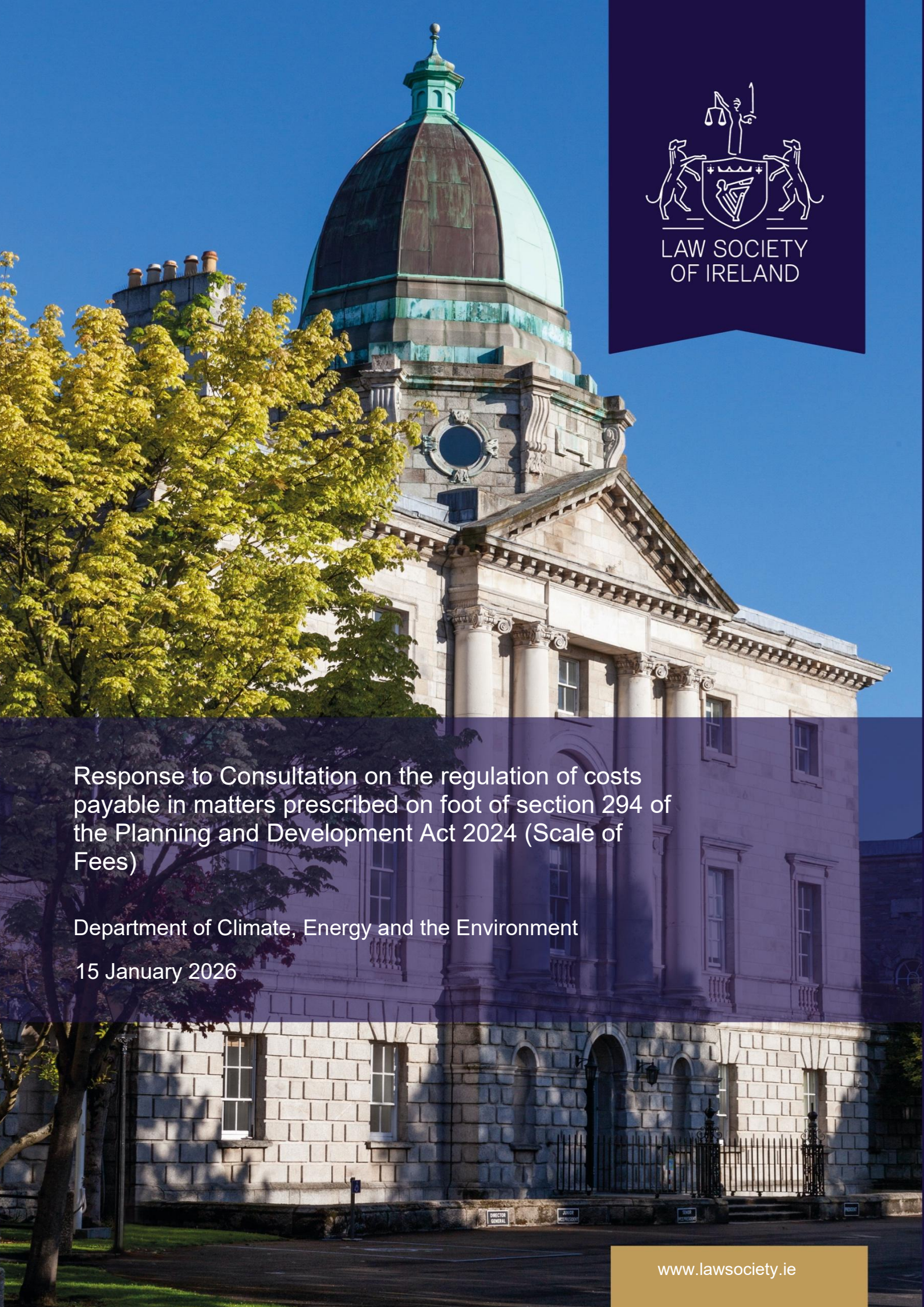

LAW SOCIETY OF IRELAND

Response to 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)

Department of Climate, Energy and the Environment

15 January 2026

www.lawsociety.ie

Response to 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)

Law Society's position

1. The Law Society of Ireland opposes the introduction of scale of fees in the justice system, and opposes in particular the proposed a scale of fees for environmental judicial reviews that are provided for under section 294 of the Planning and Development Act 2024 (the **2024 Act**).

2. The Law Society opposes the introduction of the proposed scale of fees for several reasons:

    - the proposed scale of fees is contrary to Article 9 of the Aarhus Convention[1] which requires that review procedures must be fair, equitable, timely and not prohibitively expensive;
    - the proposed scale of fees fails to comply with all of the requirements specified in section 294(3) of the 2024 Act which requires that in making the Regulations providing for a scale of fees, the Minister must have regard to four specific factors;
    - it is very questionable whether the proposed scale of fees is compatible with EU competition law and it is questionable whether it is capable in principle of giving rise to anti-competitive effects;
    - the proposed scale of fees is modelled on the UK system which itself is currently subject to scrutiny or investigation by the Aarhus Compliance Committee;
    - the proposed scale of fees will embed a principle whereby 'means rather than merit' will determine whether an applicant is in a position to initiate a judicial review. This will constitute an insurmountable obstacle to access to justice for many individuals and small businesses and will be contrary to the principle of access to justice and the principles of the Aarhus Convention;
    - the proposed scale of fees is incompatible with constitutional law, is contrary to European law, and Aarhus Convention obligations, and embeds deep inequality between applicants and the State when it comes to judicial review.

3. The Law Society highlights the absence of evidence that Judicial Review is the primary cause of delays in the delivery of housing or critical infrastructure in the State. While recognising the need to increase the rate at which housing and critical infrastructure development can take place, we also highlight the absence of evidence to support the proposition that the introduction of a scale of fees is an effective or proportionate solution to achieve that objective.

[1] The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the **Aarhus Convention**) of 28 June 1998

4. We warn that fee caps will make litigation prohibitively expensive, discourage meritorious cases, and harm environmental protection in a manner contrary to the public good. Introducing a scale of fees has no effect on the merit of cases being brought. An unmeritorious case may still be brought if the applicant has the financial resources to support it. However, the scale of fees will prevent otherwise meritorious cases being brought where the applicant does not have the required substantial financial resources.

5. The proposed scale of fees is significantly lower than actual costs (and is deliberately so), leaving applicants to fund large shortfalls, which will deter cases and increase the prominence of lay litigants before our courts.

6. The Law Society recommends the introduction of non-binding cost guidelines and calls for greater consideration to be given to alternative mechanisms, such as the provision of an internal appeals process, in order to reduce costs without restricting access to justice.

Introduction

7. Following the release of the *Accelerating Infrastructure Report and Action Plan*[2] (the **AIRAP**) in December 2025 the Department of Climate, Energy and the Environment (the **Department**) took two key actions: the publication of the General Scheme of a Civil Reform Bill 2025[3] to "overhaul judicial review and streamline courts processes"[4], and the initiation of a public consultation regarding the commencement of section 294 of the 2024 Act. The consultation focuses on the implementation of a proposed scale of legal fees in planning and environmental legal challenges. The consultation paper invites submissions on 8 targeted questions and invites further submissions on the topic.

8. The present consultation takes place in a sensitive political and societal context. The housing crisis and slow rate of development of critical infrastructure is a key political issue for the public, Government and political parties alike.

9. In the months leading up to the launch of the consultation a sustained political campaign in the press faulted the justice system, in particular cases taken by individuals challenging planning decisions, for the delay in delivery of infrastructure and housing[5].

10. AIRAP points the blame at judicial review, and the Minister for Public Expenditure, Infrastructure, Public Service Reform and Digitalisation emphasises this in his foreword:

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[2] Accelerating Infrastructure Report and Action Plan, 03 December 2025.
[3] General Scheme of a Civil Reform Bill 2025
[4] Department of Justice, Home Affairs and Migration, "Minister Jim O'Callaghan publishes Civil Reform Bill to overhaul Judicial Review and streamline courts processes", press release, 06 January 2026.
[5] See declarations of Seán O'Driscoll, Accelerating Infrastructure Taskforce in the Irish Time "Planning objections now a legal industry as 'people run down to Four Courts', official claims", Ellen Coyne, 17 June 2025 and "Planning objectors now threaten the common good, says head of planning taskforce", Mark Hennessy, 02 October 2025; or the declarations of Minister Jack Chambers in the Sunday Business Post "Legislative reform needed to stop the 'weaponisation of judicial reviews', Jack Chambers says", Megan O'Brien, 13 October 2025 and "Revealed: How Jack Chambers warned Darragh O'Brien on 'critical' environmental legal fee cap work", Daniel Murray, 18 November 2025.

> "What is particularly worrying is that the number of judicial review cases is also rapidly growing. 2024 saw a 43 percent increase compared to 2023, and already 2025 has been a further 30 percent increase in the number of cases brought to the Planning and Environment Court.(…) This is unsustainable. Absent reform, an ever-increasing tide of judicial reviews could drown our court system, paralyse infrastructure development and prevent the effective administration of justice."[6]

11. However, the AIRAP does not provide an evidential basis for asserting that judicial review is a significant hindrance to the development of housing and critical infrastructure.

12. Data reviewed by the Law Society indicates that there were 191 new Planning and Environment list cases in 2025, down 41 compared to 2024 (a reduction of 19 percent). Of these judicial reviews, 69 were taken by developers/landowners (up 10 percent compared to 2024) while the public or environmental non-governmental organisations took 86 judicial reviews (down 43 percent compared to 2024). The narrative that judicial reviews are "rapidly growing" appears to be directly contradicted by the numbers. The data seems to indicate that there were more judicial reviews against refusals of permission taken than against grants of permission (both in term of the number of cases taken and the number of affected housing units) – which demonstrates that many judicial reviews were initiated with the aim of facilitating and securing development decisions rather than opposing them.

13. The blame placed on judicial reviews brought forward by individuals masks the real root causes of the issues impeding development such, as the chronic lack of investment in the justice system (with resulting backlogs and delays) or practical challenges such as the fact that the capacity constraints in the energy grid, or the lack of adequate water infrastructure which is hindering the development of housing.

14. We have witnessed a pattern of blame being attributed to the legal sector for failings that are in fact attributable to others. For example, the long-established habit of blaming lawyers for the rising cost of insurance does not stand up to scrutiny. The Law Society has not seen any evidence put forward to substantiate the claim that judicial review or legal costs linked to judicial review are a barrier to infrastructure development.

15. The sustained attack on the judicial review and the justice system creates an unwelcome climate of distrust towards environmentally focused judicial review, which by nature have a public interest element. This is despite the fact that only a very small fraction of planning applications are challenged in the courts.

16. In addition, contrary to the aim of the consultation process, the various declarations of Government officials and public servants project the image that the scale on costs will be implemented irrespective the feedback that is provided as part of the consultation. For example, the AIRAP leaves not doubt that the scale of fees will be implemented:

> "To address the mismatched incentives, the Government will immediately commence the procedure within Part 9 of the Planning Act regarding scale

[6] AIRAP, p. 5.

of fees. This will cap the cost that the State and other parties pay in environmental judicial reviews."[7] (Pillar 1, Action 1).

17. While the consultation concerns the proposed commencement of section 294 of the 2024 Act and the introduction of a scale of fees, the proposed scale of fees raises multiple concerns regarding the right to access to the courts, the protection of the environment and consumers' rights.

18. It is regrettable that the proposal to introduce a scale of fees is being put forward in advance of the implementation of certain aspects of the planned Civil Reform Bill. A more considered approach would be to allow those reforms to be operable for some time before assessing whether a measure as questionable and as blunt as a scale of fees is necessary or appropriate.

19. The scale of fees proposed by the Department flows from the 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**)[8]. While there are no terms of reference provided, the project statement of the McDaid Report states plainly that the aim of the proposed scale of fees is to "bring greater predictability and proportionality to the State's legal costs in environmental judicial reviews" while ensuring that "it does not undermine access to justice or breach the State's obligation under the Aarhus Convention"[9]. It should be noted that the McDaid Report does not refer to, or appear to give due consideration to, relevant European legislation or case law despite the fact that the scale of fees proposal involves a complex area of law concerning aspects of both international and European law.

20. At European Union (the **EU**) level, it appears that no other country has introduced a comparable scale of fees.

21. It is significant that neither the AIRAP nor the McDaid Report establish, on an evidential basis, why they consider that the introduction of a scale of fees is an effective solution to the "ever-increasing tide of judicial reviews" or to the failure to develop critical infrastructure and housing in a more timely way.

22. The Law Society previously expressed its objection to the introduction of any scale of legal costs in the justice system, particularly concerning environmental and planning judicial reviews. The Law Society's submission to the Interdepartmental Group on Environmental Legal Costs[10] supported the introduction of mechanisms for the reduction or elimination of legal costs in environmental cases but warned against the introduction of a scale of fees. At that time the Law Society expressed concerns that a scale of fees would not be in compliance with the requirements of the Aarhus Convention and recommended an approach based on guidelines to restrict legal costs. These concerns were flagged again to the State following the publication of draft *Aarhus Convention National Implementation Report 2025*[11].

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[7] AIRAP, p. 41

[8] Report on the Regulation of Costs Payable in Matters Prescribed on Foot of Section 294 of the Planning and Development Act 2024 by John McDaid, 01 December 2025.

[9] Ibid p. 1.

[10] Law Society's Submission to the Interdepartmental Group on Environmental Legal Costs, 19 July 2024.

[11] Law Society's submission on the Aarhus Convention National Implementation Report 2025, 07 April 2025.

23. While responding to the questions posed in the consultation paper, this submission will also highlight the reasons for the Law Society's objection to the introduction of a scale of fees. We propose an alternative approach through the adoption of guidelines to restrict legal costs. We also invite the Government to consider the introduction of other cost effective and timely mechanisms to facilitate challenges to environmental decisions.

24. Prior to addressing the questions raised by the consultation we now highlight the various grounds for the Law Society's objection to the introduction of scale of fees.

Part 1: Prejudice to society and justice system incurred by scales of fees

Access to Justice and right to litigate

25. Access to justice is a core principle of the rule of law and of a democratic state. In simple terms, it means that any member of society is entitled to have equal access to a court so that they can effectively resolve their justice problem or protect their rights. In addition, this principle allows a member of society to hold decision-makers accountable for their actions.

26. In Ireland, the right to access to justice/or the right to litigate is protected by the Constitution, the European Convention on Human Rights (the **ECHR**) and the Charter on Fundamental Rights of the European Union (the **EU Charter**). They provide for the right to a "fair hearing" and an "effective remedy" (Articles 6 and 13 ECHR; Article 47 EU Charter). Further, and specifically in the context of environmental justice, the Aarhus Convention, and related case law, require "wide access to justice" to be provided to the public (Article 9(2))[12], which provides that review procedures must be "fair, equitable, timely and not prohibitively expensive" (Article 9(4)).

Means over merits

27. Prospective applicants will either have the means to afford to pay the balance of fees, and will likely have to make a deposit to that effect when instructing solicitor, or will have to represent themselves in court. As a result, means rather than merit will determine whether an applicant will be represented by a legal team. This result is neither welcome or in compliance with the general principle of access to justice, or

[12] Art. 9(2) Aarhus Convention". Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission (…) What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. (…)" Emphasis added.

the principles of the Aarhus convention prohibiting expensive legal fees and restricting access to the courts (see para. 60-61).

28. In addition, the introduction of a scale of fees will result in an increasing number of lay litigants appealing before the court. This will inevitably lead to increased delays in the disposal of cases and will also lead to an increase in the level of fees payable by the State to its own legal team (due to more lengthy hearings).

29. The introduction of scale of fees will effectively roll back on the right of the individual to access to a court to vindicate their rights. It will constitute a significant backward step, the effect of which is to prevent members of society from challenging executive action in the public interest. It is concerning that the Department has not presented any objective evidence to demonstrate that the process of judicial review is being abused.

30. The Law Society is not the only body to raise concerns over the issue of cap on legal costs. The *Report on the Review of the Administration of Civil Justice* of October 2020[13](the **Kelly Report**) noted the potential issue in terms of impeding access to justice. It referenced the *Report of the Legal Costs Working Group* **(Haran Report**)[14] and noted that: "It found difficulty in seeing how a scale would not undermine, to some extent, the principle of equality of arms."[15].

31. The difficulties that will result from the adoption of a any proposed cap on costs in terms of access to justice, and the ability of applicants to instruct solicitors, was also flagged in the Report on the *Analysis of the impact of proposals to reduce legal costs in Ireland* (the **EY Report**)[16]. The EY Report discussed the benefits and limits presented by a cap on costs such as the one provided for in the scale of fees that is currently proposed, and by costs guidelines. It concluded that costs guidelines would be a more appropriate solution to control legal costs in Ireland. This will be discussed further at para. 142-145.

The District Court example

32. When considering the background around caps on costs, the McDaid Report refers to the experience of the District Court scales. It is indeed an interesting example of a situation where party and party costs are strictly subject to a scale of fees.

33. The District Court scale of fees presents striking similarities with the approach that is envisaged under of the scale of fees proposed by the McDaid Report. In respect of professional fees, the District Court scale of fees is primarily determined by the amount of damages that are awarded or agreed, regardless of the amount of work that may be required by a solicitor to achieve the desired outcome for the client. This is contrary to the criteria for the assessment of fees pursuant to Schedule 1 of the Legal Services Regulation Act 2015 which requires legal fees to be assessed on specific principles such as costs that have been reasonably incurred and the costs are reasonable in amount. The scale of fees proposed in the McDaid Report provides no scope for taking into consideration the number of hours that legal practitioners are required to work or the degree of complexity in any given case. In circumstances

[13] Report on the Review of the Administration of Civil Justice of October 2020.
[14] Report of the Legal Costs Working Group (Haran Report), 07 November 2005.
[15] Kelly Report, p. 282.
[16] Report on the Analysis of the impact of proposals to reduce legal costs in Ireland, The Bar of Ireland & The Law Society of Ireland, EY, 09 May 2022 p. 51

where the work done by a practitioner is not sufficiently covered by the scale fee, it falls to the client to pay his or her legal practitioner in full.

34. Consequently, many litigants will not be able to afford the shortfall between the amount recoverable under the scale of fees and the amount due to the legal practitioner. The operation of the scale of fees in this way will serve as an insurmountable obstacle to many litigants, by making justice in the courts unaffordable to them. In contrast, respondent parties are typically well-resourced and are able pay higher fees to their legal team. This raises issues of inequality of arms for less well-resourced litigants and will constitute an impediment to access to justice.

35. Anecdotally, there are reports in recent years of solicitors finding that they are unable to take on cases for clients at District Court level owing to the outdated and poor fee levels in place. It is reported that the fees paid under the District Court scale of fees do not take into account the costs reasonably incurred, complexity or novelty of the issue, specialised knowledge of the legal practitioner(s) involved, or time expended on the matter. Similar difficulties can be expected to arise under the scale of fees proposed in the McDaid Report. Again, this raises issues of impediments to accessing justice as it introduces additional difficulty for members of the public in engaging a legal practitioner.

36. The flexibility afforded by the current system of costs[17], outside of District Court matters, allows solicitors to offer legal representation to an applicant who would not be able to afford it otherwise. The "no foal, no fee" payment approach enables a legal team to bear a substantial degree of risk as regards the likely outcome of the case. The introduction of a scale of fees will in many cases, lead to a substantial shortfall between sums recoverable under the scale of fees and the actual costs of the case. This will result in fewer cases in the interests of the environment and the broader public interest being taken. This leads us to the unavoidable conclusion that rendering even meritorious cases unviable is the intention of the Department.

Fairness and equality of arms

37. The fee levels provided for in the proposed scale of fees are not reflective of the actual costs of such actions. If applicants' recoverable costs are *de facto* limited to the capped amounts, many applicants may in future find it very challenging to engage lawyers at all (or may struggle to engage lawyers with the requisite expertise and experience) who are willing to act for them on a 'no foal, no fee' basis, in spite of the merits of a case.

38. Prescribing the costs payable by losing respondents to winning applicants, without prescribing the costs that public body respondents and developer notice parties may pay to their legal team and experts in the same proceedings, undermines the fairness and equity of the system.

39. State bodies have the capacity and resources to engage highly experienced and skilled practitioners, while applicants taking challenges against certain decisions will be expected to identify, source and fund legal expertise without the same level of

[17] Under the current system, in the absence of agreement between the parties, the legal costs payable to a winning applicant may be determined by the Legal Costs Adjudicator (s.154 of the Legal Services Regulation Act 2015 (the **LSRA 2015**)).The role of the Legal Costs Adjudicator is to independently determine what amounts to a fair and reasonable charge for costs reasonably incurred (s.155 of the LSRA 2015).

resources available, and in many cases may have to represent themselves in court. It is concerning that a review of the legal fees spent by public body developers and decision makers on their own representation in judicial reviews seems to have been disregarded as an evidence base by the McDaid Report.

40. The proposed scale of fees risks being contrary to the provisions and the general environmental protection goals of the Aarhus Convention as set out in Article 9(4)[18], particularly in terms of where the Convention aims to ensure that there is a level playing field between applicants and State parties with the latter invariably being highly resourced with lawyers and experts. This is particularly problematic and unwelcome when, by virtue of itself not being bound by a scale of fee, the State's advantageous position is the result of its own policy and legislation that will cement inequality of parties.

Competition law concerns

41. We have concerns regarding the compatibility of any proposed scale of fees with EU law, including competition law.

42. Competition law provides a robust legal framework to ensure that businesses and service providers compete fairly with each other. It aims to encourage efficiency, create a wider choice for consumers and helps reduce prices and improve quality of service by creating rights for consumers and imposing corresponding obligations on traders. It is one of the primary tools to protect consumers.

43. Under EU law[19], national legislation favouring the adoption of anti-competitive agreements or practices or reinforcing their effects is unlawful. The EU Commission has expressed the view that the application of a scale of fees is capable, in principle, of giving rise to anti-competitive effects[20].

44. In legal advice provided to the Law Society it is indicated that the imposition of a maximum fee scale for litigation services may well have anti-competitive effect. It is further indicated that an economic analysis is necessary to determine whether a proposed cap would have anti-competitive effect. The Law Society notes that the McDaid Report does not refer to any economic analysis.

45. Furthermore, the EU Services Directive[21], as transposed into Irish law, prohibits a competent authority in the State from fixing a minimum or maximum tariff unless such a requirement is non-discriminatory, necessary and proportionate. The Law Society does not believe that the proposed scale of fees fulfils these requirements. We note that the Court of Justice of the European Union (the **CJEU**) found that a German rule

[18] Art. 9(4) Aarhus Convention: "In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. (…)." Emphasis added.
[19] It is a well-established reading of articles 101 and 102 of the Treaty on the Functioning of the EU in conjunction with Article 4(3) of the Treaty on EU.
[20] See *Report on Competition in Professional Services*, COM(2004)83 final, 09 February 2004, para. 34-35.
[21] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

setting out a maximum fee scale was a disproportionate way of seeking to protect consumers[22].

46. In addition, the introduction of the proposed scale of fees would impact the competitiveness of the market. As noted in the EY Report:

> "a table of maximum costs has the potential to stifle competition, if the maximum rates referenced in the table become the standard charge for legal services. If practitioners choose to operate below the maximum that could improve competition but is not likely to impact overall competitiveness".[23]

47. In light of the above, it is doubtful in our view that the proposed scale of fees will be compatible with EU competition law. The proposal to introduce a scale of fees is therefore vulnerable to legal challenge – at national level and at EU level.

Specific protections in environmental law

48. When considering the proposal to introduce a scale of fees in the context of environmental law a further element that requires careful consideration is the Aarhus Convention.

49. Under Article 9 of the Aarhus Convention certain groups of people, including bodies corporate, must be guaranteed access to review procedures before a court of law or another impartial and independent body established by law to challenge decisions relating to access to environmental information, decisions likely to significantly affect the environment, and acts or omissions of public or private persons that contravene national law relating to the environment.

50. Article 9(4) specifies an overarching requirement that access to justice must be fair, equitable, timely and not prohibitively expensive. These principles are integrated in a number of EU environmental instruments[24] and are binding as a matter of EU law. The State is bound by these principles and therefore must abide by these principles in introducing any reform of the legal costs regime, including any scale of fees to be adopted.

Non prohibitive costs

51. The proposed scale of fees seeks to limit the costs awardable to successful applicants in certain environmental judicial reviews under Part 9 of the 2024 Act. To put it simply, where an applicant has succeeded in establishing unlawful conduct of a State body, thereby vindicating the rule of law, the legal costs that may be recovered are, under the proposed scale of fees, to be limited to the maximum amounts to be prescribed by a Minister of the Government.

52. However, it must be remembered that the State is bound by the access to justice provisions of the Aarhus Convention that costs not be prohibitively expensive, and that they be fair and equitable. As quoted in the McDaid Report, the test for not prohibitively expensive costs is:

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[22] *Commission v. Germany,* C-377-17, 04 July 2019, para. 94-95.
[23] EY Report p. 52
[24] For example, Directive 2011/92/EU as amended by Directive 2014/52/EU (Environmental Impact Assessment Directive) or Directive 2010/75/EU (Industrial Emissions Directive),

> "not purely subjective; the cost of proceedings must not exceed the financial resources of the person concerned nor appear to be objectively unreasonable, at least in certain cases. This is the legal threshold that must be met by any protective costs scheme."

53. A question that arises is how will the proposed scale of fees respect these requirements?

54. As regards the payment of fees, the current system operates, first, by way of negotiation between the parties (often informed by legal costs accountants on both sides), with agreement of reasonable costs reached on an arms' length basis, or, if agreement is not possible, by way of adjudication of what amounts to fair and reasonable costs by the Legal Costs Adjudicator.

55. To determine the appropriate amount to be paid under the proposed scale of fees, the McDaid Report reviewed the two rulings of the Chief Legal Costs Adjudicator in relation to costs arising on foot of environmental law judicial review cases. The Report also reviewed a study of 44 cases to which An Coimisiún Pleanála (the **Commission**)[25] was party. The study had been undertaken by Fieldfisher LLP in November 2023 for the Office of the Planning Regulator[26](the **Fieldfisher Report**).

56. According to the McDaid Report, the Fieldfisher Report found that the average payment to the applicants' lawyers in cases that went to a High Court hearing was €179,537. When the cases were appealed or subjected to reference to the CJEU, the payment increased to €270,295 on average. These figures are inclusive of costs at all stages of the process and of VAT. The same report identified that on average the payment to the Commission's lawyers was €99,693 for High Court hearing stage and €192,342 for the CJEU reference.

57. The scale of fees proposed in the McDaid Report in High Court cases that are not modularised and which do not involve an appeal or a CJEU reference – c.€41,000 in a 'standard' case, c.€53,000 in a 'complex' case, and c.€66,000 in a 'very complex' case – are all therefore as acknowledged by the McDaid Report, "significantly less than Fieldfisher found was the average applicant legal costs payment in relation to An Coimisiún Pleanála payments for legal fees" and significantly less than the Commission paid its own lawyers.

58. There is no explanation provided in the McDaid Report as to why it was reasonable or equitable to propose a scale of fees that is not in any way reflective of the actual costs that are incurred in such cases; nor does the McDaid Report explain how the shortfall is to be funded or how the proposed scale of fees satisfies the requirements of Article 9(4) of the Aarhus Convention.

59. According to the McDaid Report, the average amount paid by the Commission in High Court cases that were not appealed and which did not go to the CJEU, either negotiated on an arms' length basis as representing reasonable costs for work reasonably incurred, or adjudicated as same, was about €179,000. Proposing to limit recoverable costs in the future to between €41,000 (standard cases) and €66,000 (very complex cases) therefore clearly represents significantly less than what can be said to be reasonable recompense for the legal costs incurred by an applicant. The approach that is now being proposed will leave the applicant in the difficult position of

[25] Named An Bord Pleanála at the time.
[26] Research Report on Legal Costs in Planning and Environmental Judicial Reviews, Office of the Planning Regulator and Fieldfisher, December 2023

being required to make up a very significant shortfall that they will have to fund out of their own resources in each case. However, the reality is that many litigants will not have the financial ability to make up that shortfall.

60. The Law Society considers that the scale of fees that is now being proposed would amount to prima facie evidence of non-compliance with the Aarhus Convention on the grounds of prohibitive expense (i.e. contrary to Article 9(4)). This conclusion seems unavoidable because the level of shortfall will be, in almost all cases, objectively prohibitive and will be subjectively prohibitive for all but the wealthiest applicants.

61. On the McDaid Report's own evidence, in a 'standard' High Court case (non-modularised, no appeal, no CJEU reference), the difference payable by the winning applicant to their legal team over and above that recoverable under the scale of fees will amount (on average) to €138,000[27] which is clearly prohibitively expensive and contrary to the requirements of the Aarhus Convention.

Judicial review and protection of the environment

62. The Law Society believes that access to justice remains a core democratic principle in any reasonable society and that a robust planning process is good for everyone. While judicial review is an essential part of the justice system and one of the direct manifestations of the right to access the courts, it has a significant importance in environmental matters. When used appropriately, judicial review serves a valuable role in ensuring accountability within the decision-making processes of public and private bodies.

63. There are many examples in recent Irish history where challenging the decisions of the State, or State bodies, has not been popular but has demonstrated that the Irish legal system can deliver justice and is independent of government. It is important that any changes that may be introduced to the legal system and judicial review process are fair, balanced and proportionate.

64. The judicial review process serves an essential role in the protection of the environment as it facilitates oversight of the executive's decision-making by the judicial system. The proposal to limit access to that oversight by the introduction of financial barriers will only be to the detriment of society. An unmeritorious case may still be brought if the applicant has the financial resources to support it. However, the scale of fees will prevent otherwise meritorious cases being brought where the applicant does not have the required substantial financial resources.

65. In light of the above the Law Society objects to the introduction of any scale of fees in the justice system.

[27] €179,000 in average as per the McDaid report less €41,000 (payment for standard cases in proposed scale of fees) = €138,000.

Part 2: Responses to questions posed in the consultation

Question 1: A scale of fees to be awarded to successful applicants in a judicial review have been proposed and are set out in the attached report. Do you agree with this approach? Please explain the reasons for your answer.

66. The Law Society respectfully disagrees with the approach advised and the scale of fees proposed. As stated previously, the Law Society objects to the introduction of a scale of fees which it sees, among other concerns, as being in breach or the requirements of Article 9 of the Aarhus Convention (access to justice and elimination of financial barriers for applicants). We are of the view that the proposed scale of fees is incompatible with EU competition law.

Cap on costs in England and Wales

67. The McDaid Report refers to the Fieldfisher Report which reviewed the systems in place in neighbouring common law jurisdictions. The McDaid Report provides a short description of the caps in place in England and Wales and notes that the Aarhus Convention Compliance Committee has concerns over the lack of certainty in relation to the potential applicant to costs[28], an important aspect of the principle of non-prohibitive costs enshrined by the Aarhus Convention.

68. There are also crucial differences between the approach to a scale of fees in England and Wales. For example, the England and Wales system provides for the possibility to vary the cap in an individual case at an early stage. There is no such facility in section 294 of the 2024 Act other than a jurisdiction for the court to set aside the cap in cases of exceptional public importance and where it is in the interests of justice.

69. The McDaid Report seems to rely heavily on the English example as being a good model on which to base Ireland's approach to a proposed scale of fees. The proposed cap in a 'standard case' of c.€41,000 is almost exactly equivalent to the England and Wales standard cap in Aarhus proceedings of £35,000 (c.€39,900 at the time the McDaid Report was produced) which was set in 2013. Indeed, the McDaid Reports states:

> "In terms of the quantum of the fees recommended, I was unable to identify any common formula for the arrangements that are currently in place where the State is the funder and the principal assistance that I found was the cost cap arrangements in England / Wales. The cost cap figures in England / Wales for a successful applicant bear close relationship to the 'standard' scale that I have recommended"[29].

70. This reliance on the England and Wales cap on costs as leading example in this context is concerning. It is surprising that the McDaid Report has seen fit to propose mirroring the England and Wales approach on applicants' costs even though the England and Wales model remains the subject of proceedings before the Aarhus Compliance Committee.

71. At the recent meeting of the Parties to the Aarhus Convention held in November 2025, the Compliance Committee presented its *Report on decision VII/8s of the*

[28] McDaid Report, p. 20.
[29] *ibid*, p. 34.

Meeting of the Parties concerning compliance by the United Kingdom[30]. In this Report, the Compliance Committee held that England and Wales needs:

> "to provide the Committee with evidence that, as a matter of urgency, it has taken the necessary legislative, regulatory, administrative and practical measures to:
> (a) Ensure that the allocation of costs in all court procedures subject to article 9 of the Convention, including private nuisance claims, is fair and equitable and not prohibitively expensive; and
> (b) further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice."

72. The Compliance Committee clearly remains unconvinced that the England and Wales scale of fees system is compliant with the Aarhus Convention. It is surprising and concerning that the McDaid Report proposes that Ireland should in effect copy a core element of a system that is itself under question. Indeed, the Law Society notes that the Aarhus Convention Compliance Committee stated that:

> "In its report on decision IV/9i to the fifth session of the Meeting of the Parties, the Committee expressed concern that the (then fixed) costs caps [in England and Wales] of £5,000 and £10,000 may be prohibitively expensive for many individuals and organizations".

73. A significant concern raised as part of the proceedings before the Aarhus Convention Compliance Committee relates to the appropriateness of the England and Wales default cap of £35,000. As Leigh Day, a UK law firm that specialises in acting for applicants in environmental judicial review in England and Wales, notes in a submission provided to the Compliance Committee[31]:

> "Our second major concern is the impact of the reciprocal cap of £35,000, which now makes anything other than the most routine [judicial reviews] (a minority of the [judicial reviews] that this firm takes on) 'too expensive to win'. The result is that lawyers end up subsidising the defendants' costs of defending claims, even when the claimant wins. However, claimant lawyers are now struggling to make this work. The reciprocal cap has been fixed at £35,000 since its introduction in 2013, and its value has been eroded by inflation (given that £35,000 in 2013 equates to just under £48,000 in today's prices), while the complexity and therefore cost of environmental litigation has been increasing. In cases of any complexity, the default reciprocal cap [of £35,000] is not Aarhus-compliant because it is not objectively reasonable, particularly in a [judicial review], to require claimants or their lawyers to meet a significant proportion of their own costs of a successful claim that upholds the application of environmental law."

74. In England and Wales, the default cap of £35,000 applies at first instance in judicial review proceedings before the High Court. Where a case is appealed, a discussion then takes place regarding the appropriate cap on the applicant's ability to recover for the purposes of the appeal (if successful), and the court has the power to increase

[30] Report on decision VII/8s of the Meeting of the Parties concerning compliance by the United Kingdom, ECE/MP.PP/2025/66, 13 November 2025.
[31] Leigh Day, Access to Justice in relation to the Aarhus Convention - Response to call for evidence, January 2025, p.2.

the default cap in this regard, in order to ensure that the applicant does not face prohibitive expense in pursuing the appeal[32].

75. In contrast, the McDaid Report proposes an increase of only €17,000 in the amount an applicant may recover if successful on appeal, irrespective the complexity of the case; and only €12,000 if there is a preliminary reference to the CJEU, again, irrespective the complexity.

76. These aspects of the McDaid Report raise Aarhus Convention concerns, even compared to the situation in England and Wales, which (as above) remains under scrutiny by the Aarhus Compliance Committee.

77. The Department should note that according to a survey lead by the Council of Bars and Law Societies of Europe (CCBE) no other country in Europe has introduced a scale of fees model that is comparable to the one now proposed by the Department. It should be noted that these other countries are also bound by the Aarhus Convention and EU law.

Compliance with s.294 of the Planning and Development Act 2024 requirements

78. The Law Society does not believe that the proposed scale of fees complies with the requirements of the 2024 Act.

79. The Department's consultation website page states:

> "The objective of this proposal is to bring greater predictability and proportionality to the State's legal costs in environmental judicial reviews. It is not to limit access to justice or constrain the right of individuals or communities to challenge decisions."

80. The above statement suggests that the Department's sole objective is to reduce legal fees without giving any consideration to the other factors which the Minister is required to consider under section 294 of the 2024 Act. The McDaid Report does not address precisely how these other matters have been taken into account.

81. Pursuant to the 2024 Act, the Minister may make Regulations prescribing the amounts of costs that can be recovered by a successful applicant having regard to specific factors. S.294 of the 2024 Act provides the legal basis for making the Regulations providing for the introduction of a scale of fees. Before making Regulations, the Minister must take into consideration a number matters as follows:

> "(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,

[32] For example, the Law Society is aware that in proceedings taken by An Taisce in the High Court of England and Wales and the Court of Appeal relating to Hinkley Point nuclear power station in 2013/14, the default cap of £35,000 was doubled to £70,000 by the Court of Appeal following a short hearing on the matter.

(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."

Obligation to "have regards" to certain factors

82. The above requirements must be interpreted in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9 of the Aarhus Convention, EU law and the EU Charter.

83. There is little evidence to demonstrate that the elements set out in section 294(3) of the 2024 Act have been taken into consideration in the drafting of the proposed scale of fees.

First element

84. Regarding the first element of section 294(3), at an earlier point in the submission we discussed how the financial impact of the proposed scale of fees on the applicant will be significant. The substantial reduction in the amounts of costs recoverable by successful applicants under the proposed scale of fees will affect other factors, namely the not prohibitively expensive principle and the need for equitable access to the courts.

85. In the Law Society's view, if the scale of fees were to be implemented as proposed that would amount to strong *prima facie* evidence of non-compliance with the Aarhus Convention on the grounds of prohibitive expense.

86. On the McDaid Report's own evidence, applicants in environmental judicial review will face bills from their legal representatives which significantly exceed the caps proposed by the McDaid Report. The difference between the amounts billed and the amounts payable under the proposed scale of fees will remain payable by winning applicants to their legal team (see above, para. 60-61). This will likely have a chilling effect on the bringing of environmental review cases by applicants.

87. In the opinion of the Law Society, the proposed scale of fees fails to satisfy the requirement of section 294(3)(a) of the 2024 Act.

Second element

88. The second the element of section 294(3) relates to the fairness of the procedure, equality of arms and equity. As considered at an earlier point in this submission, the imposition of a fee cap on successful applicant will result in a natural imbalance between applicant and State respondents and notice parties (usually developers).

89. Applicants will be limited in their ability to instruct solicitor, counsel and expert of the highest standards, while in the State will face no such restriction.

90. The proposed scale of fees will place the State in a superior position to that of an ordinary litigant. The unequal position of a litigant against the State is anathema to a fair judicial system, and particularly grievous when it is the State itself that imposes barriers to reasonable oversight and accountability by the judicial branch.

91. In the opinion of the Law Society, the proposed scale of fees fails to satisfy the requirement of section 294(3)(b) of the 2024 Act.

Third element

92. The third element of section 294(3) relates to the need to ensure that the courts are utilised in the common good and in the interests of justice.

93. Ensuring that decisions made by the State on significant developments comply with the law is undoubtedly in the interest of the common good and in the interests of justice.

94. Similarly, ensuring that parties present before the courts benefit from the same opportunities, and that private individuals are not disadvantaged when compared to the resources available to the State, is also in the public interest.

95. Considering that the declared aim of the introduction of the scale of fees is to bring "greater predictability and proportionality to the State's legal costs in environmental judicial review". It appears that the Department's clear intention is to drastically reduce the access to justice and judicial control of the State's decision in the area of environmental law. The Law Society is concerned at the impact the scale of fees proposal will have on access to justice.

96. In the opinion of the Law Society it is arguable that the proposed instruction of a scale of fees fails to strike that right balance and therefore fails to comply with section 294(3)(c) of the 2024 Act.

Fourth element

97. The last element of Section 294(3) concerns the costs implications to the State of the introduction of the proposed scale of fees.

98. We note that in the Fieldfisher Addendum Report on Scale of Fees (the **Fieldfisher Addendum Report**), Fieldfisher was mandated by the Office of Planning Regulator to:

> "Determine what approximate costs savings would have accumulated to the State, had the [scale of fees] model applied to the sample of planning judicial reviews contained in the Principal Report" by "utilising a model Scale of Fees (provided)"[33].

99. The Fieldfisher Addendum Report reproduces the scale of fees provided by the Office of the Planning Regulator. It is not dissimilar to the scale of fees provided by the McDaid Report. After comparing the scale of fees against the data of costs paid by An Bord Pleanála between 2012 and 2022, the Fieldfisher Addendum Report concludes that:

[33] Fieldfisher Addendum Report, p.2.

> "if the draft Scale of Fees was applied to the cases in the individual case dataset this would have provided for a cost saving to the State in the region of €4.26 million.".

100. On its own evidence, there is clearly a financial interest for the Exchequer to introduce a scale of fees to cap the costs payable to successful applicants.

101. Bearing in mind that costs savings cannot be used to justify a scale of fees that is not compliant with the Aarhus Convention or EU law, the question is therefore whether the Minister will consider this financial impact more important than the public interest (s.294(3)(b) of the 2024 Act), the compliance with its international and European obligations (s. 294(3)(a)) or the interest of justice, access to justice, fairness of the proceedings and equity (s. 294(3)(c)).

102. In light of the above, the Law Society does not believe that the Minister will be able to confidently assert that the proposed scale of fees is fully in compliance with all those requirements set out in s.294(3) of the Act or Ireland's obligations under the Aarhus Convention.

The equilibrium of the Planning and Development Act 2024

103. During the discussions surrounding the adoption of the 2024 Act, the inclusion of the legal basis for the creation of a scale of fees was defended by the introduction of a financial assistance scheme for applicants to counterbalance undesirable effects of the scale of fees. Section 295 of the 2024 Act creates an environmental legal costs financial assistance mechanism to contribute to the legal costs incurred by applicants who do not succeed in obtaining relief in judicial review proceedings, or who succeed in obtaining such relief only in part. This provision has not been commenced.

104. We note that a similar mechanism for the provision of the financial assistance system is another point of contention remaining before the Aarhus Convention Compliance Committee in respect of England and Wales.

105. The McDaid Report notes that:

> "it is a policy matter whether section 295 is commenced at the same time as section 294 [on the Scale of Fees]. My understanding is that there is a policy decision not to commence Section 295 in the near future."

106. It appears to have been the intention of the legislature that both elements would be commenced at the same time, which makes it difficult to understand how the McDaid Report can refer to this as simply a "policy matter".

107. Nonetheless, a failure to introduce the environmental legal costs financial assistance mechanism in a timely manner seems likely to have a further chilling effect on the bringing of environmental judicial review cases by applicants. Winning applicants will have their recoverable costs capped (limiting the availability of lawyers who are willing to act for them as described above), and losing applicants will at the same time not be able to avail of a financial assistance mechanism.

108. The activation of the scale of fees without tempering the effect with the financial assistance scheme will accentuate the imbalance between the State and members of

the public. It also considerably limits the ability of the State to credibly assert that it is compliant with the requirements of Article 9 of the Aarhus Convention.

Question 2: Three levels of complexity have been proposed. Do you agree with this approach? Please explain the reasons for your answer.

109. No. We do not agree with the proposed approach. The three levels of complexity to be utilised as part of the proposed scale of fees rely on a mischaracterisation of the work involved in judicial review proceedings. The McDaid Report adopts an overly simplistic view and fails to recognise the degree of knowledge and specialisation required of legal practitioners in these cases.

110. A review of each stage of the proceedings as described in the McDaid Report shows that the work involved is severely underestimated or misrepresented.

111. **Part A (work done before the commencement of proceedings)** fails to recognise the level of client engagement required in commencing proceedings, including various meetings (in-person or remote), and obtaining expert report(s), within the time constraints imposed by the 8-week period in which to issue proceedings. This section also fails to acknowledge the degree of consideration that goes into commencing proceedings and the knowledge required to be in a position to identify points of law or procedural deficiencies in the decision-making process that would warrant judicial review. The current practice of the Planning and Environmental Court to limit the time for oral submissions ensures that applicants are 'running their best points', but this similarly places a higher burden on applicant solicitors to identify what these grounds are.

112. **Part B (from the commencement to the trial date)** does not acknowledge the volume of documents required to be reviewed in responding to a case, particularly in light of the duty of candour of public bodies. It is necessary for respondent solicitors to be across all relevant material. Additionally, Part B fails to acknowledge the volume of correspondence often required at this stage of proceedings relating to various issues including directions, costs, interlocutory applications and any other procedural matter. This also does not account for the 'for mentions' that require court attendances, including the callover of the hearing. No consideration is given to the number or complexity of various interlocutory applications that might be needed in a particular case. No consideration is given to the time required to review opposition papers of multiple parties (particularly in cases involving the State and Notice Party) and the consultations, preparation and work that goes into filing key documents such as replying to affidavits. Finally, Part B does not allow for the preparation of trial books, proposal and agreement of core books, drafting the Statement of Case and the time and outlay cost of printing books for solicitor, counsel and the court (if required).

113. **Part C (the hearing)** is perhaps the most simplistic. This gives no recognition to the preparation required for attending a court hearing. A solicitor, in accordance with their professional obligations, does not simply attend the hearing but will spend hours prior to the hearing ensuring that they are fully mastering the legal and factual arguments being advanced, as well as ensuring that the physical books are ready and that counsel can be assisted in navigating same. The physical attendance at court is usually not confined to the number of hours that the matter is for hearing but also involves waiting (sometimes for a full day) for the case to be called, further

consultation with counsel and often the client before, during and after hearing. It also fails to acknowledge that sometimes two solicitors may need to attend the hearing.

114. It is of concern that the McDaid Reports fails to recognise the work involved in settling proceedings. The ability to settle proceedings is an important tool to avoid social costs and further delays to be incurred. It requires significant legal expertise that is not acknowledged by the McDaid Report.

115. **Part D (CJEU reference)** needs to be read in light of the fact that if the court has identified a question of law that requires a reference to the CJEU, there is immediately a complex issue at play in which the legal practitioners need to be engaged. This adds to the complexity of drafting and settling submissions. A CJEU reference can also involve further written correspondence, for example, correspondence as to whether an oral hearing is required or whether a reference warrants prioritisation. Presentation of a case to the CJEU can also involve having to travel to Luxembourg on the day prior to a hearing as hearings are often listed early in the morning– this does not appear to have been considered, neither have the costs involved by such travels.

116. **Part E (matters arising subsequent to the trial hearing)** fails to consider the instructions required on cost orders, whether an appeal is warranted and/or will be sought and the legal drafting required in preparing a final order.

117. Considering that the three levels of complexity are partially based on a misrepresentation of the work undertaken by solicitors in environmental judicial review, we do not believe that the three levels of complexity accurately reflect the reality and extent of the work involved.

118. While we understand the appeal for being able to assign to every case a level of complexity, this is a simplistic artificial form of classification. While the legal complexity of a matter can be an indication of the time that will be required and ultimately the costs that will be incurred, other factors need to be considered when assigning level of complexity to a case. For example, from a number of cases being taken or defended by the same legal team may raise the same complex legal question. While each case would therefore be considered legally very complex, an overlap in resources could assist in mitigating the legal costs incurred. On the other hand, a legally standard case may require significantly more time in terms of practice management, if, for example, this involves a litigant in person, and this will not be accounted for in the proposed scale. It is current practice for example for the court to direct the party represented to prepare hearing books if the opposite side is a lay litigant.

119. As a matter of principle, the proposal to assign a complexity rating to every case is overly simplistic and unworkable.

Question 3: Do you agree with the proposed criteria that a presiding judge could take into account in determining the level of complexity? Please explain the reasons for your answer.

120. No. We do not agree with the proposed criteria. The criteria identified are similarly artificial but also do not seem to relate to legal complexity. For example, a standard case is one in which no ‘modularisation’ has occurred and a very complex case is one which involves ‘significant modularisation’. However, modularisation does not

inherently affect the legal complexity of a case. In practice, modularisation concerns usually specific grounds relating to the State respondents i.e. specific pleas as against a failure of transposition. In this scenario, the specific grounds would be adjourned to after the conclusion of the grounds pleaded as against the first named respondent. The modularisation itself may increase costs as it leads to two separate hearings being required to fully conclude the proceedings, but it does not alter the legal complexity of the case itself.

121. Additionally, a referral to the CJEU falling within 'complex' and 'very complex' is unclear and it is difficult to understand how a case cannot be immediately considered very complex where it identifies a question of law that has yet to be determined by the CJEU.

122. Interim or interlocutory relief can increase costs on the basis that these forms of reliefs can lead to significant additional procedural time and case management. For example, discovery can be an extremely time-consuming endeavour while interim motions for protective costs or cross-examination can be complex but also significantly time consuming, requiring legal submissions and a hearing. On the other hand, the seeking of interim or interlocutory relief does not necessarily mean that the substantive case itself is *legally* complex. However, the scale of complexity does not allow for the individual nature of each case and artificially treats all interim or interlocutory relief as equal. This is further evidence of the artificial and wholly unsustainable nature of this form of characterisation.

Question 4: Do you agree with the trigger points proposed to define where payment of a fee is determined? Please explain your answer.

123. No. We do not agree with the trigger points that have been proposed. The trigger points are not clearly defined in the consultation document.

124. It is clear that Part A costs are incurred immediately upon commencement of proceedings. Regarding Part B, it seems to be the proposal that Part B costs are only triggered once the statement of opposition is filed as "much of the 'heavy lifting' starts" once these are filed. This statement demonstrates the failure of the proposed scale of fees to understand the complexity of these legal challenges, the work that goes into them and how proceedings are run in practice.

125. The use of trigger points will impact on the willingness of applicants to settle proceedings between two trigger points as they will be fully liable for any costs incurred since the date of the last trigger point.

126. The work that is involved in filing a statement of opposition is significant and the idea that costs would not be triggered until after this is done is completely impractical. Additionally, the costs that can be incurred in deciding whether to defend a set of proceedings can be significant as this can require various consultations with a client, discussions with counsel, the taking of instructions and will still require detailed review of the underlying pleas as well as the documentation on the planning file, regardless of whether the proceedings are to be defended ultimately.

Question 5: Do you support the proposed level of fees to be paid in the case of a reference to the CJEU? Please explain the reasons for your answer.

McDaid Report's conclusion on the scale of fees

127. No, the scale of fees does not adequately address the costs which would be incurred by a reference to the CJEU.

128. The McDaid Report does not outline any rationale for proposing a scale of fees which the McDaid Report acknowledges is 'significantly less' than the typical costs of cases in environmental judicial review cases. The Report is silent on whom the burden of this shortfall is to be placed.

129. If it is assumed that the burden is to fall on lawyers, the proposals will likely result in those existing lawyers who act for applicants in environmental judicial review (and who have built up considerable expertise in the area) concluding that it is no longer economically viable to continue to work in this area of law.

130. On the other hand, if it is intended that the burden of the shortfall would be borne by applicants for judicial review, the shortfall is likely to be met by crowd-funding campaigns which appears to be the predominant method of addressing the shortfall in England and Wales. The legality of such third-party funding in this jurisdiction is questionable in light of the Supreme Court decision *in Persona Digital Telephony Limited and Another v. The Minister for Public Enterprise, Ireland and Others*[34]. There are also significant differences between the England and Wales and Irish jurisdictions in relation to the ability of litigants to adequately crowd-fund to meet the shortfall in costs. The greater population in the England and Wales, and extended environmental non-governmental organisations network and membership grant them a better ability to fundraise than has been historically the case in Ireland.

131. In any event costs must be non-prohibitive for each individual case and the system must provide alternative measures where the applicant faces actual financial barriers to taking meritorious cases.

132. The McDaid Report does not address the implications which will arise from the loss of 'no foal, no fee' or limited contingency fee arrangements, which the State itself acknowledges complies with Article 9(4) of the Aarhus Convention. There is no recognition within the McDaid Report of the significant benefits to society of such arrangements. These types of arrangements benefit society and the public interest by aiding access to justice for claimants with stateable claims seeking to ensure that decision-making in relation to environmental matters is made in accordance with the law.

133. In the view of the Law Society, the McDaid Report suffers from a lack of any evidence to justify its conclusions in relation to the proposed scale of fees. It appears simply to seek to copy what is in place in a neighbouring jurisdiction, without any evidence demonstrating that the scale of fees in that jurisdiction is compliant with the Aarhus Convention or making a comparison between the different legal frameworks. The Law Society would point out that England and Wales are no longer part of the European Union, and that in Ireland the Aarhus Convention remains "an integral part

[34] *Persona Digital Telephony Limited and Another v. The Minister for Public Enterprise, Ireland and Others* [2017] IESC 27

of the EU legal order", as reminded by the Luxembourg court in *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej Republiky*[35].

134. The Law Society believes that if the proposals, including the level of fees proposed for CJEU referrals, are implemented they are likely to result in multiple, multifaceted and likely multi-fora legal challenges. If this were to occur, the proposals would undermine the objectives of Government to accelerate infrastructure which is subject to legal challenge before the High Court. The Law Society notes the significant backlog created by the uncertainly surrounding legal costs in the series of cases which led to the Supreme Court decision in *Heather Hill*[36]. That Supreme Court decision provided a welcome certainty that will be erased by the introduction of the proposed scale of fees.

135. The Law Society reaffirms our serious reservations about the recommendations in the McDaid Report and our objection to introduction of a scale of fees.

Question 6: A breakdown of the fee that the solicitor and counsel would be entitled to are proposed for the various stages of the proceedings. Do you agree with this approach? Please explain the reasons for your answer.

136. No. We do not agree with the proposed approach.

Question 7: As an alternative approach to number 6 above, do you support a single payment of the combined fee to the solicitor and for the solicitor to make their own arrangements to pay supporting counsel? Please explain the reasons for your answer.

137. No. We do not agree with the proposed approach.

Question 8: Do you agree on the proposed level of fees proposed to support technical/expert advice? Please explain the reasons for your answer.

138. No. We do not agree. As recently reminded by Humphreys J. in three judgments dated 17 December 2025, the onus of proof in the context of a challenge to an environmental assessment is to be provided "by evidence (normally expert evidence), or by demonstrating a flaw on the face of material"[37]. This principle recognised earlier by the Supreme Court in *An Taisce v. An Bord Pleanála & Ors*[38] is a key factor in environmental judicial review.

139. Claims by applicants cannot be made in the abstract. In circumstances where the claims argued are factual, the opinion of an expert will be required by the court. The

[35] CJEU, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej Republiky,* Case C-240/09, 08 March 2021, para. 30.
[36] *Heather Hill Management Company CLG & McGoldrick v. An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43
[37] see *Wild Ireland Defence CLG v. An Coimisiún Pleanála & Ors [2025] IEHC 726*, para. 61(iv); *McGowan and Anor v. An Coimisiún Pleanála* [2025] IEHC 727, para. 50(iv); *Doyle v. Coimisiún Pleanála & Ors* [2025] IEHC 725, para. 46 (iv).
[38] *An Taisce v. An Bord Pleanála & Ors* [2022] IESC 8, Hogan J. para. 124 (O'Donnell C.J., Dunne, Charleton and Woulfe JJ. Concurring).

expert evidence will need to be acquired prior to the issuing of proceedings, i.e. within the 8 weeks period to issue proceedings, and available at hearing. This creates considerable logistical issues for applicants who are required to source available experts, brief them and obtain a report within 8 weeks. The particular expertise often required must be funded on commercial terms which imposes a significant upfront costs exposure for such applicants. The Law Society understands that this already has implications for certain applicants. The Law Society is aware that securing an expert report in these circumstances is a difficult task that will be rendered even more complicated, if not impossible, if the fees for experts are capped at a low level.

140. The McDaid Report does not properly address the requirement on the applicant to fund the provision of any expert report required by the court to support their claim. There is also no information in the Fieldfisher Report or elsewhere which reflects consideration having been given to the actual costs incurred by litigants on technical experts.

141. It should be noted that in criminal trials defendants and prosecution counsel often face significant issues in sourcing expert willing to work for the fees imposed by the legal aid scheme (where the amount payable is similar to the that proposed by the McDaid Report). This issue is also documented in the *Civil Legal Aid Review Report 2025* which recounts the difficulties faced by the Legal Aid Board in instructing experts for mandatory reports[39].

Question 9: Please provide submissions on any other aspect of this consultation with reasons for your proposal.

Non-binding Guidelines

142. In joint a submission with the Bar to the Indecon (Economic Evaluation Of Options To Control Litigation Costs), the Law Society advocated against the introduction of a scale of fees and suggested that consideration be given to the adoption of binding guidelines as proposed in the Kelly Report. The joint submission stated:

> "The introduction of non-binding guidelines could improve the certainty and transparency of the adjudication process, but with minimal legislative intervention.
>
> The introduction should be simple and straight forward and would not require any additional resources to implement. The guidelines should allow for flexibility to reflect the individual and exceptional circumstances which may arise at different stages of a particular case. The guidelines could consider prevailing economic conditions. In addition, depending on how the guidelines were set out, they could be weighted towards encouraging early settlement in cases so that there is no benefit in seeking defence from a defendant.
>
> The introduction of non-binding guidelines is also not without its disadvantages. Non-binding guidelines could lead to inequalities if they are not independently reviewed on a regular basis. Also, there is a wide range

[39] Civil Legal Aid Review 2025, Final Report and Recommendations to the Minister for Justice, April 2025, pp. XVII and 40, see recommendation 22 to review immediately the level of fees paid to experts.

> of litigation, and it would neither be desirable nor feasible to put in place guidelines of a type which would provide a simple, mathematical model designed to pre-determine the legal costs recoverable in every type of case.
>
> Ultimately, the Bar Council and the Law Society are of the view that if any mechanism were to be introduced that it should take the form of non-binding guidelines only, which should operate only as a starting point for the assessment of costs."[40]

143. This proposal is in line with the majority recommendation from the Kelly Report that states:

> "The majority favoured the drawing up of guidelines for the assistance of parties and their representatives, by reference to individual items that could be outlined in a table. The obligation to produce such guidelines could be achieved with minimal legislative intervention, with the function assigned either to the Legal Costs Adjudicators or the LSRA (with input from the former).
>
> The advantage of such a recommendation is that it would be simple and straightforward to introduce and would not require additional resources to implement. If the functions are carried out by the Adjudicators or the LSRA, it would not require the establishment of a new body at further cost (staff, members, etc.). The guidelines should be expressed by reference to the criteria established in Schedule 1 of the 2015 Act and the levels at which parties have either resolved or had adjudicated costs disputes. They should take into account the prevailing economic conditions and refer to the need to ensure no more than a reasonable level of remuneration on a party and party basis."[41]

144. More recently the EY Report presented a comparative study analysing the two proposed models: non-binding guidelines, and table of maximum costs (i.e. scale of fees). After their review of 10 objectives/criteria such as "provides fair and equal access to justice", "allows for the length and complexity of a case or "takes into account general economic conditions", the Report concluded that non-binding guidelines are more favourable and in-line with the majority recommendation from the Kelly Report[42].

145. The Law Society is of the view that if any mechanism to reduce legal costs in environmental judicial reviews was to be introduced it should be in the form of non-binding guidelines. Such an approach presents a considerable number of advantages over caps on costs, including being in compliance with the Aarhus Convention.

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[40] Submission to Indecon Economic Consultants Economic Evaluation of Options to Control Litigation Costs, The Bar of Ireland and the Law Society of Ireland, 21 February 2022, pp.16-17
[41] Kelly Report, p.322.
[42] EY Report, p. 8.

Internal Appeal

146. The present consultation is part of a larger plan to reform and improve the judicial system to facilitate the development of infrastructure in Ireland. The AIRAP provides the roadmap for the governmental actions to follow. The AIRAP articulates the roadmap around five pillars and thirty actions. The first action of the first pillar relates to the reform of judicial review. It plans for "a series of reforms to the judicial review process which will reduce the number of judicial reviews, improve the efficiency and timeliness of proceedings and reduce costs for all parties"[43]. The idea behind this action is to "better balance towards the common good" and reduce the "disproportionate reliance on the courts".

147. The AIRAP, and subsequent declarations from the Government, identify the "increasing number of judicial reviews" and their consequences as two major barriers to infrastructure development[44].

148. In addition to describing judicial review as a "bottleneck for progress" the AIRAP observes that:

> "While judicial reviews examine the lawful basis for a decision, there is no weighting of the impact that flaws in the decision-making process may have had versus the impact of a ruling quashing a decision. In practical terms this means that even minor errors can result in multi-year delays to projects and the consequent direct and indirect costs."[45]

149. In summary, if a party wishes to challenge a decision their only option is to seek judicial review. A question that arises is whether any consideration has been given to exploring the possibility of alternative forms of challenge so as to reduce the number of judicial reviews and to achieve that outcome, without restricting access to judicial review by introducing financial hardship for applicants?

150. The Law Society encourages the State to consider international best practices in this area and in particular a system of administrative/ex-gratia appeal[46].

[43] Accelerating Infrastructure Report and Action Plan, p. 14.
[44] Ibid p. 5 and 26.
[45] Ibid, p. 26.
[46] The *recours gracieux* in the French system allows applicant to call on the state body, that has made a decision they wish to challenge, to review their decision. This internal appeal is not mandatory or a preliminary step for judicial review of the decision. In the Swedish system members of the public may appeal acts and decisions by public authorities in environmental matters to a superior administrative authority or to a court free of charge. Moreover, the person seeking administrative or judicial review of the case does not risk paying the costs for the public authority or the operator of the activity in case the appeal is lost.

151. Consideration should be given to introducing a similar system in Ireland while preserving the right to seek access to court. Such system could potentially offer a fast and cost-effective way to allow State bodies to review their decisions without depriving applicants of the right to bring judicial review if the internal appeal does not yield a fair outcome.

Conclusion

152. The Law Society believes that access to justice remains a core democratic principle in any reasonable society and that a robust planning process is good for everyone. While judicial review is an essential part of the justice system and one of the direct manifestations of the right to access to courts, it has a significant importance in environmental matters. When used appropriately, judicial review serves a valuable role in ensuring accountability within the decision-making processes of public and private bodies. It is important that any changes that may be introduced to the legal system and judicial review process are fair, balanced and proportionate.

153. In these circumstances the Law Society strongly opposes the proposed introduction of a scale of fees.

154. The Law Society appreciates the opportunity to provide submissions to the Department of Climate, Energy and Environment. The Law Society remains available to assist the Department. For further information on any aspect of this submission, please contact the Policy Department of the Law Society of Ireland at: PolicyTeam@LawSociety.ie

Annex - About the Law Society

1. The Law Society of Ireland is the educational, representative and professional body of the solicitors' profession in Ireland.

2. The Law Society's main statutory functions in relation to the education, admission, enrolment, and discipline of the solicitors' profession are provided by the *Solicitors Acts 1954 to 2015*. These statutory functions are exercised by the Council of the Law Society or by the various committees, task forces and working groups to which the Council may delegate certain statutory functions. A separate organisation - the Legal Services Regulatory Authority - is responsible for regulating the provision of legal services by legal practitioners.

3. The Law Society delivers high-quality legal education and training and also places significant emphasis on civic engagement, supporting local community initiatives and driving diversity and inclusion. The Law Society is committed to participating in discussion and advocacy on the administration of justice and the effective implementation of public policy.

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