



# Law Society response to the Ministry of Justice call for evidence: Judicial Review and Nationally Significant Infrastructure Projects

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### Executive summary

Judicial review has a vital place in the UK's constitutional balance of powers. It encourages good governance, improves the quality of decision-making and promotes a culture of accountability that protects individual rights and is attractive to international business investment. A judicial review in the context of Nationally Significant Infrastructure Projects (NSIPs) does not consider the merits of the proposed infrastructure project, only whether the development consent order (DCO) has been made in accordance with the law. Any reforms must balance efficiency with maintaining access to justice.

The Law Society disagrees with the recommendations made to raise the permission threshold and reduce the number of permission stages to one. With regards to removing only the paper application stage, we consider that further analysis of the cost implications is needed before committing to reform. We also do not consider that introducing a specialist NSIP ticket in the High Court would produce a material benefit but could in fact increase delays.

In principle, we agree that there are some benefits to designating DCO challenges as 'significant planning court claims', utilising case management conferences, and to introducing target timescales and key performance indicators.

The Law Society also recommends the following options for reform that were not considered by the independent review:

- **Sustainable funding for the justice system** to rebuild the court system and ensure it can provide timely justice.
- **Encourage engagement with the pre-action protocol**, including considering introducing flexibility to extend time limits to pursue early settlement.
- **Strengthen the duty of candour** to further enable full engagement with the pre-action protocol stage and encourage settlement.
- **Encourage concession at permission stage** where it is clear the permission threshold is met to remove one unnecessary source of delay.

## Introduction

1. The Law Society is the independent professional body for solicitors in England and Wales. We are run by our members, and our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard access to justice and the rule of law.
2. We welcome this [call for evidence](#) in response to the recommendations made in [Lord Banner KC's independent review](#) (the Review) into legal challenges against Nationally Significant Infrastructure Projects (NSIPs).
3. The Law Society further welcomes the Government's commitment to maintaining access to justice, consistent with the UK's international and domestic legal obligations.<sup>1</sup> We note the Government recently consulted on access to justice in relation to the Aarhus Convention. As we said in response to that consultation, ensuring access to justice and compliance with international obligations is vital when considering reforms to judicial review, as is maintaining the role of judicial review in upholding the rule of law.

## The case for intervention

4. The previous Government commissioned this review based on concerns that "potentially inappropriate" legal challenges were delaying the delivery of NSIPs and, given their national significance, harming the public interest.<sup>2</sup>
5. **The Law Society agrees with the Review and the Government that the term "inappropriate" legal challenge is unhelpful.**<sup>3</sup> Legal challenges against decisions to grant or refuse Development Consent Orders (DCOs) are brought as judicial review, which is an essential mechanism for holding government to account and ensuring public bodies follow the law.<sup>4</sup> It does not consider the merits of the planned infrastructure project, only that the DCO has been made in accordance with the law.
6. Judicial review is a vital means for individuals, businesses and organisations to test the lawfulness of decisions and actions by public bodies, enforce their rights, and seek a remedy where the law has been breached. It is a fundamental part of the UK's constitutional system of checks and balances, providing a public service for individuals to challenge state power and ensure that government and public bodies act within the laws made by parliament.
7. The Law Society appreciates the need for growth and ability to deliver this through critical infrastructure projects. All aspects of the growth agenda benefit from access to justice and rule of law as key enablers. They are also core to maintaining public confidence in the delivery of new policy objectives.

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<sup>1</sup> Ministry of Justice, *Judicial Review and Nationally Significant Infrastructure Projects A call for evidence on the recommendations of the independent review by Lord Banner KC* (28 October 2024), p.5

<sup>2</sup> Lord Banner KC, *Independent review into legal challenges against Nationally Significant Infrastructure Projects* (28 October 2024), para.3 and Appendix 1

<sup>3</sup> *Ibid.*, para.25

<sup>4</sup> Planning Act 2008, s.118

8. Legal challenges to DCOs raise crucial issues on both sides of the case, as well as for the wider public interest. On one hand there is the interest in ensuring proper processes are followed to provide certainty for those engaged in and affected by important infrastructure projects, and in ensuring the public benefit that can result from these projects is not delayed. On the other, as acknowledged in the Review, DCOs can involve compulsory acquisition of land and rights,<sup>5</sup> meaning there are fundamental rights at stake with potentially severe consequences for a claimant. It is therefore critical to all involved that judicial review of decisions to grant or refuse DCOs is available, to ensure this power is not arbitrarily or unlawfully used. While pursuing certainty through ensuring swift administration of justice is worthwhile, any reforms must balance efficiency with maintaining access to justice.
9. **The Law Society agrees with the Review's finding, supported in the Government's call for evidence, that there is no case for changing the rules on cost caps to reduce the number of challenges to NSIPs.**<sup>6</sup> As we submitted to the Ministry of Justice's recent consultation on access to justice and the Aarhus Convention, we support improving the UK's compliance with the Convention to ensure access to justice for environmental claims.
10. **The Law Society also agrees with the Review's finding, supported in the Government's call for evidence, that there is no case for amending the rules on standing to reduce the number of challenges to NSIPs.**<sup>7</sup> We consider imposing a more stringent test for standing would unjustifiably restrict access to justice and weaken the effectiveness of judicial review as a means of holding public bodies to account.
11. The Review did not involve public consultation, and we embrace this call for evidence as an important step in broadening the evidence base on the issues. **We encourage the Government to engage with a diverse range of perspectives, and to keep in mind the importance of judicial review as a vital means for individuals, businesses and organisations to access justice.**

## Reducing the number of permission attempts

12. **The Law Society does not agree with the recommendation to reduce the number of permission attempts to only one (an oral permission hearing in the High Court with no right of appeal). In respect of the recommendation to reduce the number of permission attempts to two by removing the papers application stage (retaining an oral permission hearing in the High Court and a further attempt at Court of Appeal), we consider that further analysis of the cost implications of doing so is first needed.**
13. The permission stage is an important part of judicial review which protects court resources by ensuring cases that are improperly brought or with little chance of success are filtered out at an early stage. However, by its nature, the permission stage is not equivalent to a full hearing and so there is a risk that too stringent an approach would prevent access to justice for even meritorious cases. It is crucial that

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<sup>5</sup> Banner (n 2), para.67

<sup>6</sup> Banner (n 2), Recommendation 1; Ministry of Justice (n 1), p.13

<sup>7</sup> Banner (n 2), Recommendation 2; Ministry of Justice (n 1), p.14

the permission stage is not misused in a way that would undermine either the utility of judicial review as a mechanism for accountability or the UK's obligations under the Aarhus Convention by placing undue barriers to accessing justice.

14. We note that challenges against NSIPs concern only a small number of cases, so there is only a narrow range of data available. However, the data presented in the Review shows that, of cases appealed to the Court of Appeal for permission, around half (five out of nine) were successful.<sup>8</sup> That such a significant proportion of cases were granted permission in later attempts indicates that these additional attempts are necessary, as without them those five challenges would not have been heard.
15. Before making a decision on removing only the papers application stage, more analysis is needed on the costs implications of proceeding straight to an oral permission hearing. The experience of our members is that making permission decisions on the papers saves costs and resource for both parties and the courts. In contrast, the preparation required for an oral hearing can be extensive, and there are additional costs to attending a hearing. These costs would be borne by both parties but are potentially more of a risk to claimants. It is possible that the certainty of higher costs – especially so early in the case, before permission is even granted – could discourage a claimant to the extent that it raises concerns for access to justice. Requiring oral hearings for all permission applications may also lengthen these proceedings. Evidence of all these complex factors should be carefully gathered and weighed before making a decision.
16. **We note a comment made in the Review that the Government Legal Department (GLD) should more seriously consider conceding permission where it is clear that the threshold is met<sup>9</sup> and believe this should be taken on board by the Government.** Conceding permission does not amount to an acceptance or concession as to the likelihood of the case's success – meaning there is no repercussion for the substantive hearing or overall outcome – but would be a pragmatic step to speeding up some cases by removing one source of delay. This would not require amendment through either legislation or the Civil Procedure Rules (CPR) but rather is about a change of culture within the GLD and Government itself.

## Raising the permission threshold

17. **The Law Society does not support the recommendation in relation to raising the permission threshold and reiterates our points made above on the importance of ensuring that the permission stage of judicial review is not misused to create undue barriers to accessing justice.** We agree with the Government's assessment that raising the threshold would both unduly restrict access to justice and create a tiered system of access to justice between areas of judicial review.<sup>10</sup>
18. As well as ensuring accountability and access to justice, a strong system of judicial review is vital for encouraging good governance so that unlawful action does not occur in the first place, thereby reducing the need for legal challenges. There is a

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<sup>8</sup> Banner (n 2), para.33, 71

<sup>9</sup> Banner (n 2), para.76

<sup>10</sup> Ministry of Justice (n 1), p.16

risk that raising the threshold may perversely encourage risk-taking in DCO applications and decision-making.

19. The Law Society agrees with the practical arguments raised in the Review<sup>11</sup> and noted in the call for evidence document<sup>12</sup> that a higher threshold will require a more intensive review of the merits of the case. This will impede the efficacy and speed of the permission stage and could create a duplication of effort whereby preparation and consideration of evidence will require a similar level of time and effort as a full hearing.
20. We note that no formulation for a higher definition has been proposed to enable an assessment of the exact impact but highlight that introducing a higher threshold will require judicial interpretation of how this is applied in practice. Not only would this cause uncertainty for both claimants and defendants but it would probably also increase cases in the short or medium term, encouraging appeals against refusal of permission.

## Specialist NSIP judges in the High Court

21. We note that the Review concluded that the case for introducing a specialist NSIP ticket in the Planning Court has not been substantiated,<sup>13</sup> as was accepted in the call for evidence document.<sup>14</sup> **We do not believe that introducing a specialist NSIP ticket in the Planning Court would produce a material benefit but could in fact increase delays.**
22. While concerns were expressed in the Review over the judicial expertise needed to decide cases concerning NSIPs, it does not seem likely that this recommendation would produce material benefit as challenges to DCO decisions are already in practice treated as ‘significant planning court claims’, meaning that a Planning Liaison Judge ensures it is allocated to a judge with sufficient expertise.
23. Additionally, there is a risk that narrowing the pool of judges could restrict the judiciary’s ability to manage case allocation and scheduling. Contrary to the government’s aims, this could cause delays in cases progressing as there would simply be fewer judges available who can hear challenges against DCOs.

## ‘Significant planning court claim’ designation

24. **In principle, we believe that there may be some benefits to designating DCO claims as ‘significant planning court claims’, but the government should also look at why existing timelines are not always being met.**
25. Given that all DCO judicial reviews have so far been treated as ‘significant planning court claims’, formalising this within the CPR would not mark a departure from current practice. It is therefore not clear that it would, on its own, have a significant impact on reducing delays. While all DCO judicial reviews have been deemed

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<sup>11</sup> Banner (n 2), para.80

<sup>12</sup> Ministry of Justice (n 1), p.16

<sup>13</sup> Banner (n 2), Recommendation 5

<sup>14</sup> Ministry of Justice (n 1), p.17

significant planning court claims, therefore making them subject to the timelines provided in CPR Practice Direction 54D paragraph 3.4, the Review highlighted that there are challenges in meeting these timelines.<sup>15</sup> To properly address delays, it is important to first understand why these timelines are not being met, including looking at resourcing issues. We encourage the government to engage with the judiciary to better understand the challenges they face in this area.

26. While we have some doubt that formally designating DCO judicial reviews as significant planning court claims would, on its own, significantly reduce delays, there may be some benefit to the recommendation in providing clarity to both parties from the outset that the case will be subject to the timelines in CPR Practice Direction 54D paragraph 3.4. This could in turn better enable both parties to prepare accordingly so that the case progresses as smoothly and swiftly as possible.

## Pre-permission case management conferences

- 27. The Law Society agrees in principle that early case management conferences can be helpful in encouraging parties to narrow the issues and streamline the progress of judicial review claims challenging DCOs. However, as stated above, we do not support reducing the number of permission attempts and so do not agree that the paper permission stage should be replaced with a pre-permission case management conference.**

28. We consider that any requirements for the parties to engage in case management conferencing should streamline rather than complicate the process. There may be a risk of duplicating the standard directions given by the court after permission to apply for judicial review of DCO decisions has been granted and so we encourage thought to be given to this.

29. We also encourage further consideration of the additional cost that case management conferences may incur and whether this would create any barriers to accessing justice.

## Introducing target timescales

- 30. The Law Society supports in principle the Review's recommendations that the Civil Procedure Rules Committee (CPRC) and the President of the Supreme Court should be invited to consider introducing target timescales in the Court of Appeal and the Supreme Court.**

31. The Review found "broad consensus" among stakeholders that lack of certainty around turnaround times in the Court of Appeal was a problem, given the variation in how long appeals are taking to progress.<sup>16</sup> The reasons behind these variations were not made clear and **we agree the Government needs to understand the reasons behind current turnaround times to properly consider whether this reform would be appropriate.**<sup>17</sup>

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<sup>15</sup> Banner (n 2), paras.41-47

<sup>16</sup> Banner (n 2), para.110

<sup>17</sup> Ministry of Justice (n 1), p.21

32. We agree setting target timescales could help make turnaround times for appeals more predictable, which would be helpful for all parties with an interest in the outcome. We also see how defined timescales could help reduce turnaround times for applications for permission to appeal and substantive appeals.
33. However, this is a matter for the CPRC and the President of the Supreme Court to consider, and whether the timescales proposed are realistic will be contingent on sufficient resourcing. The timescales the Review suggested for the Court of Appeal would be a significant reduction from the average turnaround times it reported. For example, the Review suggested that applications for permission to appeal should be determined within 4 weeks, having found the Court of Appeal has taken on average 11 weeks to determine an application for permission to appeal since 2020.<sup>18</sup>
- 34. In the context of finite resources, this reform would require those resources to be reallocated, with impacts on the courts' other work. This is an important consideration that must be carefully evaluated before any measures are taken. **The Government must ensure the justice system is properly and sustainably resourced to ensure it can function efficiently and deliver these outcomes.****

## Performance indicators

- 35. The Law Society supports in principle the Review's recommendation of inviting the Planning Court and Court of Appeal to regularly publish data on judicial reviews of NSIPs.**
36. We agree that more accessible, regularly updated data on how long judicial review claims against DCOs are taking to proceed through the courts would create more certainty for claimants deciding whether to pursue claims as well as defendants and parties with an interest in the outcome. This would also be a helpful source of evidence for the Government and stakeholders to monitor the effectiveness of any reforms.
- 37. However, we reiterate the need for increased investment in the justice system to ensure it can meet the additional burden of collecting and publishing this data.**

## Other options for reform

38. The Law Society considers that the following options for reform which were not identified as recommendations by the Review would be beneficial in ensuring the swift progression and resolution of DCO judicial reviews, while also strengthening access to justice and the effectiveness of judicial review.

### *Sustainable funding for the justice system*

39. The Law Society has previously welcomed the additional funding announced in the Autumn Budget for prisons, probation services and the Criminal Prosecution Service. We also welcome the recent announcements of a plan for raising criminal

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<sup>18</sup> Banner (n 2), para.45

legal aid rates and creating extra sitting days in the Crown Courts as a step in the right direction and a demonstrable commitment from the Government to rebuilding the justice system. However, rebuilding the justice system to ensure it can provide the vital public service needed will not be possible unless there is sustained investment in all parts of it.

40. The Lady Chief Justice, Dame Sue Carr, recently spoke to the Commons Justice Committee of her priority to improve the timeliness of justice. However, she gave a stark warning of the obstacles courts face to achieving this, including “increasing backlogs, underfunding and staffing issues in both the courts and tribunals, crumbling buildings and serious security incidents” – all of which cause delays.<sup>19</sup> The Lady Chief Justice had earlier warned of around 100 unplanned court closures every week.<sup>20</sup>

**41. Funding for the Planning Court or wider justice system was not within the terms of reference for the Review. However, if the government is serious in its commitment to tackling backlogs and delays then it is unavoidable that this must be accompanied by sustained investment if it is to achieve its aims.**

#### *Pre-action protocol stage*

42. The pre-action protocol stage is a particular strength of the judicial review process as it encourages early resolution without the need to resort to a full legal challenge. The government could consider measures which would encourage consistent and constructive engagement with this process by both parties to a case.
43. A particular challenge for judicial reviews brought within planning law is the six-week time limit, which is shorter than the three-month time limit in other areas of judicial review. This shorter time limit has been justified by the greater need for certainty and, in planning law, solicitors generally accept this need. However, they express difficulties in meeting the six-week deadline. They report that the shorter limit often means attempts at settlement cannot be meaningfully engaged in and that this leads to a greater number of claims proceeding to court.
- 44. As the six-week deadline is a statutory time limit, set by section 118 of the Planning Act 2008, the time limit cannot be extended by the courts. We therefore suggest that greater flexibility should be considered to allow the extension of time limits where necessary and justified to enable further negotiation before a claim is filed. This could encourage settlement, therefore saving the time and resources of parties and the court. Further representations on this should be sought from those who act for both claimant and defendants.**

#### *Duty of candour*

- 45. To further enable effective engagement with the pre-action protocol stage, options for strengthening the duty of candour should be considered.** Not only does this ensure equality of arms but this duty also guarantees full and timely disclosure of all relevant material held by defendants. In turn this enables claimants

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<sup>19</sup> Justice Committee, *Work of the Lady Chief Justice*, (HC 421) page 4. Available at: <https://committees.parliament.uk/oralevidence/15056/pdf/>

<sup>20</sup> Justice Committee, *Work of the Lady Chief Justice*, (HC 466) page 17. Available at: <https://committees.parliament.uk/oralevidence/14108/pdf/>

to make an informed evaluation of the merits of a case and a decision as to whether to proceed with litigation. This could therefore again encourage settlement, or withdrawal, of cases rather than costly and time-consuming litigation.

*Encouraging concession at permission stage*

46. As mentioned above, **we suggest that consideration should be given to the point made within the Review that the GLD should more seriously consider conceding permission where it is clear the threshold is met.**<sup>21</sup> Doing so would not amount to an acceptance or concession as to the likelihood of the case's success - meaning there is no repercussion for the substantive hearing or overall outcome - but would be a pragmatic step to speeding up some cases by removing a source of delay. This would not require amendment through either legislation or the CPR but rather is about a change of culture within the GLD and Government itself.

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<sup>21</sup> Banner (n 2), para.76