however explicitly highlighted in detail amongst other relevant matters in section 10.3 of a submission I was invited to provide in 2024 to the Inter-Departmental Group on Environmental Legal Costs (“IDG”), for its consideration of the risks arising from the regulations proposed under ch 2 pt 9 of what was then the Planning and Development Bill, 2023. While it is relied upon in full here for this submission - its section 10.3 is particularly relevant under this point. (That submission was substantial but limited in scope to practical and huge costs risks arising from the regulations and the lack of evidence to support introduction of a scale of fees – and not to specific legal considerations).

However these important differences highlighted in that submission with the UK and touched on in s6.5 below, are not considered or referred to in the consultation report.

The issues of fundraising and the discrepancies with the UK on that alone are further compounded by:

- The practical issue of attracting fundraising support in remote areas with low populations often the centre of environmental sensitivities and focus in JR was highlighted in the Supreme Courts Judgement in *Grace Sweetman*.
- There is also the very real issue of attracting funding for JR of a decision for the purposes of environmental protection and upholding environmental law, which can be locally or nationally contentious, given the development at issue in the impugned decision.

If implemented as proposed and presented, the scale of fees proposed:

- Would have a seriously chilling effect on the pursuit of access to justice and the pursuit of effective judicial remedies to uphold EU law rights.
- Be an impermissible impingement of EU law rights and the right of access to effective Judicial Remedy under the European Charter of Fundamental Rights, (“the Charter”), the broader obligations in respect of effective legal protection arising given Article 19(1) of the Treaty of the European Union. (“TEU”), and risks serious compromise to the rule of law and Art 2 of the TEU.
- Would not be compliant with the NPE, fairness and equity requirements arising under the EU Public Participation Directive.⁵
- Would not be compliant with Article 9(4) of the Aarhus Convention, in respect of its requirement that costs must not be prohibitively expensive (“NPE”), that access to justice reviews must be fair, equitable, and provide for adequate and effective remedies, in addition to the other important required characteristics specified.
- Would not be compliant with the general obligation to provide for “wide access to justice” required by the Aarhus Convention. (Advocate General Medina noted, “wide access to justice” is widely acknowledged as a general obligation notwithstanding it arises in the context of Article 9(2), c-252/5510, *Societatea Civilă Profesională de Avocați*, para 46.)
- Raises serious concerns in respect of its compatibility with Article 3(8) of the Aarhus Convention, and in particular the prospect of penalisation for those exercising access to justice rights – notwithstanding that provisions allows for reasonable costs in judicial proceedings. This concern is heightened given the highly negative narrative on comments on JR and those pursuing JR, and indeed their lawyers and the clearly articulated intention of the Government to push back on the level of JR, evident in multiple articles published in the media in recent months, statements of multiple members of the Government in multiple fora and even in the last days by the Taoiseach in response to a question from Deputy O’Rourke on the level of costs arising for JR applicants consequent on what is proposed in this consultation. (Further details on all of this can be provided – I simply do not wish to add to the length of this submission in documenting that here – given what is and has been clearly evident to anyone in Ireland over the last months.)
- Raises the most serious concerns that it would not be compatible with the Irish Constitution and its guarantees on fundamental rights, and in respect to the role

⁵ 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

of the courts and access to justice and also the ability to vindicate property rights.

4. Overarching context for relevant legal considerations

In addition to the considerations highlighted under “Core issues and concerns” above, I wish to highlight certain points on the relevant legal architecture for access to justice in environmental matters which is complex and inter-related. Rather than repeating this throughout – it should be taken as context for the significance of references made throughout the rest of this submission.

The architecture reaches to the EU Treaties, including Article 2 and 19(1) of the TEU, and is further supported given Article 191 TFEU and the importance for environmental matters. It of course relies heavily on Art 47 of the Charter and the further protection and support for that under its Article 52(1). There is additionally of course the Aarhus Convention and its Article 9, including in particular in this context the key characteristics of Article 9(4) on NPE, fairness, equity and adequate and effective remedies, and I return to consider the convention in more detail below. There is additionally the access to justice provisions of the Public Participation Directive 2003/35/EC and the whole body of case law of the EU Court of Justice on access to justice and in particular on the public interest in the protection of the Environment – and which is being set out in detail in many of the submissions to this consultation by those concerned at these proposals – so I will not add to the length by repeating them here. There is also importantly also the Findings of the Aarhus Convention Compliance Committee, ACCC, endorsed by the Meeting of the Parties and all the legal implications of that under the Vienna Convention Law on the Treaties. Additionally, and importantly there is of course our own Irish Constitution and how that supports fundamental rights including under Art 40.3, the role of our courts, and property rights and the implications for right of vindication and enforcement.

This is not exhaustive – and it is of course a serious flaw, that the consultation did not set it out in full and examine how the proposed scale of fees complies with the legal obligations pertaining or indeed what was or wasn’t considered – irrespective of the scope of the McDaid report – this could and should have been done – otherwise what is proposed on the scale of fees is effectively meaningless and aspirational without any sound legal basis for its implementation.

In any consideration of the Aarhus Convention requirements, it is important to note that while Ireland is a full party to the Convention and is an International Law Convention, that the Aarhus Convention has also been ratified by the EU and the CJEU has clarified in case c-240/09, para 30, that the Convention is “an integral part of the legal order of the European Union”. That of course gives added significance, impact and enforceability of the Convention’s obligations within the Irish legal system as it is part of European Union law.

On the NPE requirement, while that is not defined in the Aarhus Convention, the ACCC has interpreted that through its findings, and the CJEU also, including in the context of c-260/11 *Edwards*⁶ in particular and also c-530/11 *Commission v UK*⁷.

It is clear from these, and important to note that the NPE requirement is not just in respect of exposure to the other sides costs, but it extends to own costs and all costs incurred in the pursuit of a review and to get to that point.

To ensure costs are not a chilling deterrent to the pursuit of access to justice – there are two primary limbs to be considered:

- i) The costs should not be prohibitively expensive
- ii) An applicant should have reasonable predictability before the onset of proceedings that the costs an applicant will be exposed to (including own costs) will not be prohibitively expensive.

It is worth reflecting in particular what has been considered by the CJEU in respect of a cap on cost awards. While ultimately the CJEU did not determine this in the infringement proceeding against the UK on costs in case c-530/11 due to a technical issue – it did not disagree with what Advocate General Kokott said on the matter in her opinion. Para 74-77 are particularly relevant given the motivation evident in the consultation and associated PR on managing the State's exposure on costs.

Those comments are particularly relevant given the significance of the approach being pursued here by Ireland. The PR [here](#) in introducing the consultation refers to an objective of – “greater predictability and proportionality to the State's legal costs in environmental judicial reviews.” The Addendum FieldFisher report was specifically asked to calculate the cost savings to the State had the scale of fees been in place and applied to the 46 JR cases it had examined in its earlier report, clearly evidencing a focus on cost savings associated with the scale of fees proposal.

So what appears to be clearly in focus apart from pushing back on levels of JR, **is effectively protecting public authorities costs at the expense of the public** taking a JR. It is worth considering that approach and how contrary it is to the comments made by Advocate General Kokott in the EU Commission's infringement proceedings against the UK on its cost rules, case c-530/11⁸:

“75 ... A public body which is unsuccessful in proceedings before a court because its decision under challenge proves to be unlawful does not deserve protection in relation to litigation costs comparable

⁶ JUDGMENT OF THE COURT, 11 April 2013, c-260/11, *Edwards*, EU:C:2013:221

⁷ Judgment of the Court, 13 February 2014, c-530/11, *Comm v UK*, EU:C:2014:67

⁸ OPINION OF ADVOCATE GENERAL KOKOTT, 12 September 2013, c-530/11, *Commission v UK*, EU:C:2013:554, para 75

to that afforded to an applicant. It was, of course, the public body's own unlawful act that prompted the action to be brought.”

The Advocate General (“AG”) continued in para 77 to say:

“77. Moreover, that objective of the Aarhus Convention serves to refute the argument of the United Kingdom in relation to the limited resources of the relevant authorities. It is admittedly the case that funds spent by the authorities on legal proceedings cannot be used to fulfil their primary tasks. However, the Convention accepts this. That is also appropriate since the judicial enforcement of environmental law or the risk of a legal challenge forces the authorities to exercise particular care in applying the law in this area.”

The AG had earlier reflected in the opinion as follows:

“74. In actions brought against public bodies, no true equality exists from the outset as those bodies generally have much greater resources at their disposal than the persons covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive. To that extent, therefore, a one-way protective costs order is simply an initial step towards establishing equality of arms.”

The AG also highlighted the public interest in environmental actions in para 75 stating:

“75. Furthermore, actions of that kind ultimately involve an interest common to both parties, namely, ensuring that the law is upheld. ...”

However, ultimately, of course the issue of caps on cost recovery was not decided in that case for technical reasons, and was not ultimately ruled out. But significant limitations and requirements were indicated for it, and such safeguards have not been clearly addressed in this proposal on a scale of fees limiting awards, nor in the primary legislation of the 2024 Act.

Additionally, of note in that regard, as highlighted earlier above are the multiple issues and safeguards required by the Aarhus Convention Compliance Committee rehearsed and highlighted again in its latest report on the ongoing non-compliance

of the UK on its cost solution on MoP decision VII/S⁹ on the matter of caps and related matters, including for protection of lay litigants.

⁹ Report of the Compliance Committee on decision VII/8s of the Meeting of the Parties concerning compliance by the United Kingdom*, ECE/MP.PP/2025/66

5. Specific concerns in respect of the Consultation

The consultation has in process and substance not been fit for purpose for the reasons outlined herein and below in particular. These deficiencies have implications not just for the consultation but the necessary considerations essential to advance any implementation of these proposed scale fees. The following consultation concerns are highlighted:

- **In the correspondence I had with the Department on this consultation in advance of the consultation and following its publication.**
 - a. In advance of the publication of the consultation - I called on the Department to ensure the effectiveness of public engagement and that the consultation was sufficiently long so it was not compromised by the Christmas and New Year holiday period, making significant references to the obligations under the Aarhus Convention, and its findings in respect of what is reasonable and necessary for effective consultation and the relevant considerations thereon in respect of traditional holiday periods, complexity etc.
 - b. Following the publication of the consultation I wrote again (correspondence included in Annex 1a). This was when I noticed significant gaps in the materials provided and that effectively unflagged and unclear changes had been made to the consultation webpage. I noticed an unflagged additional document “[Explanation of the various parts proposed in the scale of fees](#)” was added apparently in / around the the 9th of December, and I had concerns the content of the other original documents might have changed also, given there was simply a “last updated on” date indicated for the webpage of 9th December 2025. So:
 - I once again called for the consultation to be extended, for the website to be updated and the public properly notified of changes made on the 9th , and for access to be provided to key materials relied upon for the underlying legislation, policy proposal and main consultation report – (“The McDaid report”) including:
 - i. the FieldFisher report relied upon in the main consultation document;
 - ii. the two Legal Costs Adjudicators determinations also relied upon and given issues with accessing them on the courts website
 - I also called for: relevant legislation and all relevant materials considered to be provided on the consultation webpage.

While the Department's responded to me on the 23rd (see Annex 1a) it did not indicate it would address these matters on the consultation webpages. However, a limited but nonetheless welcome set of updates were made to the consultation web page which are detailed later in this submission and in comments on residual issues and issues arising, and in the correspondence referred to immediately below from An Taisce the National Trust for Ireland and Friends of the Irish Environment ("FIE")

- **I sought information on a breakdown of costs incurred by An Coimisún Pleanála "ACP" last August– it being a significant respondent in the context of planning JR.**

Following over a month of non-response I pursued access formally by AIE and FOI requests, which ended up as deemed refusal given the non-response. I then requested internal reviews and despite and these too ended up as deemed refusals. The matters have now been appealed to the OIC and OCEI appropriately – but the data necessary to support this consultation – albeit sought over 5 months before the consultation was launched has still not been provided. Moreover the failure to reply to formal requests underpinned by EU and International law obligations – is in marked contrast to the experience of FieldFisher who remark on how helpful ACP was in providing similar data to it over a year ago. This evidences a serious problem in responding and I should be granted an extension on the basis of this as the information has not been forthcoming.

- **The issues detailed formal call to the Minister by An Taisce the National Trust for Ireland and FIE to withdraw the consultation in their letter of Friday, 9th January 2026** and which is publicly available [here](#).

This submission adopts and rely in full upon the issues set out in that letter, but which in the interests of brevity are not rehearsed in detail herein.

- **The serious deficiencies in the consultation arising for those who operate in Irish, or are more fluent in Irish, or who choose to engage on such matters in Irish**, and it would appear serious failure to comply with s.10 of the Official Languages Act, 2003 as amended. On the basis of these alone - the consultation should at the very least be extended.

While a link to the OPR website to the Fieldfisher report was provided on the 23rd of December on the English Version of the website and links provided to the two determinations of the Legal Costs Adjudicator

relied upon, and which were not otherwise accessible on the web - **these updates were not made to the Irish version of the consultation page until the 5th of January.** Leaving those operating in Irish, more comfortable and fluent in Irish than English, or choosing to operate in Irish - at a material disadvantage in engaging on this matter. This is further compounded by the fact the link provided on the 5th was originally just to the OPR home page. If a member of the public thought to go the publications page – “Foilseacháin” - there was also no Irish version of this report whose importance to the consultation has been *de facto* evidenced by the belated links provided to it, and indeed its clear significance for what has been proposed and the sum of deficiencies in the proposal as outlined throughout this submission.

- Given the origins of the report detailed in the main consultation report and indeed in it and the addendum report - we submit it would seem clear it should have been made available in Irish simultaneously given s.10 of the Official Languages Act 2003 as amended.
- We also note the further disadvantage as the PDA 2024 some 15 months after its enactment is still not available in Irish.
- Key provisions such as its s297(9) of the PDA 2024 are not covered in the consultation report and were not then available in Irish. That provision allows for lawyers contract for higher rates than the monetary amounts limiting the awards under the scale of fees proposed here. It thus is critical to making clear a shortfall of own costs can arise for those relying on the award to discharge their own costs in the proceedings as is the case for most people of ordinary means and indeed eNGOs.
- Extensions should be granted to facilitate people answering to the consultation consequently and the necessary information provided to facilitate same.
- **The requirement for effective consultation under Article 8 of the Aarhus Convention,** given such issues and indeed those issues for the underlying legislation in the Planning and Development Act 2024 (“The 2024”) Act. This is particularly significant given the background context considered in the section on “Concluding Remarks & Recommendations” below which reflects on the development of the underlying legislation in the 2024 Act and the consultation failures in respect of it; and the lack of transparency in the review by the former and current Attorney General which informed it. That has not been published to date – meaning no rationale and evidence for the changes is in the public domain, nor can it be relied upon.

- The Minister will be aware, **the Environmental Pillar wrote to him early in the consultation process to express their concerns on the scheduling of the consultation over the Christmas New Year period and how this would impact on public engagement.** It sought meaningful engagement from the outset and constructively called on him then to extend the consultation window well beyond the published deadline of January 15th 2026.

I also understand certain **Joint Oireachtas Committees, following Ministerial portfolios for a number of Ministers who are obliged to be consulted on these proposals under s.294(2) of the Planning and Development Act 2024, (“the 2024 Act”), and/or who ultimately consent to them, also wrote to the Minister calling for such an extension, as did others – all unsuccessfully,** with the consultation deadline still set for January 15th . It was scheduled to run over what is probably Ireland’s most significant and traditional holiday period, and where longstanding and extensive preparations and commitments are envisaged for Christmas and with friends and family meaning there is effectively no opportunity to focus on consultations in the evenings or weekends, which are the windows of time relied upon by ordinary members of the public on consultations such as this. Equally so many eNGOs and members will have been largely unavailable and on leave over this period.

However, further to the initial position of requesting and extension from the outset, in the intervening period, **even more serious concerns have come to light given the opportunity to consider the consultation materials, including:**

- The piecemeal approach to updating the consultation webpage with further significant and complex documents, added effectively 21 days later in some instances well into the consultation window and without any meaningful and effective notifications to ensure there was awareness of these updates;
- The ongoing serious deficiencies in making available relevant information necessary to inform consideration by the public of these proposals and their implications;
- The serious failure to providing reasonable clarity on the significant cost implications of the proposals for the wider public, and indeed eNGOs, and the implications for upholding EU law rights and associated environmental protection at a time of what the Inter-Governmental Panel on Climate Change, (“IPCC”) has acknowledged as in interdependent climate and biodiversity crisis.
- A total failure to set out how these proposed scale of fees comply with the State’s obligations on access to justice and effective judicial protection under the significant and complex legal architecture applicable for same, which is presumably is absent given there is no such compliance.

(In an Irish Context that compliance requires but is not limited to: the EU Treaties including Articles 2 and 19(1) of the Treaty of European Union; Article 47 of the EU Charter of Fundamental Rights; Article 9 of the Aarhus Convention, and in particular the characteristics required for access to justice under Article 9(4) of the Convention, including the requirement for reviews including but not limited to: that they should not be prohibitively expensive, (“NPE”) and fairness and equity, the added implications for the Convention’s obligations in an Irish context given the CJEU have clarified, the Convention is an integral part of the EU’s legal order, and of course multiple considerations under our Irish Constitution, not limited to Article 40.3.)

We are concerned that the flaws in the consultation are so far reaching they fundamentally compromise any effective engagement and response to the matters it specifically seeks views upon. As a result, the public, and even those more experienced and familiar with this area are not positioned to respond meaningfully.

Consequently, I fully support the call to the Minister by An Taisce the National Trust for Ireland and Friends of the Irish Environment (“FIE”) to withdraw the consultation in their letter of Friday, 9th January 2026 and which is publicly available [here](#).

This submission adopts and relies in full upon the issues set out in that letter, and as stated above in the interests of brevity I do not intend to rehearse or further expand here on all its issues.

6. The chilling and deterrent effect of these proposals on the pursuit of access to justice and the accessibility of effective judicial remedies.

6.1 Relevant context for eNGO concerns:

We have the most gravest concerns and indeed are seriously alarmed at the chilling effect of these proposals and their deterrent effect on the pursuit of access to justice in environmental matters, including by eNGOs, and not limited to planning the planning sphere.

We say ‘not limited to the planning sphere’, as we note the intention indicated to replicate these changes across all sectors in an Aarhus Legal Costs Bill detailed in the Government’s Legislative Programme. We are conscious that clearly in the context of our highly fragmented decision-making frameworks and legislation in Ireland – these controversial changes will not be confined to planning but will be applied across forestry, aquaculture, EPA consents, Ministerial Development Consents etc across a range of sectors. It would make for obvious issues if a development were subject to one judicial review costs regime for its planning permission, but another costs regime for some licence or permit from another body such as the EPA for example under non-planning legislation.

Clearly not every member group of the Environmental Pillar or eNGO engages in legal argument in their various submissions, or indeed in litigation. But we do nonetheless fully appreciate the importance that public authorities know they can be held to account before the courts, and as we highlight in the next section further below on the dysfunctional implications of this proposal for amongst other things environmental protection and the rule of law.

We collectively also rely on those who have the capacity, in the ordinary sense of the word, to pursue access to justice to support the effective implementation of environmental law and the environmental protection which flows from that.

It is therefore really alarming to consider the chilling effect these proposals would have on this important function and duty of eNGOs, and environmentally active members of the public, given the implications of the proposed scale of fees. That chilling effect needs to be considered in detail therefore together with the failure of the consultation materials to properly consider it.

The following sets out at a high level concerns on:

- The chilling effect of the scale of fees proposal even for successful JR applicants,
- The indirect chilling consequences of the scale which arise for unsuccessful JR applicants,
- The wider consequences for legal representation given the further chill of these proposals on applicant lawyers, and
- Misplaced and misleading reliance on the UK reciprocal cost cap as a basis for a cap on Irish awards using the scale of fees.

6.2 The chilling effect of the scale of fees proposal even for successful JR applicants

The following outlines the scenario which a potential applicant will need to consider even if they are successful in winning their JR, and what are some of the most serious failures of the main consultation report and materials to set out the relevant considerations on this and to engage with this impact.

The practical implications are best understood in the context of the way the system currently works in environmental JR in Ireland.¹⁰

Currently, most people of ordinary means, and eNGOs, generally rely on the award of costs to a successful litigant in Judicial Review, (“JR”), to cover the costs, or a substantial portion thereof, of their own legal teams and what is known as “own costs”.

However, under this scale of fees proposal, the monetary amounts being set out are to cap. i.e. create an upper limit to the amount of those awards.

This will mean that a shortfall can and is likely to arise between the award and the JR applicant’s own costs legal bill. This is because lawyers can and may have to end up engaging with clients for higher rates than what is proposed in this scale of fees proposal. While taking one case at a loss might be entertained, it is clearly that is not an economically sustainable model for lawyers operating in the practice area.*

¹⁰ Sections 50, 50A and 50B of the Planning and Development Act 2000, (“the 2000 Act”) and Part 2 of the Environment (Miscellaneous Provisions) Act 2011.

In the first instance we wish to take issue with the failure of the consultation to highlight in clear and accessible terms for the public those implications, and the scale of such potential gap. It even fails entirely to reference the prospect of such gap, not mentioning once throughout the report setting out the proposed scale, [section 297\(9\) of the 2024 Act](#) which allows for lawyers to contract for higher rates, let alone what that means in the context of the proposal. To support the development of the primary legislation of what has since become the 2024 Act, and the associated policy proposals to implement a scale of fees, analysis and reports were commissioned through the Office of the Planning Regulator from FieldFisher. An addendum report sets out the consequences for the State in terms of savings had a version of the model of scale of fees been in place across a data set of some 46 historic JR's considered. Quite apart from the practical difficulties of the mapping exercise requested which in fairness FieldFisher endeavour to highlight – what isn't immediately apparent is that - the savings for the State and Public Authorities in the level of awards they have to pay out – translate into a liability and cost exposure for the successful litigant, who is effectively penalised for their efforts in checking the quality of the public authorities decision, and who were vindicated in their concerns by the courts.

It is notable in this regard that the Minister's PR here on publicising the consultation had a stated objective of:

“The objective of this proposal is to bring greater predictability and proportionality to the State's legal costs in environmental judicial reviews.”

It went on to immediately state:

“It is not to limit access to justice or constrain the right of individuals or communities to challenge decisions.”

The consultation and associated documents belatedly added to it, do focus on the former, but do not address or explain at all how the second matter is assured and that it does and will not limit access to justice or constrain the right of individuals or communities to challenge decisions. That needs to be demonstrable for each individual, group, association, eNGO etc seeking JR.

It is notable in this regard that [s.294\(3\) of the 2024 Act](#) on the making of a regulations to implement the scale of fees requires:

“(3) Before making regulations under subsection (2), the Minister for the Environment, Climate and Communications shall have regard to—

- (a) the need to ensure that proceedings to which this Chapter applies can be taken by applicants in a manner that is not prohibitively expensive,
- (b) the need for equitable and orderly access to the courts for all persons to be ensured in accordance with law,
- (c) the need to ensure that court and judicial resources are utilised for the common good and in the interests of justice, and
- (d) the cost to the Exchequer of matters provided for in such regulations.”

This cannot be read as a set of discretionary balancing requirements where there is wider legal obligations on Ireland in relation to NPE and ensuring financial barriers do not compromise EU law rights in respect of effective judicial protection.

But the consultation wholly fails to adequately assess the scale in the context of these provisions and obligations.

It is important to note in that regard also, and again this is really not well highlighted in the consultation, that the 2024 Act under [s.293\(4\)](#) seeks to limit the discretion of the court, in increasing any award beyond the monetary amounts specified in regulations under s.294, and this consultation is setting out proposals for such amounts.

The threshold is set very high under s.293(4) for the court to be able to increase the award beyond the levels set out in regulations, and the court only determines this at the end of the proceedings at the point of making an award it seems.

Therefore there is further chilling uncertainty based on court discretion. It would seem Ireland has come full circle from the original EU infringement case against it on costs, *c-427/07 Commission v Ireland*¹¹, where Ireland’s reliance on judicial discretion on costs, was not seen to meet the threshold of precision and certainty to assure a potential litigant of their rights under the Public Participation Directive in that instance, and ultimately not to provide for the requisite level of predictability and resulting in chilling uncertainty, see para 93-94. The issue of reasonable predictability at the outset of proceedings on total exposure to costs including own costs is a central limb to NPE.

¹¹ JUDGMENT OF THE COURT, 16 July 2009, *c-427/07, Commission v Ireland*, EU:C:2009:457, para 93-94 in particular

It is the most serious failure of this consultation that it fails to consider the legal compliance of what is proposed together with the practical chilling implications of it.

Specifically, it fails to set out the relevant considerations and case law, and then fails to show how the scale of fees proposed could meet the Aarhus standard of NPE; and how it is consistent with the general obligation under the Convention in respect of “wide access to justice” which is not limited to Article 9(2) , and associated obligations arising under Art 9(5) to remove or reduce barriers in accessing justice, and the added edge this all has for Ireland as a matter of European Union law.

There is also the need to demonstrate consideration of and compliance with the wider and complex integrated architecture to ensure financial barriers do not operate to compromise effective judicial protection under European law.

Achievement of the relevant legal standards need to be demonstrable for all applicants and this is not done.

In other words it fails to set out how the level of scale of fees proposed and given the overall context for its introduction, how it will be actually legally compliant. That is unacceptable in the context.

Nor does it set out any evidence base on issues with JR to justify a curtailment of rights in such a system, and to evidence that sufficient safeguards are in place – as set out by the CJEU in c-73/16, *Puškár* with reference to Article 52(1) of the EU Charter of Fundamental Rights.

The scale of such gaps resulting from the scales proposed in this consultation, and the very real prospect of them we submit, would if implemented be a chilling and impermissible deterrent, and restriction, to the pursuit of access to justice in planning. The obligation rests with Ireland to demonstrate that is not the case, and that it is not also in fact a serious regression in terms of our access to justice obligations.

In further considering the implications – we consider the situation then for potential applications in practical terms, particularly in respect of the deterrent effect.

Quite apart from what the EU Court of Justice has said in *Edwards* case c-260/11¹² on NPE and on the objective and subjective nature of the costs involved, and on the considerations of own costs there and also in c-530/11, *Commission v UK*¹³, there are two primary limbs the NPE requirement. Firstly, that a potential litigant is not deterred by costs, and secondly, that a potential litigant has a reasonable measure of predictability on their total exposure to costs, at the outset of proceedings, including in respect of their own costs.

Had the limitations on awards of costs been in place at the level which are proposed in this consultation– it is undeniable and clear that certain important and indeed transformative litigation would not and could not have been undertaken in Ireland, particularly by eNGOs within the Pillar, and we understand direct and specific feedback in that regard is being made to the consultation.

The historic situation however while interesting is admittedly less relevant than the future situation.

Many of those who do consider litigation have been unequivocal, that they simply could not entertain litigation in the context. We can state clearly that even small amounts can be deeply problematic for eNGOs whose discretionary funding is limited and how have multiple functions to discharge with it.

The sustained and repeated ability of eNGOs to seek review is an absolutely essential feature of the system of access to justice which Ireland is legally obliged to support, as highlighted in our introductory remarks.

The comments of Fordham J in a claim by The Badger Trust and Wild Justice against Natural England, Neutral Citation Number: [2025] EWHC 2761 (Admin) from last October were both welcome and significant in that regard when the potential cost implication of one JR, on such future litigating capacity of the eNGO in question. Admittedly, that was in the context of considering a cost exposure cap under the UK cost rules where Natural England sought to increase what is the capped level of cost exposure for unsuccessful applicants. But the principle and implication of bankruptcy and/or the effective end to future litigation are equally pertinent, regardless whether the huge debt arises from own costs, or cost exposure if you lose.

¹² JUDGMENT OF THE COURT, 11 April 2013, c-260/11, *Edwards*, EU:C:2013:221

¹³ Judgment of the Court, 13 February 2014, c-530/11, *Comm v UK*, EU:C:2014:67

Finally, it is also important to note, that the money the State can expend on its legal teams or the legal teams of well resourced developers, acting as interested notice parties in proceedings, will not be capped under these proposals. Consequently a further serious issue arises in respect inequality of arms, and the key characteristics of fairness and equity, specified explicitly as essential characteristics under Article 9(4) of the Aarhus Convention. They are also fundamental to the principles of the administration of justice in our democracy.

This is clearly at issue if the scale of fees is implemented and where discrepancies arise between rates effectively paid to either side, or where an applicant is constrained to engage only up to the level they can hope to recover or discharge if successful.

The serious potential for heightened inequality between parties in proceedings invariably has also a chilling effect, including on how it can impact upon the prospect of success, and expectations on same.

That chill is invariably further compounded by the total extent of change on JR rules arising under for example: ch 1 of Part 9 the 2024 Act; new Rules of the Superior Courts introduced in the summer for the Planning and Environmental Court; new and evolving Practice Directions for that Court; further changes to JR rules envisaged in Planning legislation and across environmental legislation; potential implications of a new Civil Reform Bill whose General Scheme has just been published and the final implications of any resulting legislation enacted on foot of this; and ongoing interpretations by the courts. All of which creates a total shift across the landscape of Judicial Review in a planning context in Ireland.

Specifically on the two new General Schemes I add the following:

On the GS Civil Reform Bill

The [General Scheme of the Civil Reform Bill](#) was published on the 6th of Jan it seems - just 9 days before the close of this consultation. In its 59 pages, it includes a profound reshaping of the landscape for Judicial Review. While it is acknowledged that this is General Scheme and much may change before any legislation is enacted - it has undoubtedly been referred to as a key part of the response to the Governments intentions on JR in a planning context in the very negative narrative leading up to the consultation on a scale of fees.

While there has been admittedly very little time to fully consider this scheme, it seems clear that despite limited carve outs in Head 13 to

judicial review proceedings under Part 9 of the Planning and Development Act 2024, that Head 8 on Judicial Review generally and remedies in particular has really significant implications for access to adequate remedies and on the issue, particularly for those not meeting the further very limited carve outs under subhead 8 creating exemptions for eNGOs meeting a very high standard of criteria under S.286(2) Planning and Development Act 2024.

Quite apart from the concern arising for JR in a planning context from this General Scheme, it would be remiss of us not to highlight the very serious concerns this General Scheme has for wider environmental JR.

General Scheme of Planning and Development (amendment) (no. 2) Bill 2025

On the General Scheme of Planning and Development (amendment) (no. 2) Bill 2025, published on the DLGH website late on the day before the close of this consultation - even more that the General Scheme for the Civil Reform Bill there has been effectively no time to consider it. It is concerning it is named as a 2025 Bill - but has not been made available to the public until 2026, the 14th of January specifically.

Even based on the most superficial read - serious concerns arise in respect of its apparent application of ch 1 Pt 9 of the 2024 Act to matters under the 2000 Act not already in train.

However the cumulative implications of this and the GS of the Civil Reform Bill appear not to have been fully thought through, particular for matters underway and implications for remedies. That is quite apart from the wider issues arising for standing consequent on the different standards for that in the 2000 Act and the 2024 Act, as people will have participated on the basis of the 2000 Act provisions for example. So there is a potential for further chilling uncertainty then arising on standing with related implications for cost exposure under the 2024 Act.

6.3 Indirect chilling consequences of the scale of fees for unsuccessful applicants.

It is also important to reflect that when unsuccessful, under the current rules on environmental JR, the general rule is that there is no cost exposure to the other sides costs, albeit that can be punctured where specified conditions are met. Nonetheless, an unsuccessful applicant for JR, which shielded generally from an adverse cost order, still has to contend with meeting their own legal costs. Such “own costs” also are required to be considered within the requirement that they are NPE.

Ireland has relied upon the operation of the ‘no foal no fee model’ here also, albeit it doesn’t work in all instances. The implications are of no, or a reduced, legal fee for a JR applicant’s lawyers if the case is unsuccessful, with the award if successful being relied upon to discharge all or a significant portion of the own costs.

However, given the lower level on cap on awards proposed in this consultation, the ability of lawyers to engage on this basis, and importantly to engage on more generous terms when their clients are unsuccessful, will inevitably also be impacted by the capping of awards when successful. As, the carrying capacity of lawyers in other words will be impacted.

So there are further indirect chilling effect therefore in respect of increased costs when you lose, which is also ultimately consequent on the limits on awards.

6.4 The wider consequences for legal representation given the further chill of these proposals on applicant lawyers.

The impact this will all have on the practice of law in this area, and how unattractive it will make environmental law and representing applicants from the public and eNGOs in particular is also of serious concern.

Without adequate representation, there can be serious issues in accessing justice and achieving effective remedies. This is particularly so in an area of law as complex as environmental law, further compounded by the complex technical considerations and fact matrices associated with environmental factors and species and habitats. The State on the other hand has the benefit of effectively unrestricted legal representation, and JR applicants also face often

significantly resourced developer notice parties who have much to gain from vigorously dispatching any legal challenge to their permission/consent.

That issue is further compounded by the highly inappropriate narrative which has been directed at lawyers representing the public in various fora and which has been particularly prevalent in recent months.

The characterisation portrayed, in our view unfairly and without evidence, has been that of a few unscrupulous actors ‘weaponizing JR’ for their personal interest, at the expense of the delivery of housing and infrastructure. Whereas a number of our members have highlighted the generosity and public spirited nature of such lawyers in their engagement with them.

The approach being pursued here not only risks precipitating flight from the profession, but arguably intends exactly that, leaving those who seek to speak and act for the environment in court, inadequately represented, the environment effectively voiceless, and the wider public facing serious challenges also in securing representation to vindicate their rights.

6.5 Misplaced and misleading reliance on the UK reciprocal cost cap as a basis for a cap on Irish awards using the scale of fees.

We submit that the main consultation report [here](#) – “Report on the Regulation of Costs Payable in Matters Prescribed on Foot of Section 294 of the Planning and Development Act 2024” - (“the McDaid Report”), clearly relies on certain evidence it received from UK consultants, to support its proposals on a scale of fees both in theory and outline, stating: (emphasis added)

““ The presentations made to the Inter-departmental group on the 15th April 2024 by a number of legal practitioners in England / Wales in relation to their experience of cost capping **is worth noting and in particular their observations around managing cases to ensure that work was done in a manner that was achievable within the cost cap. Prior to that presentation, a number of those I engaged with made positive comment about the potential of cost capping to meet the State’s obligations on foot of the Aarhus Convention and in a manner that was likely to be prudent for the public purse.**

I am doubtful of the extent to which there are lessons to be learnt from other EU jurisdictions as most of those jurisdictions are civil law ones with a much stronger focus on judicial enquiry and greater direct investment in the justice system, than the common law approach that we adopt which is essentially, party led.”

So it appears Mr Mc Daid and the Inter-departmental Group met with experts from the UK and indeed he had meetings with them or possibly others in advance of this.

This is deeply problematic in our view as there is no transparency or clarity on who these practitioners were, on what basis were they selected and what information did they present. Not is there any clarity on who were the others engaged with prior to that presentation and what evidence and data they provided.

These basic issues of transparency become all the more alarming, when one considers that the Mc Daid report then:

- Fails to inform the public that the UK is currently not in compliance with the Aarhus Convention in relation to costs, and that the ACCC, has set out multiple issues with its regime, and matters relevant to safeguards necessary around the operation of caps, certain of which are highly relevant for costs on awards as highlighted earlier.
- Fails to set out the context for the EU Commission dropping infringement proceedings against the UK and the context of Brexit.
- Fails to provide a comparative review between English and Irish procedural law, nor does it examine and summarise English case law on their costs caps
- Fails even to reflect on the legal implications of Ireland's membership of the EU and the consequential obligations.
- Fails to set out and examine significant structural differences between Ireland and the UK in considering the context for litigation. For example the massive disparity in the size and nature of very large eNGOs compared with even the largest Irish eNGOs, and the often significant commercial and other significant property operations of such large UK eNGOs, which make them very valuable clients for legal practices who then may be more open to undertaking JR work on their behalf albeit at a loss.
- Fails to acknowledge the implications of the chambers model for Counsel in the UK and more diverse legal practices which means more capacity to support the taking of environmental and public interest litigation albeit at a loss.
- Fails to acknowledge even basic highly relevant differences in the two regimes in respect of crowd funding and to acknowledge the potential importance of that in addressing shortfalls on cost recovery given the UK

reciprocal cap, and then also failing to acknowledge the massive differences in population and the capacity to fund raise in the UK and the small but highly significant legal restrictions on crowd funding in Ireland

In fact the McDaid report misleadingly gives the impression that the English system is lawful and comparable, and entirely fails to provide any evidence it is not a barrier to accessing justice.

7. The dysfunctional consequence that the quality of environmental decision-making will be lowered, impacting negatively across: environmental protection and on the associated public interest; the administration of justice; public order; and the rule of law.

7.1 Reduction in the quality of decision-making, environmental protection and negative consequences for the public interest.

Given such chilling deterrents, and perceived or actual reduction in the capacity to hold public authorities to account before our courts for the lawfulness of their decision-making- there are real risks that the quality of decisions will go down. With that reduction is an obvious risk and issue for effective implementation of environmental law which governs so many decisions on activities and development in Ireland, and which is intended to deliver a high level of protection for the environment, and the public good which flows from that.

A broad range of environmental indicators from the EPA's State of the Environment report – make unambiguously clear the poor state of the Irish environment, and our problematic and disproportionate contribution to greenhouse gas emissions and the wider issue of climate change.

There should be no need to rehearse here the existential nature of the situation we face from the interdependent climate and biodiversity crises. Given the ever shortening window we have to mitigate and adapt to the effects of climate change and to address biodiversity collapse, any impediment to the effective enforcement of environmental law, and the key role of eNGOs in that, and the wider public also – is unacceptable.

Such as dysfunctional outcome is directly contrary to the narrative on restricting access to JR in the common good which has preceded this consultation, where there is a clear established and evidential base to the acknowledged public interest deriving from environmental protection, and which is also central to EU values.

7.2 Increase in lay litigants, less expert and experienced advocacy for environmental protection.

The further negative consequence of a problematic cost environment for the pursuit of JR is for an increase in lay litigants

Such litigants may potentially be not as well placed to ensure effective enforcement and compliance with environmental law through such court actions, without the benefit of expert and experienced legal Counsel and solicitors, capable of arguing and taking-on the State and well supported notice Parties.

7.3 Consequences for the administration of justice, public order and the rule of law.

The increase in lay litigants can increase the burden on an already under-resourced court system and judiciary. Recent budgets entirely failed to address despite the calls from the President of the High Court more than a year ago for more judges, see [here](#).

Of further concern in that regard is how the Planning and Environmental Court has had to respond and the effect on hearing times and the associated implications this has particularly for lawyers acting for the public who do not have the advantages in preparing that large law firms have acting for the State or well funded developer notice parties. Ultimately the concern arising here is on the negative implications for effective judicial oversight of environmental decision-making and the negative consequences for environmental protection.

There is the further matter of course of the rule of law, and the fundamental role that judicial review plays in its architecture in providing an established and independent mechanism to hold public authorities to account for the lawfulness of their decisions before the courts.

Where that judicial oversight is compromised, or confidence and credibility in being able to access such oversight is compromised, there is a very real risk that an increasingly alienated public may resort to more extreme measures where access to the courts is seen to be closed off. This is particularly so when members of the public are also increasingly alarmed by the prospect of environmental breakdown; and/or being impacted by it, and increasingly alarmed by failures of the State in that regard.

Such alienation, also makes States more vulnerable to efforts to de-stabilise democracies.

Particularly in the context of the quite extraordinary and unprecedented powers granted to Ministers, the Government and the OPR under Part 3 of the 2024 Act to force through development, the oversight of the courts has never been so important, and for there to be confidence in the accessibility of such oversight.

8. The dysfunctional effect of these changes on the delivery of housing and critical infrastructure, including sustainable climate change initiatives.

It is clear and inevitable from the controversy surrounding these proposals that these changes will precipitate serious argument on their legality, occasioning increasingly complex litigation with associated negative implications for legal certainty, investment, and sustainable development of much needed housing and critical infrastructure.

It is worth focusing on the opening paragraph of the Supreme Court Judgment in *Heather Hill*, neutral citation [\[2022\] IESC 43](#) and what many consider to be a salutary and sobering reflection by Mr Justice Brian Murray on the scale of litigation which had been precipitated up to that point in Ireland on the issue of NPE alone, under the current cost rules. (emphasis added)

“In a period of a little over a decade, the provisions intended to give effect to the ‘not prohibitively expensive’ requirements of the Aarhus Convention (which I refer to throughout this judgment as ‘s. 50B’ and ‘EMPA’) have generated at least thirty-five reserved judgments of the High Court, four decisions of the Court of Appeal, three references to the Court of Justice of the European Union, one judgment of that Court (so far) and, now, this decision of this Court.”

Many had hoped that the above judgment in *Heather Hill* had brought with it a equilibrium, certainty and clarity on the current cost rules. However, the previous and current Government in particular seems intent to re-ignite the burden of satellite litigation in planning JRs, including on costs, all over again.

But this time around it will be compounded by additional issues on standing, scope of review etc and the other changes it has commenced in ch1 of Pt 9 of the 2024 Act, and other changes appear intent on applying to the current rules in the 2000 Act which still has effect for many decisions, acts and omissions, and further changes made and underway on JR rules highlighted earlier above.

In effect we could be looking at multipliers of the level of satellite litigation reflected upon above by Mr Justice Brian Murray. Of course concomitant with such satellite litigation will be delays and uncertainty for the delivery of Housing and critical infrastructure.

In summary, the very real risk here is that the effect of these changes will be entirely counterproductive to the Government’s objectives of facilitating such delivery.

9. The wider impact of these changes, including on costs and JR.

Even at the most superficial level there has been no data or analysis presented with this consultation of even the most potential net cost implications of the proposals. There are some very limited consideration of savings in the addendum to the FieldFisher report, yet it is not even clear if this was included in the considerations of the consultation report, and is not referred to across the consultation.

That addendum tries to calculate the cost savings arising from a scale of fees model had it been in place for the historic data set on costs of the 46 cases analysed in the main Fieldfisher report.

In attempting this exercise, it is notable the view is only backward looking only, and there is no attempt to consider the scale of satellite litigation or the factors likely to drive litigation.

In the addendum report, Fieldfisher highlight the multiple difficulties with the data mapping exercise and calculation they were tasked with. This is given amongst other factors: the different structure of the data and proposed scale of fees model given to them to work with, and changes in the structure of JR consequent on the dropping of the requirement to apply for leave.

But there is no effort to additionally consider the implications of the new Rules of the Superior Courts of the effect of the Practice Directions on the Planning and Environmental Court on the organisation and duration of cases. The expedition of cases and their prioritisation in the list including with very short durations – is likely to lead to an increased requirement to prepare – and an intensity of work, belied by the shorter case duration.

The characteristics and scale of fees model proposed ultimately fall far short of the real complexities and variabilities across environmental litigation. The cost savings from legal costs indicated therefore are ultimately unrealistic quite apart from the factors they leave.

The fundamental hypothesis underlining the Governments negative narrative on JR, has been clear over the last months in particular and that: the pursuit of JR has got out of hand; and that it needs to be controlled in the common good, to facilitate the delivery of housing and critical infrastructure, and to create an environment conducive to necessary investment.

Flowing from the factors and impacts above, but in particular from the legal uncertainty arising, there has been no workings or even framework presented to establish the net effects from these proposals even simply in terms of the costs of the litigation on costs

arising, let alone on the wider negative consequences of legal uncertainty and the complex multi-dimensional costs direct and indirect costs arising from that for the exchequer.

In considering the broader cost implications for the State of what is proposed given the avowed objective of the proposal under consultation indicated in the PR [here](#) namely – *“greater predictability and proportionality to the State's legal costs in environmental judicial reviews.”* – such impacts on litigation are highly relevant.

However s.294 the provision specially referenced in the consultation, and which in its subsection (3) subparagraph (d) expressly requires consideration of the effect to the exchequer of the scale of fees regulation. But this is nowhere quantified, nor indeed is a framework for such quantification even set out in the consultation or any hypothesis on the net effects. The net effect on investment and development in the State is an obvious consideration, But on what basis an overall positive effect can be concluded is entirely unclear.

But there are then also a whole series of other impacts: on health; costs from fines and penalties for noncompliance and the wider implications of environmental degradation including on food production and our important indigenous tourism industry. These are but a few examples in which the Ministers in s.294(3) need to be able to make a statable case on their evaluation of the scale of fees and the basis for such evaluation and the cumulative implications for the exchequer, and to set out credibly what does and doesn't need to be considered.

It is more than concerning therefore that no information has been furnished on such considerations to help inform the deliberations of the public on what is proposed.

There are simply no estimates of the costs arising from the introduction of this proposed scale of fees, let alone and in conjunction with the other factors impacting on the landscape for Judicial Review. There is no relevant quantification of benefits in financial terms.

It is hard therefore to see or comment meaningfully on how this proposal can accord or even be evaluated by the Ministers involved in consultation on any regulations to implement a scale of fees, and consider the implications for the exchequer in any meaningful and comprehensive way under s294(3)(d) – which as highlighted above specifically refers to the “the cost to the Exchequer of matters provided for in such regulation”.

Equally there is no evaluation presented on the other factors in sub-paragraphs b) and c) in subsection 3 of section 294, or even a framework or clarity for the public to input to on how this scale of fees proposal impacts on them and the evidence for that, and which is necessary under s.294 (3). In the absence of that the consultation is

significantly limited in informing the required Ministerial deliberations under s.294(3) and associated consent.

10. Conclusion and recommendations

Ultimately, in reflecting on how we got to this point, where there are specific proposals on a scale of fees for regulations being proposed for wider consideration, we reflected with serious concern on the associated gaps in data, analysis and underlying review.

Ireland has implemented special cost rules to comply with its obligations under *i.a.* the Aarhus Convention and its wider EU law obligations particularly in Sections 50, 50A and 50B of the Planning and Development Act 2000, (“the 2000 Act”) and Part 2 of the Environment (Miscellaneous Provisions) Act 2011.

On foot of the “Housing for All Strategy”, a review of planning was proposed and was initially welcomed by many. However, most regrettably, what transpired was an entirely un-transparent review of planning led by the then Attorney General (also now the current Attorney General). Not one page of analysis, evidence or data has to date been published on foot of that review. What emerged instead was simply a set of legislative changes revising and consolidating the Planning and Development Act 2000 in a draft Planning and Development Bill 2022. This was then developed into a Planning and Development Bill, 2023, (“the 2023 bill”). That was then enacted as the Planning and Development Act, 2024 in a highly controversial legislative process subject to extensive guillotining of the various stages of the legislation after the Dáil Select Committee stage, combined with the introduction of 100s of Government amendments to its own bill which went effectively entirely unscrutinised when the guillotine fell, and simply passed into the text of the bill.

It is also important to reflect that the draft Planning and Development Bill 2022, (“the 2022 draft”) which was subject to Pre-Legislative Scrutiny, contained only a draft head in respect of JR and absolutely did not include any proposal on a scale of fees. In fact it bears little or no resemblance or effect to what was then subsequently proposed in the 2023 bill, and enacted to become the 2024 Act which is the primary legislation under which these scale of fees are being developed and consulted upon.

Therefore, to date no expert evidence has been heard by the Joint Oireachtas Committee on the implications of this, and no evidence is in the public domain on this.

No consultation on the 2023 Bill was conducted either as required by Article 8 of the Aarhus Convention, and the deficiencies in this consultation also need to be considered in that light.

It is important to note also that the [Review of the Administration of Civil Justice](#) led by the Hon Mr Justice Peter Kelly (“The Kelly Review”) – did not include in its scope statutory Judicial Review, and specifically excluded from its scope Planning Judicial Review, given the Government had then advanced the [General Scheme for the Housing](#)

[Planning and Development Bill, 2019](#) which was proposing significant and indeed highly controversial changes on JR rules.

It is in this context that this wholly inadequate consultation and associated materials is then now bringing forward proposed monetary limits to inform regulations introducing and imposing a scale of fees, and which will cap the awards a successful litigant can be awarded in a planning JR, and where it is clearly intended to roll this out across all environmental JR.

Therefore in conclusion, we re-iterate the call on the Minister to withdraw the consultation, and also call upon him to then engage as a priority with his Ministerial colleagues and their officials, including in particular the Minister for Housing Local Government and Heritage (“HLGH”) to:

1. Initiate a robust, holistic, transparent and consultative review of planning and also on environmental Judicial Review particularly in the context of planning. Those reviews should not be limited to legislative considerations, but need to be holistic and systems based, involving consideration for example of resources, processes etc and the intersection with legislative considerations.
2. Implement a stay on further changes on to planning legislation and in particular changes to the rules on JR for planning, pending the completion of the above review. (This is particularly relevant in the context of yet more changes on JR rules we’ve learned about the day before this consultation closes in a General Scheme for a PLANNING AND DEVELOPMENT (AMENDMENT) (No. 2) BILL 2025, and which we simply have not time to consider together with further possible implications of the General Scheme for the Civil Reform Bill, also published 6 days before the close of this consultation.
This will provide for important legal certainty in the intervening period and the benefits which flow from that for all parties, be they Developers, landowners, the public, eNGOs, and Ministers seeking to deliver on remits.
3. The review above should then be used to properly inform an evidence based approach to the consideration of a comprehensive and holistic set of requirements and a programmatic approach to their introduction, evaluation and monitoring.
This is an essential pre-requisite to any changes on the rules on Judicial Review which can only otherwise fall to being considered disproportionate and unjustified particularly where curtailment of EU law rights is involved, as clarified by the CJEU in *Puškár* , and/or risk being seen as impermissibly regressive under the Aarhus Convention.
4. We urge the Government to additionally consider its own communications and actions on JR in planning in the context of its wider obligations under obligations under Article 3(8) of the Aarhus Convention which provides:

“Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement...”

We also urge it to act and legislate as a priority, and to take all necessary other measures, to ensure that people exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement.

We are gravely concerned at the unprecedented scale and tenor of the negative narrative on JR and those pursuing JR and indeed lawyers acting in JR which has preceded this consultation, and indeed continued of the duration of the consultation. In particular we are concerned at the impact this risks having on those who have pursued JR or who may consider it, and the intimidatory and chilling effect on the exercise of rights, and how it constitutes clear harassment, persecution and indeed vilification of individuals, groups and lawyers who are effectively identifiable from the narrative, and or who feel targeted.

We would be happy to provide details on this from the extensive catalogue collated – but do not wish to add substantially to the length of the consultation at this point.

In concluding, we wish to reiterate our concern, not just for the negative implications on environmental protection and the public interest which flows from this, but also for the dysfunctional effect and delays these proposals will have on the delivery of housing and critical infrastructure.

We are conscious that Ireland is to assume the EU Council Presidency from July of this year. In the past Ireland has made significant efforts to bring itself in greater alignment with its EU obligations. It is interesting to reflect the significant focus and efforts made in advance of our Presidency in 2013 to ratify the Aarhus Convention. It is therefore deeply disappointing to reflect on the current direction of travel given the concerns outlined above and by others on the implications of these proposals on a scale of fees, and indeed on the approach to consultation on them. It is even more disturbing to reflect on the implications for public accountability and the rule of law and what can be expected of Ireland's EU Presidency in that context.

Ireland's reputation and compact with the public and civil society generally will only be damaged by these proposals if advanced. So we urge a pause re-evaluation and a comprehensive evidence based approach is pursued as recommended above.

Finally, we thank the Department for its consideration of these remarks and are available to clarify any of the above as needs be, and remain as always available to the

Department to engage constructively on Ireland's environmental law obligations, in the public interest, and for the environment our community of eNGOs is committed and indeed charged with protecting.