

James Cartlidge MP
Parliamentary Under Secretary of State
Ministry of Justice

By email

19 April 2022

Dear Minister Cartlidge,

Judicial Review & Courts Bill

I am writing on behalf of the Link Legal Strategy Group, a coalition working to improve the creation, implementation and enforcement of environmental law, to urge you to accept the fourth amendment made by the House of Lords to the Judicial Review and Courts Bill.

Along with many other civil society organisations, Link is concerned by the provision formerly in Clause 1 of the Bill which would direct judges to use Suspended Quashing Orders (SQOs) and Prospective Quashing Orders (PQOs) if they would provide “adequate redress”. It is our view, along with many others, that SQOs and PQOs would effectively allow decisions to stand despite being found unlawful, including decisions that harm the environment.

We were pleased to see Lords amend the Bill at Report Stage to remove subsection (9) (Lords amendment 4), along with provisions for PQOs. We were encouraged by the commitment given by Lord Wolfson of Tredegar at Third Reading that the Government would closely consider the Lords amendments, saying that he had “*heard and listened carefully to the arguments made to me both inside and outside the Chamber*”.¹

The arguments against the presumption are very clear and have been made by crossbench peers with legal expertise and by a range of legal and parliamentary bodies, including the Law Society, the Joint Commission on Human Rights and the Bingham Centre for the Rule of Law. These groups have set out how the drafting of subsection (9) ‘*restricts the flexibility that judges need*’ potentially preventing ‘*a fair outcome that fits the facts of the case*’², and undermining ‘*the remedial flexibility that the former Lord Chancellor claimed was the ultimate goal of the Bill at the time of its introduction*’.³ The Bingham Centre has concluded that it ‘*it undermines the principle of legality if the default is that an unlawful action is still valid and a quashing order ought normally to be suspended, or only have prospective effect*’.⁴ The Government has responded by maintaining that the presumption would not compel judges to use SQOs and PQOs.

¹ <https://hansard.parliament.uk/lords/2022-04-06/debates/79344895-36DA-4904-BFE2-0B80B1BA26F2/JudicialReviewAndCourtsBill>

² <https://www.lawsociety.org.uk/en/topics/human-rights/judicial-review-reform>

³ <https://committees.parliament.uk/publications/8105/documents/83261/default/>

⁴ Dr Cormacain Report https://binghamcentre.biicl.org/documents/140_jr_and_courts_bill_report.pdf, pgs 7-9

As Lord Anderson highlighted at Committee Stage of the Bill, this analysis still requires the removal of the presumption as *"if proposed new subsections (9) and (10) constrain the free exercise of judicial discretion, they should be resisted on that ground alone; if they do not constrain it, they are pointless clutter and, for that reason, should be removed from the Bill"*.⁵

This removal, which the Law Society has described as the minimum change required to make the Bill functional, should be accepted by the Government as part of its commitment to uphold environmental law and judicial discretion. To do so would not affect the rest of the Bill. Without the presumption, the new provisions in subsection (1) would still be available as new tools for judges, as has always been the Government's stated intention. In the words of Lord Faulks, Chair of the Independent Review of Administrative Law which preceded the Bill (and which did not suggest any presumption, instead recommending it was left for judicial discretion), *"Clause 1 will survive without it"*.⁶

We hope that you will closely consider these points and, in the spirit of constructive compromise, accept Lords amendment 4 to remove the presumption in favour of SQOs and PQOs from Clause 1. As an environmental coalition, we see this removal as essential to prevent decisions from being permitted to continue to inflict environmental harm, despite being found to be unlawful.⁷

We also recommend an amendment to Clause 1 to require any potential environmental impacts to be considered before the passing of a SQO or PQO.⁸ It is important to stress that, without amendment, the Bill undermines the UK's compliance with international environmental law in the form of the UNECE Aarhus Convention. As highlighted by Lord Marks of Henley-on-Thames at Lords report stage:

"In the environmental field, this power would probably put us in breach of our international obligations. We are bound by Article 9 of the Aarhus convention of 1998 to accord to all members of the public with a sufficient interest the right "to challenge acts and omissions by ... public authorities which contravene ... national law relating to the environment."...We would not be complying with the convention by denying members of the public who do not get in first the right to enforce the law."

Link would be pleased to provide further information if helpful. Thank you for your consideration of these important matters for the future of environmental justice.

Yours sincerely,

Matt Browne
Advocacy Lead, Link Legal Strategy Group

Cc Rachel Bailey, Deputy Director of Environment Governance & Corporate, Defra

⁵ <https://hansard.parliament.uk/Lords/2022-02-21/debates/4C9F3839-15A8-4BC7-85E8-370C17341960/JudicialReviewAndCourtsBill>

⁶ <https://hansard.parliament.uk/Lords/2022-03-31/debates/7A894EFF-EEDE-47E0-A30B-2E8A85855FFC/JudicialReviewAndCourtsBill>

⁷ These concerns are detailed here: <https://www.wcl.org.uk/a-threat-to-environmental-justice.asp>

⁸ See amendment 32 from Commons committee stage: https://publications.parliament.uk/pa/bills/cbill/58-02/0152/amend/judicial_review_day_pbc_1104.pdf