Bar Council response to HM Government's Call for Evidence in relation to the Independent Review into Legal Challenge against Nationally Significant Infrastructure Projects

This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Government's Call for Evidence ('the Call for Evidence') following the Independent Review carried out by Lord Banner into Legal Challenge against Nationally Significant Infrastructure Projects ('the Banner Review').[1]

The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct

- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas
- To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

[1] Call for Evidence

Introduction & Executive Summary

1. The Bar Council is very grateful for the additional time allowed for the submission of its response and trusts the below is helpful.

2. The Bar Council can confirm it has seen the responses from the relevant Specialist Bar Associations to these proposals i.e. the Planning & Environmental Bar Association ('PEBA) as well as that of National Infrastructure Planning Association ('NIPA') and United Kingdom Environmental Law Association ('UKELA'). To the extent that the matters raised by the Call for Evidence and indeed the Banner Review fall specifically within the expertise of barrister members of these bodies the Bar Council would defer to these members' expertise. As such the Bar Council has limited its response to those questions which it considers raise wider questions of access to justice and rule of law such as implications of raising the threshold for permission stage. In particular the Bar Council does not consider it can provide helpful responses to the questions raised relating to the potential introduction of automatic case management conferences; Court performance reforms, such as target timescales and performance indicators; and specialist NSIP judges. The Bar Council considers these matters are properly within the purview of the Planning Court and Court of Appeal as well as their administrator themselves or are best addressed by more specialist bodies such as those referred to above.

3. The Call for Evidence sets out the ten recommendations from the Banner Review and seeks views on most of Lord Banner's recommendations save for Recommendation 1: *For so long as the UK remains a member of the Aarhus Convention, there is no case for amending the rules in relation to cost caps in order to reduce the number of challenges to NSIPs* and Recommendation 2: *There is no convincing case for amending the rules in relation to standing to reduce the number of challenges to NSIPs.*

4. With regard to the former, the Bar Council is aware of the recent Government consultation exercise on the role of costs protection in respect of Aarhus Convention environmental judicial review claims which as the Bar Council understands received responses from specialist bodies involved in such claims which the Government will no doubt be guided by.

5. In addition, with regard to standing, the Bar Council notes the recognition given at page 14 of the Call for Evidence to the Independent Review of Administrative Law ('IRAL'), conducted in 2020 and 2021, and which, among other things, included a review of the question of standing in judicial review ('JR') claims generally. The Bar Council in its response to the call for evidence to IRAL set out why it saw no case for changing the rules on standing. In light of IRALs conclusion which concurred with that view, the Bar Council respectfully maintains its position.

6. The Bar Council notes at points that the Call for Evidence to the Banner Review also invites views on the implications of the Recommendations upon wider categories of judicial review and has sought to give its views.

7. The call for evidence asks 20 questions covering the case for intervention in NSIP related judicial review claims made pursuant to s118 of the Planning Act 2008 for reducing the number of permission attempts and raising the permission threshold; for specialist NSIP judges in the High Court; for making 'Significant planning court claim' designations for any NSIP JR and pre-permission case management conferences. As noted, there are then questions relating to potential Court performance reforms.

8. The case for intervention and the impetus for the Banner review is understood to be the previous Government's concern that NSIPs were being "*unduly held up by inappropriate legal challenges*" and that, if this was so correct, how the NSIP JR procedures might be improved to reduce delay to the progress of these important projects.

9. The Bar Council notes and supports the conclusion drawn by Lord Banner at [25] of his review that despite the request by the previous Government to do so *"it would be unhelpful to define what is an 'inappropriate' legal challenge or frame my recommendations by exclusive reference to this concept*". It further notes that the current Government also agrees with that conclusion of the Call for Evidence concluding it is a "*misleading concept"* given that "*if the court considers that a case should proceed"* at the permission stage a JR claim "*is, by definition, an appropriate challenge, regardless of whether the case is ultimately successful."*

10. Overall, the Bar Council agrees with the Government in its statement at [page 3] that any changes that it decides to make "*must strike the right balance between reducing delays to infrastructure projects and maintaining access to justice in line with our domestic and international legal obligations".*

Response:

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

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.

11. The Bar Council does not have any comments upon the Review's methodology.

12. With regard to the findings and in particular whether there is a case for streamlining the NSIP JR process, the Bar Council would defer to the direct expertise of those members of the Bar and practitioners in the field referred to above. Nevertheless, the Bar Council would make the point that one of the matters the IRAL panel was directed to consider was the case for streamlining judicial review process and to that extent the panel's recommendations still hold.

13. The Bar Council would also add that it is inevitable that the existence of a period after the decision within which a person with legal standing or interest) may challenge a decision granting permission for a development by way of JR will lead to a corresponding delay to the start of the that project given that (as noted by PEBA)

developers will not risk commencement until it is clear whether such a challenge will be made, and if made until it is finally determined. The Courts will either determine that the decision was lawfully made or not. The question at the heart of the Review and Call for Evidence appears to be whether NSIP decisions should be treated *differently* to other planning projects, such that the Court's decision in respect of an NSIP JR claim must be made more quickly than other JRs or that the legal basis for challenging a *grant* of a Development Consent Order (DCOs) for an NSIP is made more difficult. The time taken in respect of JR claims against decisions by the Secretary of State to *refuse* NSIP DCOs do not for obvious reason come under the same scrutiny as part of the review or give rise to the same concerns but would be subject to the same different bespoke process if introduced.

14. As set out below, the Bar Council, again subject to the views expressed by members with expertise in NSIPs and planning, is not convinced that a case has been made to treat decisions in favour or against such projects differently.

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?

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?

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?

15. As noted above the Bar Council is not convinced that the case has been made to treat challenges to NSIP decisions differently to other planning project decisions. Nevertheless, if the Government concludes that that case has been made, the Bar Council has considered the above questions on the basis of whether such a change to procedure would meet the Government's aims albeit subject to striking the right balance between reducing delays to infrastructure projects but also maintaining access to justice in line with domestic and international legal obligations as noted above and whether such a change would have wider implications.

16. The above three questions relate to Recommendation 3 of the Banner Review, namely to reduce the opportunities a claimant has to seek permission for its NSIP JR claim from three namely, a paper stage; a hearing stage on reapplication; and an appeal stage to the Court of Appeal) to two by removing the paper stage.

17. The Bar Council respectfully agrees with UKELA in its response to this proposal in that the reduction of the number of 'bites of the cherry' would only appear to achieve the desired reduction in time such claims take if it is assumed that it is unlikely that such claims obtain permission from a High Court judge on the papers. The Bar Council notes the careful analysis of the data at [33] of the Banner Review relating to the 30 NSIP JRs to

date and whilst it is correct that a good number of those claims (11) were refused permission at the paper stage, at least seven were granted permission on the papers and eight more proceeded directly to a hearing by direction of the Planning Court.

18. In the Bar Council's view (and in agreement with UKELAs response) the benefit of the paper stage to all parties as well as the administration of the Court is that it does not attract the considerable costs related to a hearing nor the allocation of the Court's time. These benefits would appear to be significant.

19. It is equally noted that Lord Banner's analysis at [33] concludes that around 70% of the NSIP JRs to date were ultimately granted permission to proceed on at least some grounds.

20. If there are presumptions to be drawn from this analysis it would appear to be that a very high proportion of such claims are legally arguable. That would tend to support the alternative proposal put forward by NIPA which is to remove the need for a permission stage at all from such claims and that instead they should proceed directly to a substantive hearing.

21. On balance, the Bar Council considers that if the permission stage is to remain for NSIP JRs the paper stage should also remain. Whilst NIPA's proposal is in their own words more radical, it does in the Bar Council's views appear to be fairer than the removal of the paper stage.

22. The disadvantage of removing the permission stage altogether is that it removes the filter for unarguable cases. The Bar Council would ask the Government to note that IRAL in its overall review of wider JR claims concluded that the permission stage *"was clearly a significant filter of judicial review claims"* [4.41 of the IRAL Report].

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

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

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

23. The Bar Council would repeat the above proviso about a case first needing to be made that NSIP JRs should be treated differently in the context of procedures. However, with regard to Lord Banner's recommendation 4, which is the subject of Q6-8 of the Call for Evidence, the Bar Council respectfully agrees with the Government's assessment of the potential for raising the threshold at permission stage for such claims. At page 16 of the Call for Evidence the Government states that "*in addition to the practical risks highlighted in the report, there is a more fundamental concern that raising the permission threshold in this way could unduly restrict the right of access to justice*". As such the Bar Council does not consider that such a change is justified and considers that it should not be pursued further.

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)?

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

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? Pre-permission case management conferences

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? Introducing target timescales

24. The Bar Council defers to the views of specialist practitioners and those of the Planning Court in respect of these questions.

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?

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?

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? Performance indicators

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. Other options for reform Judicial Review and Nationally Significant Infrastructure Projects

25. The Bar Council defers to the views of specialist practitioners and those of the Planning Court, the Court of Appeal and the Supreme Court in respect of the effective answers to these questions.

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?

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

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

26. The Bar Council defers to the views of specialist practitioners and those of the Planning Court in respect of effective answer to these questions.

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Bar Council

For further information please contact:
The General Council of the Bar of England and Wales
289-293 High Holborn, London, WC1V 7HZ