Independent review into legal challenges against nationally significant infrastructure projects - A call for evidence
Response from Wildlife & Countryside Link

Introduction

1. Wildlife and Countryside Link ('**Link**') is the largest environment and wildlife coalition in England, bringing together 86 organisations to use their strong joint voice for the protection of nature. Our members campaign to conserve and protect landscapes, wild animals, plants, habitats, the climate, and rivers and seas. For many years, Link's Legal Strategy Group has focused on the importance and application of environmental rights, with particular emphasis on access to environmental justice and judicial review ('**JR'**). We frequently respond to relevant consultation exercises. Our members also pursue JRs, mostly in their own right but occasionally jointly or even through Link itself. This has included legal challenges to decisions concerning applications for development consent orders ('**DCOs**') for nationally significant infrastructure projects ('**NSIPs**'). Such challenges are brought as a last resort when all other processes have failed.
2. Link welcomes the opportunity to respond to this call for evidence. This response draws and builds on our submission of 18 April 2024 to Lord Banner's review. It also draws from our response of 5th December 2024 to the separate call for evidence on access to justice in relation to the Aarhus Convention.

The case for intervention

Question 1: Do you have any comments regarding the Review's methodology or its findings?

3. Our main comments on the case for intervention are in response to question 2 below. Otherwise, our comments on the methodology and findings are as follows.
4. **Not a public consultation**: Lord Banner's review was not a public consultation. Lord Banner spoke to a selected range of stakeholders which will have had an impact on the review's finding and, consequently, the parameters of this public consultation. We would query whether this complies with the public participation provisions of the Aarhus Convention (or at the very least, with good practice).

5. **Costs and standing**[1]: Lord Banner found no case for weakening claimants' ability to obtain costs protection, or for narrowing the class of potential claimants that would have standing to challenge a DCO decision. He made recommendations to this effect which the government accepted, meaning no evidence is sought on these topics. We welcome this.
6. **Inappropriate legal challenges**[2]: The previous government's desire to define and address so-called "inappropriate" legal challenges was the sole driver for this review. Despite this, both Lord Banner and the current government reject the concept as being unhelpful and misleading. We welcome this.
7. **Causes of legal challenges**[3]: Given the previous government's perception that some challenges were being brought inappropriately, Lord Banner was asked to explore why they were being brought. Whilst he did not consider it necessary to do this, given he rejected the premise of an inappropriate challenge, he did set out some points on the topic. These largely summarised and reflected, without comment, what the various stakeholders had told Lord Banner. On this, we say the views of those on the claimant side, on why they brought their challenges, is more insightful. Whilst it is interesting to hear the speculations of those on the promotor side, that is all they are.
8. Also on this topic, Lord Banner did pass comment on one of the points he listed. He said:

   > "…there was a widespread feeling that Claimants are seeking to re-argue the merits of DCOs in the Courts, notwithstanding the frequent exhortations from the bench to the contrary. Having reviewed the various grounds of claim in many of the DCO cases, I tend to agree that often challenges to the planning decisions and merits have been dressed up as rationality challenges."

   On this, we are not told which and how many cases were reviewed, which grounds appeared to be merits challenges, and what proportion these were of the total. So we cannot tell how significant Lord Banner thought the problem was, or whether we agree with his thinking. And Lord Banner is open that this is his opinion based on a reading of grounds of claim, as opposed to, for example, trends emerging from judgments. Ultimately judges can refuse permission for merits challenges that are disguised as legal arguments. Given 80% of legal challenges have been granted permission (see below), our view is that this is not an issue that should trouble the government.
9. **Statistics on challenges to DCOs**[4]: We agree that the sample of JRs of DCO decisions is very small, and we note no expert statistical analysis has been carried out[5]. The Review identifies four successful challenges to grants of DCOs. However, by widening the net to challenges to DCO grants

[1] Review, paragraphs 59 to 64.
[2] See "Getting Great Britain building again: Speeding up infrastructure delivery"; Lord Banner's terms of reference; Lord Banner's Review at paragraphs 25 to 30; and the Call for Evidence at page 9.
[3] Review, paragraph 31.
[4] Review, paragraphs 32 to 34 and Call for evidence, page 4.
[5] Review, paragraph 8 (Lord Banner did not consider these caveats affected his overall conclusions: para. 11).

and refusals, the number rises to seven[6]. Whilst either approach can be justified by the Review's terms of reference, this shows differing approaches can produce differing headline statistics, which are then liable to be taken out of context and misunderstood[7].

10. The Review goes on to analyse the number of claims where permission to proceed to a full hearing has been granted:

    "…overall, of the 27 claims so far which have had some form of permission decision (bearing in mind this is a moving picture), 19 (c.70%) were ultimately granted permission to proceed on at least some grounds, and 8 (c.30 %) did not obtain permission to proceed at all."

    The figures do not appear to be accurate. It appears to us that, at that point in time, **20 (77%)** were ultimately granted permission to proceed on at least some grounds, and **6 (23 %)** did not obtain permission to proceed at all[8]. And were you to widen the net to claims against DCO grants *and refusals*, then the figures change again to **24 (80%)** and **6 (20%)** respectively.
11. The statistics do not therefore show any systemic issue on the claimant side. Around 80% of DCO decisions are not challenged at all. Of the few that are challenged, 80% involve arguable errors of law. Only one challenge involved a finding that a ground was totally without merit, and that was only for some of the grounds, with other grounds granted permission[9].
12. Nor do the case studies identified in the Get Britain Building report identify any systemic issue. In that report the previous government referred to only four challenges in its case for reform. We note that one of those (Pearce) was in fact successful and proceeded through the courts relatively swiftly. To have avoided even that short delay, the solution would have been to have avoided falling into legal error in the first place. Whilst the remaining three were ultimately dismissed, that in itself cannot establish a case for reform. Two of these (SASES and SEASS) were granted permission to proceed by the High Court and were subsequently granted permission to appeal by the Court of Appeal. They clearly had substance, even if ultimately unsuccessful. Whilst the remaining challenge (TAN1) was refused permission to proceed, it related to one decision out of 135 to date, or 0.7% of the total.

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[6] As the Review notes at paragraph 32, there had been four challenges to DCO *refusals*. All were granted permission to apply, and three were ultimately successful in demonstrating a legal error (Aquind, EFW Group and Halite Energy Group) with the remaining claim (Myndd Y Gwynt) being dismissed.

[7] The Call for evidence, for example, states that only four JRs "against DCO decisions" have been successful - the correct figure is seven.

[8] This is based on our reading of paragraph 33 and its footnotes, which suggests: 20 claims were granted permission to apply either by the High Court or Court of Appeal (An Taisce, Boswell 1(1), Boswell 1(2), Boswell 1(3), ClientEarth, CPRE, Dawes 1, Dawes 2, FCC Environment, John Mars Jones, Mair Bain 1, Mair Bain 2, Mayor of London, Pearce, SASES, Scarisbrick, SEASS, Stonehenge 1, Stonehenge 2 and TASC); and six did not obtain permission (Associated British Ports, Biofuelwatch, Gate, TAN 1, Thames Blue Green London Plan and Williams). We have not included Boswell 2 as that was awaiting a oral permission hearing, so it was not known at that stage whether permission was refused.

[9] TASC

13. **Number of challenges brought**[10]: In support of his conclusion that there is a case for streamlining the JR process Lord Banner notes that DCO challenges have become more prevalent in recent years, setting the data out in a table for the years 2008 to present. Whilst the number of challenges has increased slightly (noting the small sample size), it is important context that the number of DCO decisions has risen in recent years[11]. With that increase you would expect, all other things being equal, an increased number or challenges. This does not, therefore, point to a change in approach to DCO litigation by claimants.
14. **Impact of legal challenges on NSIP projects**[12]: Under this heading Lord Banner summarises six broad themes which emerged from his review. All six reflect negative impacts and, without seeing the underlying evidence, it is not possible to comment on them. We return to the question of impacts in response to question 2 below.

Question 2: Do you agree with the Review's conclusion that there is a case for streamlining the process for judicial reviews of DCO decisions? Please provide evidence, where available, to support your answer.

15. We support any streamlining that does not restrict access to justice. This includes, for example, the proposals for case management conferences and target timescales. Faster disposal of cases, if done fairly, benefits everyone.
16. We do not agree a case has been made (e.g. in the form of quantifiable evidence, statistical analysis, reports, case studies etc) for measures that would restrict access to justice. In particular, no case has been made to reduce the number of permission attempts or raise the permission threshold.

<u>Public interest in speeding up delivery of major infrastructure</u>

17. We recognise the benefits of appropriate major infrastructure development and support in particular expeditious rollout of infrastructure necessary for the decarbonisation of the UK economy, in a manner consistent with the urgent need to restore and protect nature. Decarbonisation needs to happen at speed, and major infrastructure will play a central role. Not all NSIPs are equal in this respect, however. Some will undermine carbon targets and lock in

[10] Review, paragraph 58 and Fig 1.
[11] For example the Get Britain Building report stated that "Since 2020, there has been a 40% increase in the number of major infrastructure projects going through the NSIP system, compared to the number between 2016-2019".
[12] Review, paragraphs 48 to 55.

decades of emissions, such as expanded airports, large road schemes and power stations that burn gas or forests. In other words, it is not enough to point to the need to rapidly decarbonise when making a case for streamlining the NSIP process, given NSIPs can just as easily be part of the problem in the absence of strong overarching policy.

18. On this, it is worth noting the context in which recent NSIP applications have been considered and decided. In 2019 Parliament declared a climate emergency and enacted the 2050 net zero target, in order to align domestic targets with the Paris Agreement. In December 2020 the government announced the UK's nationally determined contribution ('**NDC**') – to reduce emissions by 68% by 2030. In June 2021 Parliament set the Sixth Carbon Budget, requiring a cut in emissions by 78% by 2035. In December 2021 the UK and other countries adopted the Glasgow Climate Pact, which recognised the need for accelerated action. In October 2024 the UK announced its new NDC - to reduce emissions by 81% by 2035.
19. Throughout this period the Climate Change Committee ('**CCC**') was clear that planning policy needs radical reform to support net zero, and that the planning system must have an overarching requirement that all planning decisions be taken giving full regard to the imperative of net zero[13]. All of this reflected the urgent need for radical action to reduce emissions, now and in the coming decades.
20. Meanwhile a significant and rising number of NSIP proposals were coming through the pipeline. Many had sizable GHG impacts associated with them, and proposed lifespans stretching decades into the future. There was (and still is) concern over: (a) locking in high-carbon projects that might undermine the new targets set by Parliament and the government, (b) the outdated national policy statements ('**NPSs**'), which did not reflect the current targets, and (c) the environmental impact assessment process, which, as it had been interpreted by some developers and decision-makers prior to the recent *Finch* ruling[14], unlawfully failed to account for the full climate impacts of high-carbon projects. This combination of factors made it highly likely that important issues would be left to the courts to resolve. This is regrettable – the better course would have been for government to fill the policy vacuum identified by the CCC. As Holgate J (as he was then) noted in ClientEarth's Drax DCO challenge, for example, that claim raised important issues about the interpretation of the NPSs, designated in 2011, and their legal effect in determining the DCO application, particularly as regards greenhouse gas emissions[15].
21. As to the biodiversity crisis, the 2023 State of Nature Report reveals that the UK has seen significant loss of its plants, animals and fungi[16]. Across the UK species studied have declined on average by

[13] Recently stated, for example, in the Committee's "2023 Progress Report to Parliament".
[14] R.(Finch) v Surrey CC [2024] UKSC 20.
[15] R(ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 1303 (Admin) at [3].
[16] The Report can be found here

19% since 1970, with nearly one in six species threatened with extinction from Great Britain. Since 1970, more than half of our flowering plants, mosses and their relatives have been lost from areas where they used to thrive. Pollinators such as bees, hoverflies and moths, have decreased by 18% on average, whilst predatory insects, like the 2-spot Ladybird which help control crop pests, have declined by more than a third (34%). As a result of these and many other declines, the UK is now one of the most nature-depleted countries on Earth.

22. The government should clarify national policy to ensure that the tests for whether a project is compatible with climate and nature targets are robust and easily interpreted.

<u>The constitutional right of access to the courts, and its wider societal benefits</u>

23. The right to access to justice is an inevitable consequence of the rule of law and is a fundamental principle in any democratic society. The right means not merely theoretical but effective access in reality. Impediments can constitute a serious hindrance, even if they do not make access completely impossible.[17] The right is not restricted to the ability to bring claims which are successful. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication.[18]
24. In *R (UNISON) v Lord Chancellor*[19], Lord Reed gave a powerful exposition as to why access to the courts was a core element of the rule of law, and why being able to bring a claim and have it determined was of a broader societal benefit than merely to the parties involves, holding:

> "*68. At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other[…].*

[17] R(HL) SSHSC [2023] EWHC 866 (Admin) at [135] and [138]
[18] R(Unison) v Lord Chancellor [2017] UKSC 51 at [29].
[19] Ibid.

69. Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance […]

70. Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless. […]

71. But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations […].

25. Turning to the Get Britain Building report, to Lord Banner's terms of reference for his Review and the Review itself, these all focus on arguments for streamlining the NSIP process. Whilst mention is made of the need to maintain access to justice, there is no acknowledgment that doing this would bring the wider benefits set out above. JR is an essential foundation of the rule of law and the final mechanism for civil society to challenge potentially unlawful decisions affecting the environment and achieve a remedy in the courts. DCO cases are inherently in the public interest. The claimant rarely has any personal financial interest in the outcome of the case and does not stand to profit from winning – it is the environment and, therefore, society as a whole that stands to benefit (or lose) from the outcome of an environmental case, be that a clarification on a point of law, the protection of biodiversity, adherence to environmental standards or holding decision makers accountable and thereby increasing public buy-in. In light of the climate and biodiversity crises, there has rarely been a more important time for environmental cases to be heard by the courts, yet this is a time when the right of access (and the rule of law more generally) is under significant threat[20].

<u>Other ways to reduce legal challenges without impeding the right of access to justice</u>

26. As has already been noted, fewer DCO decisions would have been challenged had the government grappled with difficult questions, such as on climate and nature protection, through strong policy and other general measures. This is recognised in the Get Britain Building report, which states (with emphasis added):

[20] See Link's response to the Call for evidence on access to justice under the Aarhus Convention, dated 6 December 2024 (link here).

- "We will complete the review of key National Policy Statements (NPS) by March 2024 […] **More clarity will** improve legal certainty and **reduce the scope for legal challenge**"
- "[We will] Launch revised guidance covering the preparation of applications, on proportionate and effective engagement and consultation, and clarifying the NSIP process. **This will lead to** better applications from the outset, **a reduced risk of** uncertainty and delay due to **legal challenge** […]"
- "We will extend the critical national priority designation for more nationally significant low carbon infrastructure: […] **More certainty will [reduce]** ambiguity that can lead to **potential legal challenge**"
- "We will explore reform of the way consultation works to provide greater certainty, reduce delays, and deliver value for the taxpayer. […] **Done well it can** improve public acceptance, **reduce the risk of subsequent legal challenge**". It should also be noted that greater strategic planning for major infrastructure, which ensures the avoidance of protected sites from the start, would also reduce legal challenges.

Conclusions

27. No case (let alone a cogent one) has been made for measures that would unduly restrict access to justice.
28. The central premise that resulted in the Review - that NSIP delays are being caused by inappropriate legal challenges - has been rejected.
29. The statistics and case studies do not support a case for reform. Whilst there has been a slight rise in challenges in recent years (noting the small sample size) that is explained by the corresponding rise in DCO decisions. In fact, only 20% of DCO decisions have faced legal challenge. And of those a very high proportion - 80% - were arguable cases which the claimants had a right to present for adjudication.
30. DCO challenges are brought to defend nature and the environment in the public interest, and in the exercise of constitutional rights that are central to the rule of law in a democratic society. The claims, even if unsuccessful, bring wider societal benefits.
31. Fewer DCO decisions would have been challenged had the government grappled with difficult questions on climate and nature protection, and effective public participation, through strong policy and other general measures. That frontloading did not happen, leaving important questions, including questions of law, to be resolved in individual NSIP decisions, under the supervisory jurisdiction of the courts.
32. Looking forwards, more resourcing and capacity building is needed for the NSIP process as a whole. Improving the quality of decision making, and the policy context in which it takes place, will reduce the need for legal challenge without impeding access to justice.

Reducing the number of permission attempts

Question 3: Do you agree with the Review that the number of permission attempts should be reduced for judicial review of DCO decisions? If so, should this be reduced to two (maintaining the right of appeal) or just one?

33. We do not agree with this recommendation. It would unduly restrict access to justice for claimants and no case for change has been made out.

Question 4: If you agree that the number of permission attempts should be reduced for judicial review of DCO decisions, do you think that this change should also be applied to judicial review of other planning decisions?

34. Not applicable.

Question 5: What would be the impact on access to justice if the number of permission attempts were reduced, either for just DCO judicial reviews or wider categories of judicial review?

35. This would unduly restrict access to justice for claimants and risk putting the UK in breach of the Aarhus Convention.
36. Lord Banner was right to refer to the *Finch* case as an illustration of mistakes being made by judges when deciding permission applications[21]. That risk will increase with each permission attempt that is removed, at the expense of the claimants and their right of access to justice in circumstances where no case for change has been made out.
37. There are also costs implications for claimants.
38. Firstly, an initial permission decision 'on the papers' gives claimants early certainty over their potential costs exposure. In their acknowledgments of service defendants may challenge whether a claim is an Aarhus Convention claim, and hence whether the costs limits apply. They may also apply to vary the default costs limits, or remove them entirely. In either case the court must

[21] Review, paragraph 71. In the *Finch* litigation, the claimant had to exhaust all three bites of the cherry before it was even accepted that she had an arguable case. Her case then progressed to the Supreme Court which allowed her allowed her claim.

determine the issue at the earliest opportunity[22]. In practice this happens when the court decides the permission application on the papers. Disposing of the paper permission stage, and hence delaying these costs decisions to a case management conference would disproportionately prejudice claimants. Defendants or interested parties, who might otherwise have accepted an Aarhus costs direction made on the papers, may become more inclined towards contesting the issues, creating costly satellite litigation that would use up court time. Certainty from the outset, at a stage where costs incurred by the parties will be relatively low, is crucial for claimants.

39. Secondly, currently defendants and interested parties are not required to attend JR permission hearings and, on that basis, are not usually awarded attendance costs even if successful[23]. The proposals in the Review to remove the paper permission stage and add two case management conferences will change this dynamic. Defendants and claimants will be required to incur more costs at the permission stage, and will likely seek to recover that from claimants, as happens in court procedures for other types of planning decision[24].
40. The Aarhus Convention is important in relation to these matters. The Convention provides safeguards for environmental cases to ensure that certain minimum standards apply to them. Article 9(4) of the Convention requires Parties to ensure that the legal review mechanisms referred to in Articles 9(1), (2) and (3) provide adequate and effective remedies (including injunctive relief as appropriate) and are "fair, equitable, timely and not prohibitively expensive".
41. If the review were to recommend that NSIP cases (all of which qualify as Aarhus cases) should be subject to reduced number of opportunities for claimants to seek permission – this would ultimately be unfair to environmental claimants (as opposed to JR claimants generally) and represent a breach of the Article 9(4) requirement for fairness. As noted by the Compliance Committee in the Findings and Recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the UK, the concept of "fairness" in Article 9(4), refers to what is fair for the claimant, not the defendant (see paragraph 135 of the Findings).
42. On this issue, we do not agree with Lord Banner's analysis of the legal position, set out at paragraph 69 of his report.

[22] CPR 46.28.
[23] CPR 54A PD para 7.4 and 7.5.
[24] See, for example, rules for recovering attendance costs under section 289 Town and Country Planning Act 1990, set out in the case of Rozhon v Secretary of State for Wales [1993] 4 WLUK 188.

Raising the permission threshold

Question 6: Do you think the CPRC should be invited to amend the CPR to raise the permission threshold for judicial review claims challenging DCOs?

43. No. We note that Lord Banner did not conclude that there was a case for raising the permission threshold, only that there 'may' be such a case.
44. The right of access to justice is not restricted to the ability to bring claims which are successful. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication.[25]
45. Our points on the Aarhus Convention, responding to question 3 above, apply equally to this question.

Question 7: What, if any, are the potential benefits of raising the permission threshold for judicial review claims challenging DCOs?

46. It is unclear what difference that would make in practice. There do not appear to have been many cases which meet the higher threshold but not the lower one.

Question 8: What, if any, are the potential impacts on access to justice of raising the threshold for judicial review claims challenging DCOs?

47. For the reasons above, this would unduly restrict access to justice for claimants and risk putting the UK in breach of the Aarhus Convention. It also risks an inefficient frontloading of the process by turning permission hearings into mini trials. This would be necessary for judges to properly understand the issues and documents and what, if any, evidential gaps there may be that might later be plugged by the defendant's detailed grounds and supporting evidence.

[25] R(Unison) v Lord Chancellor [2017] UKSC 51 at [29].

Specialist NSIP judges in the High Court

Question 9: What, in your view, are the potential benefits of introducing an NSIP ticket which would restrict the ability to hear judicial review cases concerning DCO decisions to a small specialist pool of judges (four to six judges)?

48. Not applicable. We do not support this suggestion.

Question 10: What would be the impact on the operation of the Planning Court if an NSIP ticket were to be introduced?

49. The pool of judges should be widened, not narrowed. That would be the most effective way to speed up cases. It would also allow for a diversity of perspectives, which is to be encouraged. Conversely, A narrower pool of specialist judges risks 'groupthink', which would undermine good decision-making and access to justice. A small pool of judges hearing the same type of cases risks bias (whether conscious or unconscious) and breaches of natural justice. It's unlikely that the same judge hearing the same point of law is going to reach a different conclusion.

'Significant planning court claim' designation

Question 11: Do you agree with the Review that the CPRC should be invited to amend the CPR so that DCO judicial reviews are automatically deemed Significant Planning Court Claims?

50. Yes.

Question 12: The report states that in practice all DCO judicial reviews are treated as Significant Planning Court Claims. What would be the benefit of formalising this existing practice? In particular, how would this change help to reduce delays or the impact of delays?

51. It would ensure all DCO cases are treated as significant. Otherwise we defer to the judiciary and court officials on how this might help reduce delays or the impact of delays.

Pre-permission case management conferences

Question 13: Do you agree with the Review that the CPRC should be invited to consider amending the CPR to introduce automatic case management conferences in judicial review claims challenging DCOs? If so, do you agree that case management conferences should be convened in the way suggested by the Review, including the requirement for pre- permission case management conferences and further case management discussion once permission for judicial review or permission to appeal has been granted?

52. We note that case management conferences ('**CMSs**') have been helpful in civil law proceedings and could usefully be incorporated to set the timetable in relation to (at least) the date of substantive hearings.
53. The Review suggests a pre-permission CMC on the basis the paper permission stage will be removed. We do not agree that it should be removed, for the reasons set out under question 3 above. We would not object to a CMC following the grant of permission on the papers, or immediately following a renewal hearing at which permission is granted.
54. In relation to any such CMC:
    - We agree with the Review's recommendations aimed at ensuring flexibly, such that at least one counsel on each side is able to attend rather than a substitute[26]. Claimants would suffer much more than defendant government departments were any new system to increase the risk of parties having to instruct alternative counsel (in some cases it could even make a challenge prohibitively expensive). Such an imbalance would be contrary to the overriding objective which includes, so far as practicable, "ensuring that the parties are on an equal footing and can participate fully in proceedings".
    - We agree with Lord Banner[27] that it would be sensible for Government Legal Department lawyers to be encouraged to be more prepared to suggest to their clients that permission be conceded in cases where the claim plainly meets the threshold for permission. As Lord Banner notes, conceding the grant of permission does not amount to any concession as to the prospects or strength of the case to be considered at a substantive hearing. It is simply a pragmatic action which cuts out the delay caused by the permission stage in cases which are obviously going to pass through that stage. We welcome this being included on the default CMC agenda.

[26] Review, paragraph 103.
[27] Review, paragraph 76.

- We agree with the Review's suggestion that earlier consideration of disclosure could have a streamlining effect. We welcome this being included on the default agenda.
- Aarhus costs limits should not be on the default agenda. Any challenges to whether the Convention applies, or applications to vary or remove the default limits, should be dealt with instead at the court's earliest convenience, that is, earlier on in the process and on the papers. This provides early certainty to all parties, who should not be encouraged at CMCs to pursue satellite litigation on matters such as this. If defendants wish to apply at later stages to vary the limits, there is already provision for that[28]. And the representatives of all parties already have an ongoing duty not to mislead the court. Given this, there is no need for Aarhus questions to be continually revisited throughout the life of a case.
- To the extent any given CMC does considers Aarhus matters, it should be in private if it involves confidential information, such as information about a party's finances[29].

Question 14: What, in your view, are the factors leading to the length of time currently taken by the Court of Appeal and the Supreme Court to determine an application for permission to appeal and to deliver a judgment on that appeal with regards to judicial review claims against DCO decisions?

55. We agree this is a significant issue (which undermines any simplistic pointing of the finger at DCO claimants as the cause of project delays). We note for example that the Supreme Court took a year to give judgment in *Finch*. and the Court of Appeal judgments routinely take many months.
56. We have no inside knowledge on why this is happening, but presume it is caused by limits on judicial and court resources.

Question 15: Do you agree with the Review that the 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, respectively?

57. Yes. Targets will aid transparency and have the potential to speed up the litigation process, assuming the court system is sufficiently resourced,.

Question 16: What would be the impact on the operation of the appellate courts if the target timescales proposed by the Review were to be introduced?

[28] CPR 46.27(6).
[29] CPR 39.2(3)(c).

58. We do not comment on this.

Performance indicators

Question 17: Do you agree with the Review that the Planning Court and the Court of Appeal should be invited to publish regular data on key performance indicators as outlined in the report? Please provide any evidence of likely benefits and potential costs, where available, to support your answer.

59. Yes. This information will be of value to court users and the wider public.
60. Whilst the Ministry of Justice ('**MoJ**') publishes some date about JRs at first instance in its Quarterly Statistics, these are not granular. In Link's response to the Aarhus Call for Evidence[30], we raised concerns regarding the MoJ's decision to stop collecting data on Aarhus claims. Our concern is that unless the MoJ has a separate system for monitoring DCO cases, it will have no way of knowing if any of these proposed reforms are effective, because the MoJ's IT system now apparently precludes them from collecting data on environmental cases.
61. We do, however, note that this may cause the courts to incur costs, and as such would recommend that this is accounted for through adequate resourcing so as to avoid undermining the courts' functioning.

Other options for reform

Question 18: Are there any other potential changes to the judicial review process which could help reduce judicial review related delays to the delivery of NSIPs that have not been considered by the Review?

62. **More funding for the justice system**: The justice system should be more adequately resourced. This will speed up the administration and determination of cases. It may also address the problem of recruiting leading planning and infrastructure practitioners to a career change to the High Court[31]. There would be no adverse implications for access to justice.
63. **Encourage defendants to concede permission in appropriate cases**: Defendants should be penalised by costs orders for unreasonably resisting applications for permission to apply in cases/grounds that, in the court's view, obviously will pass through that stage. This will streamline cases and reduce costs. There would be no implications for access to justice.

[30] See paragraph 17 to 19 of Link's response to that call for evidence.
[31] Review, paragraph 86.

64. **Extend limitation periods**: Legal challenges relating to DCOs must be brought within six weeks of the impugned decision. This limit is set by section 118 of the Planning Act 2008. Because set by statute, the time limit cannot be extended by the courts. Similar six-week challenge periods apply to other planning-related decisions. The limitation period for other public law challenges, outside the planning sector, is three months, together with an obligation on claimants to issue claims 'promptly' within that period. Link continues to express concerns about the adverse implications of the extremely short limitation period in planning JRs in which claimants must seek legal representation, be advised as to whether they have grounds for JR, prepare to issue and fundraise for a case. In addition to this, it is not unknown for the defendant to seek an extension to the normal 14-day period given for responding to the Pre-Action Protocol (**PAP**) letter. All of this combines to make the limitation period extremely challenging for claimants and it is possible that some planning JRs are issued as a precautionary measure (sometimes necessarily before the defendant has responded to the PAP letter). Link recommends the reinstatement of the three-month limitation period in planning JRs on the basis that the full PAP could be undertaken and for it to fulfil its purpose of weeding out/resolving some potentially weaker grounds.
65. **Codify the duty of candour:** The requirement to provide all relevant information and facts to the Court and to the other parties to the claim (the duty of candour) applies to all litigants in JR. However, Link is concerned that there is an increasing tendency for defendants to provide disclosure at late stages of the JR process, which can prolong cases beyond their natural life.
66. As Fordham J has recently held, if documents matter, they should be provided, and if they matter prior to or at the permission stage, that is when they should be provided[32]. There is a clear benefit to defendants complying with their duty of candour at early stages as opposed to "drip feeding" documents throughout the proceedings. The timely provision of key documents may lead to an early resolution of the case. Link suggests that it may be helpful to codify the position on the duty of candour in light of recent caselaw.

Question 19: What are the likely benefits of the proposed change(s)?

67. As above, the potential benefits of the proposed changes include the streamlining and speeding up cases, a reduction in costs, and resolving the shortfall of judges.

[32] *R (Police Superintendents' Association) v Police Remuneration Review Body and Secretary of State for the Home Department* [2023] EWHC 1838 (Admin) at [17-18]. See also *R (Abdul Aziz Jalil) v Secretary of State for Justice* [2020] EWHC 1151 (Admin).

Question 20: What are the implications for access to justice arising from the proposed change(s)?

68. The proposed changes would not restrict access to justice. To the contrary, they would help speed up DCO cases whilst protecting this important constitutional right and all the wider societal benefits it brings.

For questions or further information please contact:
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The following organisations have inputted into this briefing:

- Friends of the Earth England, Wales and Northern Ireland

The following organisations have signed onto this breifing:

Friends of the Earth England, Wales and Northern Ireland
RSPB
The Wildlife Trusts
CPRE, the countryside charity
Woodland Trust
Bat Conservation Trust
Seal Research Trust
Whale & Dolphin Conservation
River Action
Open Spaces Society

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