



Built Environment Committee

Uncorrected oral evidence: The impact of environmental regulations on development

Tuesday 18 April 2023

10.40 am

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Members present: Lord Moylan (The Chair); Lord Berkeley; Lord Best; Lord Carrington of Fulham; Baroness Eaton; Lord Faulkner of Worcester; Lord Goddard of Stockport;; Lord Mawson.

Evidence Session No. 8

Heard in Public

Questions 77 - 86

Witnesses

I: Heather Sargent, Landmark Chambers; Robbie Owen, Partner, Parliamentary Agent, Pinsent Masons.

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Examination of witnesses

Heather Sargent and Robbie Owen.

Q77 The Chair: Welcome to this meeting of the House of Lords Built Environment Committee and our evidence session as part of our inquiry into the impact of environmental regulations on development and on infrastructure. Our witnesses today are Heather Sargent from Landmark Chambers and Robbie Owen from Pinsent Masons. Please could members and witnesses keep questions and answers brief?

Our first question for you is from me. I am Daniel Moylan, and I will introduce the other members of the panel as we go through. To what extent has the legal complexity of infrastructure development and housebuilding increased in recent years? Has this led to extra cost and delay? Can you provide any examples? Unless there is a question specifically to one of you, it is very much between the two of you to decide who answers first, who answers second and so on.

Heather Sargent: Thank you. I will start. I will deal with housebuilding and Mr Owen will pick up on infrastructure.

I want to touch briefly on the three sets of environmental regulations that are the general ones in that they regulate a broad range of environmental effects and not specifically something like air quality. There are the strategic environmental assessment regulations—the SEA regulations; the environmental impact assessment regulations—the EIA regulations; and the habitats regulations. There have been no revisions to the text of the housebuilding regulations in recent years that I would say make their provisions significantly more complex.

What has continued is the process of the meaning and the effect of the regulations being clarified by the courts. There has been consistent litigation on those regulations since at least the mid to late 1990s, and important judgments have still been handed down in recent years. One would hope that the effect of the courts considering the regulations is to make matters less complex, because everyone then understands better what they need to do and what an environmental impact assessment has to cover if it is going to be robust and deter potential claimants from seeking to bring a legal challenge. Also, the courts have consistently emphasised that many of the questions involved in environmental assessment are for the judgment of the decision-maker, so the courts will not interfere with those judgments unless the decision-maker has acted irrationally.

I will give one example of a decision of the courts making the process more complex. It relates to the habitats regulations and to a case called *People Over Wind* from 2018, which was a judgment of the Court of Justice of the European Union. It had previously been well established in domestic law, including at the level of the Court of Appeal, that when you are applying the habitats regulations and you are looking at the initial screening stage—you have to decide whether the development is likely to

have a significant effect on a protected site—you could include in your assessment the mitigation measures that were proposed as part of the development. The European Court ruled in 2018 that you cannot take mitigation measures into account at the initial screening stage. The result of that is that many more housing developments now require a full appropriate assessment, which is the next substantive stage of the application of the habitats regulations.

That has led to at least some additional cost, because if a full assessment is required, that is more detailed ecological assessment. There is the potential for delay in housebuilding if ecological survey work can be undertaken only at particular times of the year. Then the difficulty is that once you are in the territory of requiring an appropriate assessment, it might not be possible to grant planning permission, because you will not be able to satisfy the requirements of the habitats regulations.

The other aspect of housebuilding that I will touch on again relates to the habitats regulations but to the way they operate in practice. There are three examples: water neutrality, nutrient neutrality and air quality. In short, the requirements of the habitats regulations have meant that in some areas of the country there have been moratoriums on development, including housebuilding, continuing. There is a repeated pattern with all three of those topics in that there is an ecological pathway between the development and protected sites either that people were in ignorance of or that factually just did not exist, and then that ecological connection comes to light. Often Natural England issues advice, saying essentially that you have to mitigate the effects, which requires a period, usually a couple of years, while everybody works to find a solution to it. I know that the Government, in the last 12 months in particular, have been focusing on nutrient neutrality.

I think those are the most obvious ways in which the main regulations have made housebuilding more complex from a legal perspective.

Robbie Owen: Good morning. Turning to infrastructure, despite most of the key legislation currently in force and applying to major infrastructure projects, particularly nationally significant infrastructure projects, being well used in practice and familiar to those working within the system and firmly established for the most part through the Planning Act 2008, which governs energy, transport, water, waste and wastewater projects, there is no doubt, in my view, that consenting infrastructure developments in England in particular have increased in complexity over time.

Examples of that increased complexity include having to prepare, submit and examine major project applications with significant policy shifts running in parallel. The introduction of the Environment Act 2021, nutrient neutrality for habitats regulations assessments, uncertainty that one will be successful in securing habitats regulations assessment derogations, changes in approach in case law relating to how one should assess options and alternatives, differing iterations of national policy statements, the whole shift in climate change policy and many other things have all added to complexity over the years.

What has particularly added to complexity and people having to cover off risk is the ageing suite of national policy statements that apply to a lot of the nationally significant energy, transport, water, waste and wastewater projects. The difficulty is that this complexity extends throughout all phases of the consenting process, from the very preliminary environmental information stage to consultation, application, examination and then decision.

Often the complexity arises out of a developer needing to take a very precautionary approach to responding to issues that arise. If an issue could give rise to a potentially successful legal challenge, developers will often seek to derisk that possibility by providing more information, more assessments, more verification by pursuing a change to the project. All this can be hugely resource-intensive for everybody, not just the developer but the Planning Inspectorate and the public. Often the developer feels that they have very little choice in the face of the risk of legal challenge but to pile on the detail.

There are some very good illustrations of this, such as the Government's own document, published only in February of this year, called the NSIP—the nationally significant infrastructure projects action plan. The Department for Levelling Up, Housing and Communities published that in February of this year and it refers to four metrics.

The first metric is that the average length of time to reach a decision on applications of projects and the timespan for development consent orders, which you get your permission through, increased by 65% between 2012 and 2021 from 2.6 years to 4.2 years. Deadline extensions to statutory stages of the planning process are most prominent in offshore wind and highway-related developments.

The second metric is that more projects need multiple extensions of time at the decision stage at the relevant government department. Out of a total of 118 decided projects since the Planning Act regime started in 2010, 12 have involved multiple extensions at decision stage, and five of those 12 were for projects decided in 2020 and 2021. You can see the trend there, which is concerning. This is generally due to complex issues related to the project remaining unresolved following the public examination stage and requiring, therefore, detailed consideration at the decision stage.

The third metric is the increase in the volume of documentation. The department says that some applications have generated more than 90,000 pages of documentation published on the Planning Inspectorate website. That can slow down the decision-making process, making it less accessible to those wanting to engage in it and it does not necessarily guarantee better outcomes.

The final and fourth metric is that the number of projects subject to successful legal challenge has also increased. Since 2021 there have been four successful challenges out of a total of 15 legal challenges since the

system started in 2010. All four of the legal challenges that led to consents being quashed occurred in 2021.

I think the Government's own figures support the proposition that the legal complexity of infrastructure development has undoubtedly increased in recent years.

The Chair: Neither of you has mentioned biodiversity net gain as an additional complexity. Is there a reason for that?

Robbie Owen: That is undoubtedly a growing factor for complexity. It is still very much in the early days of biodiversity net gain and, indeed, of the broader concept of environmental net gain. Certainly with infrastructure development the Government have said that they are not going to mandate biodiversity net gain until 2025, I believe. The difficulty, as you already know, is that going through public examinations of major infrastructure you are expected nevertheless, because of the overall direction, to try to achieve biodiversity net gain.

It is extremely difficult, when the policy tapestry is developing around you and behind you, to try to navigate through that. The experience of the planning process is that despite those requirements not yet being legally in force, developers are nevertheless put under a lot of expectation to do what they can, not just to achieve a neutral position but to try to achieve net gain where possible.

Heather Sargent: It is a similar position in the housebuilding world. The 10% requirement is not yet in force, but in most of the appeals that I have been at recently, the developer has been putting forward at least 10% in anticipation that it will be on the statute book soon. The difficulty in practical terms comes where you have, for example, a nutrient neutrality problem and you are attempting to mitigate that and then find your biodiversity net gain. Working out how those calculations fit together has been exercising people's thoughts, but from a legal perspective there has not been any particularly complex challenge yet. It seems that developers are just meeting the requirement before it is imposed on them.

Q78 **Lord Faulkner of Worcester:** I want to ask about the judicial review process, particularly what scope there is to challenge the environmental impacts of housing and major infrastructure projects through judicial review.

Robbie Owen: There is considerable scope to challenge the environmental impacts of major infrastructure through the judicial review process. The main areas of challenge are in relation to the environmental impact assessment and the habitats regulations assessment. Both those regimes cover wide subject matters involving the application of complex and sometimes competing sets of regulations and case law, and they can require a decision-maker to apply broad discretionary powers. Complex aspects of EIA and HRA on individual projects can also interface with

matters of wider law and policy—for example, government approaches to carbon reduction.

There are also many technical strict legal tests and steps that need to be met when consenting an infrastructure project—for example, satisfying ever more complex consultation requirements at various different stages, and if a change is made to the scheme or further environmental information is submitted. There are a large number of opportunities for interested parties to challenge an individual project, whether that is on an administrative or consultation flaw or on a point of wider policy.

Aspects of the environmental impact assessment and habitats regulations assessment that can be challenged include issues to do with scoping; whether you need an environmental impact assessment at all or the equivalent in habitats regulations assessment called the stage 1 assessment; whether the process that the developer embarked upon allowed for enough consultation; whether the sometimes competing legal regimes have been correctly applied—cultural heritage assessment has been a particular issue there in recent times; whether mitigation has been correctly considered, and, equally, compensation; as well as the whole issue of pursuing derogations, including the extent to which a derogation must be evidenced to be secured.

There are many more examples than that, but there is enormous scope for challenging the environmental impacts of major infrastructure projects through judicial review.

Heather Sargent: The position is not dramatically different for housebuilding. One cannot challenge the planning merits of a grant of planning permission. A straightforward disagreement with the decision-makers' exercise of their planning judgment is not a legitimate basis for challenge, but any grant of planning permission is open to an application for permission to bring a judicial review claim for a period of six weeks for planning claims. The court has the power to extend that period, and on very rare occasions it has done so even years after the grant of planning permission has been made.

The most obvious grounds for planning permission are to challenge for illegality, such as misinterpretation of one of the regulations or failing to take into account a material consideration; and irrationality, such as alleging that the decision-maker has acted in a way that no reasonable decision-maker would act, but that is a notoriously high threshold.

On the scope more generally, standing in judicial review used to be a more robust requirement than it is. It is not difficult to show that you have sufficient interest, particularly in the environmental context, given the public interest in environmental matters.

On challenging the grant of planning permission, you do not necessarily have to wait for the planning permission to be granted. You might be able to challenge a screening direction or some sort of former step in the EIA process. That happens.

The test for being given permission to proceed with your judicial review is just that you have an arguable claim, which is a very low threshold.

In general terms, it is not difficult to obtain permission. It is then more difficult to succeed at the substantive hearing, but the threshold is not very high for having your litigation and getting your day in court.

Most grants of planning permission for housing development are Aarhus convention claims, which means that the claimant can straightforwardly opt in to a cost-capping regime whereby, if they are an individual, they can be made to pay only £5,000 of costs if they lose. I do not have the statistics to hand, and I do not know if there are any, but my own experience is that that appears to have made it easier for claimants in environmental cases to access the courts, which is the point of the Aarhus convention.

The final point to mention is that in judicial review the remedies are always discretionary, so even if a claimant succeeds and it is found that the planning permission has been granted unlawfully, it is still for the court to decide whether overall it is right to quash the grant of planning permission and make the decision be taken again.

- Q79 **The Chair:** We have heard in earlier evidence that as many as 100 plans are required of local planning authorities, although not all of them. For example, there are marine plans, coastal plans and so forth that local authorities have to have. Is one of the bases on which judicial review proceeds playing off one plan against another: that this permission is consistent with this but has not taken account of some other plan in a different regard? One of the overarching regulations is the strategic environmental assessment regulations, but it seems to me that there is nothing strategic about this bringing it all together. Do we need a thorough overhaul of the system of plans?

Heather Sargent: It is conceivable that a claimant could argue that a neighbourhood plan, for example, does not satisfy the requirements for correlating against the local plan that the local planning authority has adopted. I have not seen those arguments run particularly frequently in practice. Again, there is usually an element of judgment in that the body that is adopting the plan has to be satisfied that it fits comfortably and appropriately with the other plans that the local planning authority has produced, which would make it more difficult to bring a challenge on the basis that there was an inconsistency. However, certainly if there was an oversight such as a failure to take into account relevant policies of any of the suite of plans, that would be a straightforward ground for judicial review.

The Chair: And on the question of an overhaul?

Heather Sargent: In my view, no. The system is set up sufficiently to ensure that there are statutory requirements and the plans should all work together in concert. The statutes are drafted so that it is clear which plans take precedence and how they are to relate to each other.

Robbie Owen: For infrastructure, the position is rather better and clearer. For most infrastructure, particularly that consented under the Planning Act 2008—the nationally significant projects in energy, transport, water, waste and wastepaper—the regime is that you have this network, this system, of national planning policy statements. They sit at the top of the policy tree, and decisions, with a few exceptions, must be taken on individual projects in accordance with and with reference to the relevant national policy statement, or policy statements in some cases. Other policy documents like marine plans can be what is referred to as important and relevant to the decision, and therefore should also be taken into account, but they are lower down in the pecking order. It is a clearer system.

The difficulty, however, is that national policy statements over recent years have become out of date, which is a large part of the reason for increases in judicial reviews, because policy is less clear. For example, the current national networks national policy statement, which Government are consulting on a refresh of, dates from 2015, which is before net zero and so on. Clearly it is way out of date, so if the national policy statements are kept up to date, that hierarchy is much clearer than perhaps it is in relation to other forms of development.

Q80 Lord Berkeley: This is a question for Mr Owen. He and I worked together, sometimes against each other, on different projects over the years.

My concern here is that, before you get to the JR stage, for major projects three different processes could be applied: hybrid Bill, transport and works order hearings, Planning Inspectorate, and things like that. I would like to hear your view about how the petitioners get a fair hearing and how the developers can still get their projects through if they can argue that it is the right thing to do. There is a case going on at the moment where a parish council in a hybrid Bill hearing is up against eight directors, including two King's Counsels. It is a frightening process to go through. How do the small people get a fair hearing without being able to block things for reasons that might be good or might be bad? Do you have a solution to it?

Robbie Owen: I think the hybrid Bill process, which has been around for many decades, is a necessary part of the overall toolkit for consenting big infrastructure projects and has been used to good effect on the Elizabeth Line in this capital city and early stages of HS2.

The process has been reformed in some respects in recent years. Until 2010 or so, there had been very little reform for decades. There have been two or three reforms since then that have improved the accessibility of the hybrid Bill process to petitioners, objectors; there is no doubt about that. But there is still much more than can and should be done to improve the process yet further. Some of the consultations that have been held to date have then been acted upon. For example, petitions can now be deposited electronically; you do not have to turn up with hard copies and that sort of thing. It has been modernised, which is very good.

Systems and other aspects of the petitioning process, like who has to be your agent, have been modernised as well, which is very welcome.

There are, however, some more fundamental elements of the process that Parliament needs to look at, and a number of papers have been put to officials, certainly by the body of which I am a member: the Society of Parliamentary Agents. The society has come up with some ideas for improving the accessibility of the system yet further—for example, assistance to be given to petitioners during the committee process, perhaps having a system like the one in Scotland for hybrid Bills where you have a reporter who conducts a preliminary hearing, which can all make the process a little less daunting for parish councils and the like. It is all very well for some petitioners who are able to afford to commission expert witnesses, KCs and everyone else, but certainly for parish councils and the like, coming down to London and appearing in a room like this can be daunting. Again, committees of this House and the other place have tried harder in recent years to make it less daunting, but more can be done.

Lord Berkeley: That is a very helpful response, but should some of these people be able to get some kind of legal aid to help them? The reporter, as you mentioned, is a very good start, but it is still quite traumatic for some people, and a bit of help with expenses even to get to London would be quite useful. Could you write in on that, or have you already done something?

The Chair: With every respect, Lord Berkeley, we are here to ask questions, not to provide the answers for the witnesses so that they can send them in, but the point about access is a very important one. Mr Owen, do you have anything else to say on that? By all means respond to the question about financial support.

Robbie Owen: On financial support, I can see a number of complexities in quite how you would set up the architecture of that regime and who would qualify and who would not. Others are far better qualified than I am to reach judgment on that, but certainly I can see how that might help some petitioners.

I would be delighted to put forward a few issues to do with further improvements to the process that I think this House would do well to consider. As I say, it is much improved. I believe it is an important process to retain. The hybrid Bill is a very effective process for getting consent for our very largest projects, typically railway schemes, and it needs to remain. But it needs to move with the times. I think I am right in saying that the last major review of the hybrid Bill process was in 1948. The reviews in this century that I mentioned have been very much around the edges. That is not to say that they were not welcome. They were very welcome, but they did not go into fundamental aspects.

The Chair: This is a good point for me to say to both witnesses, by the way, that if you have any supplementary evidence you want to give us in writing relating to our inquiry, you are very welcome to send it in over

the next few weeks.

- Q81 **Lord Best:** My question is about case law, which you will be great experts in. Am I right in thinking that case law takes some time? It is quite a slow-burn thing after a piece of legislation goes through. Is it then trumped by the next piece of legislation, in our case now the Environment Act 2021? Does that wipe out the decisions that have been taken through case law up to that point? Are we trumped each time by the next piece of legislation, or does case law survive?

Heather Sargent: If you were to word your legislation very specifically, you could trump previous case law, but what happens most often is that there is further case law exploring to what extent the old case law remains relevant in light of the new legislation. From this side of the table, that may be a happy perspective, I do not know. To everybody else it is probably very annoying.

On the environmental regulations—the habitats, EIA and SEA regulations—you are correct that there is a period where you work up a head of steam. There were many cases in the 1990s and noughties litigating fundamental principles of EIA. Once that has all been sorted out, you tend to spend more time discussing more niche issues, such as whether a particular category of development is within the regulations or not. In those categories, it is surprising how often we refer back to case law that is of some age now.

I would not say that it is constantly reinventing itself. It seems to me that with the environmental regulations, there is an initial period where you litigate over the fundamental principles of how you are supposed to be applying it and then you end up focusing on matters of detail a bit further down the line.

Robbie Owen: When the environmental impact assessment regime came in following the 1985 European Union directive, there was a whole spate of litigation for many years on how the whole system of environmental impact assessments and environmental statements should work. That then settled down, and I have little doubt that we will have the same with environmental outcome reports, if they proceed.

Case law can be helpful. It is certainly crucially relevant to progressing housing and infrastructure projects. If we look at the environmental impact assessment regime, there was a whole series of cases all to do with what we term the Rochdale envelope. The cases concerned a business park in the area of Rochdale council and how you assess, in EIA terms, the flexibility that a project clearly needs at the consenting stage. Very often, you have not done your detailed design, so you need in effect to undertake the environmental impact assessment within an envelope, within parameters. If the project moves to the left or the right or goes high or low on the ground, if it is a railway for example, you still have a compliant assessment. That series of cases helped to develop that whole approach in a very helpful way.

There was a case literally a few months ago in relation to Tewkesbury and the whole system of what we call salami slicing, which is the practice of chopping a project up into smaller projects so that you can avoid—that is some people’s motivation—undertaking an environmental impact assessment. The court in that case, which was about a bridge connected to a larger garden community project, gave very valuable guidance about what the rules were.

Case law can be enormously helpful. It is often seen as being unhelpful, but perhaps that is more the case with European Union case law compared with UK case law.

- Q82 The Chair:** This is a good point to ask—you may be aware that immediately following this session we have another session with the head of the Land and Environment Court of New South Wales, who is sitting immediately behind you now; welcome—whether we would benefit from having a distinct and specialist environment court?

Heather Sargent: In my view, we would. We already have the Planning Court. My concern is who would sit in that court and how we would ensure that we have sufficient members of the judiciary who focus on environmental matters, or would it be tribunal members? In principle, it would be beneficial. There are other legally complex areas, but the environmental regulation aspect of the planning system is legally complex, and it would be very beneficial to have a specialist court or tribunal that was tasked with dealing with those cases.

- Q83 Lord Mawson:** What is the influence of decisions made by the Court of Justice of the EU? How will the Retained EU Law (Revocation and Reform) Bill change this? As we take more control, can we improve on some of the EU legislation? If so, where and how, and can you give examples? Is it possible, in your experience?

Heather Sargent: On the influence of the European Court of Justice, prior to Brexit—just starting back a bit for context—member states would make a reference to the European Court for preliminary ruling, either on the validity of the directive or on its interpretation. Then the court would issue its preliminary ruling and that would be binding on all courts in all member states. That is why *People Over Wind*, although it was a reference from an Irish court, ended up having ramifications domestically here as well. European Court judgments were hugely influential on the interpretation of the EIA directive and the habitats directive in particular. I think it was slightly less so for the SEA directive, although that is a more recent piece of legislation.

At the moment, domestic courts can no longer make reference to the European Court for preliminary ruling. The Supreme Court is no longer bound by the European Court’s case law, although as things stand it is supposed to apply the same test that it applies for deciding when it wishes to depart from one of its own decisions. The Court of Appeal is also only bound now to a limited extent by retained European case law. The High Court is supposed to determine cases in accordance with

retained case law, but new case law that comes post the implementation period completion day is not binding, although the courts can have regard to it. That is where we stand at the moment.

The Bill maintains the position whereby it is only the Court of Appeal and the Supreme Court that has the discretion to depart from the retained case law. The proposal is to amend the test that the Court of Appeal and the Supreme Court are supposed to apply when considering whether to depart. At the moment, the Supreme Court would be asking itself whether it considers it right to do so, and the Bill is proposing a number of factors that the Court of Appeal and the Supreme Court would have to take into account. That is one change there.

There is also a proposal to enable the High Court and lower courts—courts below the Court of Appeal and the Supreme Court—to refer points of law on retained case law to the Court of Appeal or to the Supreme Court. I think the point is that because the higher courts are not bound, they are in a good position to assist the lower courts on points of law for retained case law. That, in a nutshell, is where we are on the application of the case law.

As to whether we could do better than the Court of Justice's case law, I think it depends on one's perspective. It is certainly obvious that the habitats directive and the habitats regulations in particular are very demanding. They are fatal to achieving planning permission for housing development. If you cannot satisfy the requirements of the directive and you do not have what is called an IROPI—imperative reasons of overriding public interest—argument to enable you to have your planning permission nevertheless, that is it; it is game over.

It appears to me that habitats protection sits at a slightly higher plane than, for example, cultural heritage, because you have the Planning (Listed Buildings and Conservation Areas) Act, which does not operate in that way. You have to give considerable importance and weight to the fact that, for example, you will have an impact on a grade 1 listed building, but it is not necessarily fatal to your prospects of having planning permission.

I think it depends on how important we consider the conservation of habitats and species to be and where we want to place those in the hierarchy of considerations, or whether we want to take the view that it should be something that factors into the planning balance in the way that listed buildings, conservation areas and everything else do.

Robbie Owen: What you just heard applies as equally to infrastructure as it does to housing. Although under the Brexit legislation the Court of Appeal and the Supreme Court have the power to depart from EU case law, to date they have signalled that that is a power that they are likely to exercise only in exceptional cases because of the uncertainty that overturning prior cases would give rise to.

I think we are facing a period of a degree of uncertainty despite that, not least given the current position of the retained EU law Bill in this House, the fate of which is currently unclear, not least in timing. It is also entirely possible that, under UK common law and domestic principles of interpretation, that could be used to fill some of the gaps, and of course our international obligations still remain in relation to important principles like the precautionary principle. It is a complex picture out there as to how the future may unfold.

Q84 Baroness Eaton: How does the environmental impact assessment process vary across different regimes?

Heather Sargent: I think the answer is that there are not vast differences. I will speak briefly about the main town and country planning environment EIA regime, and then Mr Owen can pick up on the infrastructure side of things. Those are the two sets of regulations that you find applied most often. There are others, whose names are familiar to me but I have never had to read them.

The town and country planning EIA regulations essentially operate as a prohibition on granting planning permission unless and until you have undertaken your environmental impact assessment. It applies only to what is termed EIA development—schedule 1 development or schedule 2 development—that is likely to have significant effects on the environment by virtue of factors such as nature, size and location. Housing development, if it comes in at all, comes in under schedule 2. Category 10b is for urban development projects, including anything that has a site area of over 5 hectares. More than 150 houses would be a schedule 2 development. Then you would look to assess whether it is likely to have significant effects, and if it did you would have to undertake your EIA.

An applicant for planning permission can opt in to EIA development by submitting an environmental statement. That way, they undertake the work but avoid any argument over whether they do or do not have to follow the environmental impact assessment regulations. Otherwise, an applicant can request a screening opinion from the local planning authority, giving its view on whether EIA is necessary. There is also a power for the Secretary of State to give a screening direction. An applicant can also ask for a scoping opinion to assist them in understanding the scope and the level of detail that the local planning authority or the decision-maker will want to see in the process.

In contrast to the habitats regulations, which are substantive and can bite so as to prevent you from having your planning permission, EIA is purely procedural. If you supply the requisite information and consult on it for the necessary period, and it is taken into account, you have satisfied the regulations. Even if the effects are significant and adverse, it will not prevent you from being given your planning permission if you can persuade the decision-maker that overall you should be given it.

Robbie Owen: EIA is entirely procedural, and the process is broadly similar whether looking at infrastructure or housing. You have the same

stages of screening, scoping, submission of the environmental statement, a decision from the relevant authority and then monitoring.

There are some technical differences between the different sets of regulations—for example, on consultation. That is a running theme across the stages, and consultation requirements can differ from one set of regulations to the other in how long the consultation period is and who has to be consulted. There is a complexity there. The other complexity is that, for some projects, more than one set of environmental impact assessment regulations can apply. For example, on infrastructure, the mainstream 2017 regulations would apply, but so too could the marine works regulations of 2007. There are also other separate regulations dealing with electricity works, forestry and so on.

If multiple EIA regimes apply, it can be quite a complex task to make sure that you have done everything you have to do under each set of regulations, as you can appreciate. That complexity across regimes undoubtedly presents a procedural risk, so is more likely to be subject to a legal challenge. Certainly we will come on to discuss the environmental outcome reports. Reform is intended to put a uniform regime in place across the whole board to try to get away from different sets of regs for different sectors.

Q85 Lord Carrington of Fulham: This question is on the last part of that last question. One issue that has been raised with us as a committee in this inquiry is the difficulty in getting permission particularly for infrastructure developments. They take an awfully long time to get. Building HS2 seems to be a project that will run us into the next millennium at the rate it is going, and probably even then will not reach Glasgow.

One delay in all these things is the legal challenges. We have all this legislation going through. We have the LURB, as it is called, going through. We have the environmental outcome reports and so on going through. Will that change anything? Will it prevent people who object to a new road, a new railway, a new housing estate or whatever from using the legal system to frustrate development?

Heather Sargent: No. This goes back to Lord Best's point earlier. It is the inevitable result of introducing new legislation, in my view, that additional new case law explores how that legislation is to be applied. I anticipate that we can expect, in the first instance, cases concerning how, if at all, we apply the case law principles that we have articulated in relation to EIA, SEA and habitats. How do those principles apply, if they do, to the new legislation? There is reference, for example, to reasonable alternatives in the environmental outcome reports. The immediate question that comes to mind is whether that is the same concept as in SEA and EIA.

It may be possible to make that clearer through drafting so as to minimise the scope for having to go to court to get answers to questions about how the body of case law applies in relation to the new legislation,

but I do not see how that can necessarily be removed entirely as the work that the courts will need to do.

Again, there is significant case law on the approach that the courts take to EIA and leaving matters for the exercise of the decision-makers' judgment. Is that approach to be taken towards environmental outcome reports as well? The obvious answer is probably yes, but someone may have to go to court to get confirmation of that.

More fundamentally, I do not see that the effect of environmental outcome reports will be that people who wish to delay development have no opportunity to do so. It may be affected to some degree. I can see, for example, that the proposal is to have category 1 and category 2 development rather than schedule 1 and schedule 2, and to focus on the sensitivity of the receptor rather than the nature of the development. That may mean that some of the opportunity to litigate over whether something is in schedule 2 or not may be removed. I do not see a world in which nobody can take their claim to court to seek clarity on the regulations.

Robbie Owen: Theoretically, this new system of environmental outcome reports should reduce legal challenges. It is certainly part of the Government's aim in putting this forward, as we see from the recent consultation, to reduce legal challenges by providing more clarity on when an environmental impact assessment is required and by reducing the risk associated with not assessing individual environmental topics and issues.

However, given the early stage of the development of this alternative regime, it remains unclear to me how questions and potential issues under the regime would be resolved. For example, it is not clear how questions about whether a project complies with a designated environmental outcome will be answered. How do you determine that? Indeed, if a project does not comply with a designated environmental outcome, should it nevertheless be consented for some other reason of overriding public interest or something like it? Without a framework for resolving these queries in a non-judicial setting, it is inevitable that questions will go to the courts through legal challenge, as happened, as I said earlier, in relation to EIA 20 years or so ago.

The final point, therefore, is that a lot can be achieved by the Government both in relation to environmental outcome reports and more generally in issuing and keeping up-to-date clear guidance on these things. Equally, clear national planning policy kept up to date helps to reduce legal challenge. In relation to infrastructure, I mentioned earlier the system of national policy statements. If they are kept up to date every five years, as was the intention, that will play an important role in reducing legal challenge. You will never avoid it, and it is an important check and balance, if I can put it that way, as part of our constitution. But up-to-date policy provides much needed clarity and certainty, which is vital.

Q86 Lord Carrington of Fulham: One issue that has been raised with us and one issue that is generally out in planning is that we should have legislation that says that something is a national priority. Let us take HS2 as an example, which raises all sorts of issues, from environmental right the way through to archaeology and to the cost overruns and so on. We should say that something like HS2 is a national priority and that it will be done through straightforward legislation—a hybrid Bill process or whatever—and then it should not be capable of being judicially challenged. Is that an option? Is there a way of making something not judicially challengeable?

Robbie Owen: You cannot judicially challenge a hybrid Act, the result of a hybrid Bill, directly, because the courts cannot inquire what Parliament does. Nevertheless, there have been half a dozen judicial reviews in relation to HS2 during its construction stage, which you cannot get away from. One reason why the hybrid Bill process is effective is that the outcome, in principle, cannot be judicially reviewed.

Lord Carrington of Fulham: If we made it tighter, if we changed the 1948 reform of the hybrid Bill and made it more straightforward so that you could not get these judicial reviews of aspects of it, might that solve the problem?

Robbie Owen: The judicial reviews that we have seen have been on implementations, such as the system for local authorities approving detailed design. There was a case involving Hillingdon—

The Chair: This is the question that Lord Carrington of Fulham is coming at. It is not so much the hybrid Bill process itself as the fact that it inevitably, in our system, leaves a whole range of subsidiary planning decisions to be made on matters of detail.

Robbie Owen: It does, yes.

The Chair: The question is whether in some countries the national parliamentary approval of a major project dispenses with the need for further supplementary planning permissions and that, therefore, there is no role or a limited role for local planning authorities to make decisions and, therefore, no role to challenge those decisions in the court because they have not made them.

Robbie Owen: The difficulty with that is that you would have to come to Parliament with a detailed design to justify the absence of any further downstream consents on the detail. That, therefore, perhaps moves the problem to another place and you would then encounter delay in developing a project ready for Parliament to receive it.

It is difficult to get away from the need for subsidiary approvals, but it can be done in different ways. Certainly a lot of work has been done in relation to the A66 northern trans-Pennines scheme, which is currently being taken forward by National Highways under the Project Speed initiative, to reduce delay at the pre-construction and construction stages after consent by having a better, more streamlined system for more

detailed approvals. Things can be done to try to reduce legal challenges at that stage. It is impossible to totally avoid them, though.

The Chair: Anything you can send us on that A66 streamlined scheme would be helpful. With that, I will draw things to a close and thank you both very much indeed for your evidence.