

Accelerating Infrastructure

How to get Britain building more, faster

By Samuel Hughes

Foreword by Isabella Tafur

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Foreword

An immense amount of transport and energy infrastructure needs to be built in Britain in the coming decades. Decarbonisation will require expansion in the production, storage and transmission of energy from renewable sources. Rapidly growing urban populations require increased transport capacity. Britain will need to build wind farms, power stations, electricity pylons, railways, bridges, tunnels and reservoirs much more rapidly than it has in its recent history.

Britain's system of infrastructure consenting can be slow, expensive and unpredictable, and can impose requirements that are disproportionate. Recent years have seen an increase in the length of time it takes for decisions on major infrastructure projects; more frequent delays; and an increasing number of judicial reviews of planning decisions. These issues have contributed to Britain's mounting infrastructure deficit.

‘ Britain is gradually facing up to the scale of the infrastructure challenge before it ’

Having worked on a number of important infrastructure projects, I have witnessed these issues first hand. The Lower Thames Crossing has now spent 15 years in planning and has cost more than £300 million, more than it cost Norway to actually build the Laerdal Tunnel, the world's longest subsea road tunnel. The reopening of Manston Airport has been pushed back by four years of legal challenges, yielding nothing except cost and delay.

Encouragingly, there is growing political will to change this. The previous government made progress on reforming statutory guidance. The current government has bold aspirations for more comprehensive reforms to infrastructure consenting. Britain is gradually facing up to the scale of the challenge before it, although calls for change often remain vague and abstract.

This paper begins the work of remedying this. It offers a suite of concrete and practicable reforms, many of which do not even require primary legislation. If implemented, they would markedly reduce the cost, time and difficulty of infrastructure consenting in Britain. Even then, there would be much more to do. But they constitute some vital first steps to addressing the infrastructure deficit that Britain faces today.

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Executive Summary

From the 18th to the 20th century, Britain generally enjoyed the finest infrastructure in the world. Yet in the course of the 20th century, our infrastructure fell behind. Today, we build too little energy and transport infrastructure, and what we do build is too expensive and takes too long. As the present author argued in the recent essay, *Foundations*, this – together with the constrained supply of housing – is the main driver of Britain's relative economic decline.

One of the main reasons for this is that Britain's system for planning, consenting and mandating infrastructure has become increasingly sclerotic. Significant infrastructure projects generally take years and often take decades to secure permission. As Isabella Tafur mentions in her foreword, the planning process for the Lower Thames Crossing has now cost Britain nearly £300 million, and it is still unclear whether the vital crossing will ever actually be built. Every recent British tram network has cost more per mile than every recent French tram network, with the most expensive British tram network around *eight times* more expensive than the cheapest French one.

A good planning system would give applicants clarity about what will be permitted, and decision-makers clarity about what the law allows them to do. It would give power over decisions to those who will be held accountable for them, and who have responsibility to consider the national interest as a whole. It would be proportionate, efficient and swift.

The British system of infrastructure planning was last overhauled in 2008 with a view to delivering this. But it did so only partly, and has become steadily less effective in the years since.

Working with a team of leading planning lawyers, we have developed a suite of reforms to give England the infrastructure system it needs. The key changes are:

- The planning process needs to be streamlined, and governments need to empower themselves to make key decisions in the national interest rather than letting them sink into bureaucratic quagmires. We propose shortening timescales, strengthening deadlines and simplifying statutory guidance for infrastructure projects, while creating a truly one-stop shop for ministerial approval and restoring key decisions to the relevant government departments.
- Many infrastructure projects are stalled by judicial review, at enormous cost to the public. The solution to this is to fix the ambiguous laws and sometimes obsolete policy documents that give rise to judicial reviews. In particular, we propose clarifying the law around legitimate expectations and consultation, bringing the relevant National Policy Statements into line with recent law, and reforming the Aarhus Convention rules.
- In addition, the policy documents governing Government decisions need to be substantively reformed to make them clearer, more proportionate and more effective. We propose a range of detailed fixes to achieve this.

None of these changes are unattainable. Indeed, most do not even require primary legislation, and could be achieved in the early days of this Parliament. What they do require is focus, energy and willpower. Collectively, they would give England perhaps the most efficient system of infrastructure delivery in Europe, and the strength to meet the infrastructure challenges of the decades ahead.

1. Introduction

In February 1756, a private Bill was brought before a special committee of Parliament. It sought powers to build a four-mile road bypassing what was then the northern periphery of London, relieving congestion in the city itself. By May, the Act was passed. The requisite land was compulsorily purchased and work began almost immediately. By September 17, it was complete.

The road in question was then called the New Road, and is now called Euston Road. Though it has long since ceased to be a bypass, it has now served as a vital part of London's transport infrastructure for more than a quarter of a millennium. From commencing the planning process to completion, it took less than seven months.

‘ In the single year of 1846, Parliament mandated 9,500 miles of railways. The London-to-Birmingham leg of HS2 is just 143 ’

In 1949, work began on planning a bypass around Newtown, in central Wales. The bypass was about four miles long, like Euston Road. The project petered out but was revived in the 1960s and then again in the 1980s. In the 2000s it was revived for the third time and permission was finally granted, after which the project was shelved. Construction finally began in 2016 and was completed in 2019.

Between commencing the planning process and completion, 70 years had passed. For all that time, drivers on the A483 had suffered congestion and Newtown had been blighted by arterial traffic.¹

This is an extreme example, but it illustrates a general pattern. From the 18th century to the early 20th century, the United Kingdom was extremely good at building infrastructure. By 1800, Britain already had a system of canals and turnpike roads that far surpassed those of its continental neighbours.² In the 19th century it consolidated this leadership with its extraordinary railway boom. In the single year of 1846, at the height of the Railway Mania, Parliament mandated 9,500 miles of railways; for comparison, the London-to-Birmingham HS2 route is only 143 miles.³ In the 1860s London installed an extensive underground railway system, almost four decades before a single underground station was excavated in any other country.⁴

1 Nicholas Boys Smith, *No Free Parking* (2022).

2 Rick Szostak, *The Role of Transportation in the Industrial Revolution* (Montreal: McGill University Press, 1991).

3 Mark Casson, *The World's First Railway System: Enterprise, Competition and Regulation on the World's First Railway Network in Victorian Britain* (Oxford: Oxford University Press, 2009).

4 Cf. Christian Wolmar, *The Subterranean Railway: How the London Underground was Built and How it Changed the City Forever* (London: Atlantic Books, 2020 [2004]).

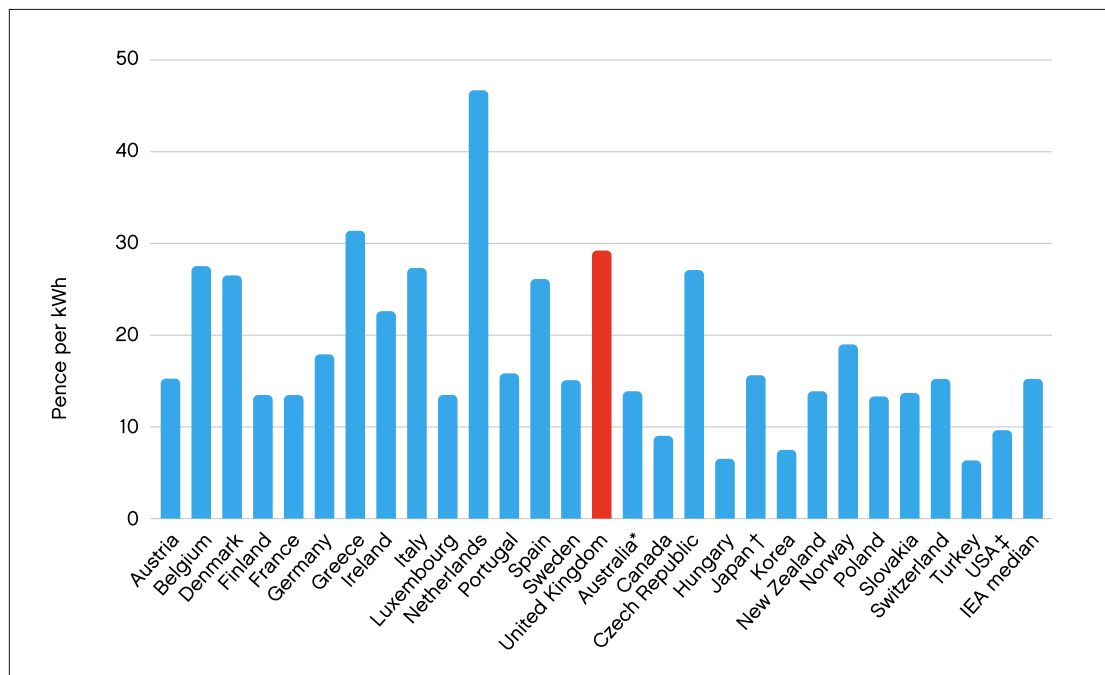
This triumphant and continual success is thought to have played an important role in Britain's extraordinary economic boom in this period, at whose peak it produced nearly one third of the manufacturing output of the entire world.⁵ And amazingly, this enormous transport network was largely built by private investors, at almost no cost to the taxpayer.



The London to Birmingham Railway, the world's first major intercity railway, was described as 'the greatest public work ever executed either in ancient or modern times'. It took three years to receive Parliamentary approval and five years to build.

This international leadership has now been squandered. Today, Britain lags behind its competitors all over the world in infrastructure provision. France is just over twice as large as Britain, but has three times as many motorways. Even before the invasion of Ukraine, the median price of industrial energy was nearly three times higher here than in the United States.⁶ We now have among the highest domestic energy prices of all members of the International Energy Agency.⁷ We have built no new reservoirs since 1992, and parts of the country are now faced with acute water shortages.⁸

Domestic energy prices exclusive of tax in 2022⁹



5 Jim Tomlinson, *Public Policy and the Economy* (Oxford: Oxford University Press, 1990).

6 Compare Department of Energy Security and Net Zero, Gas and electricity prices in the non-domestic sector (2023) and Energy Information Administration, Electric Power Monthly Data (2023). [Link](#)

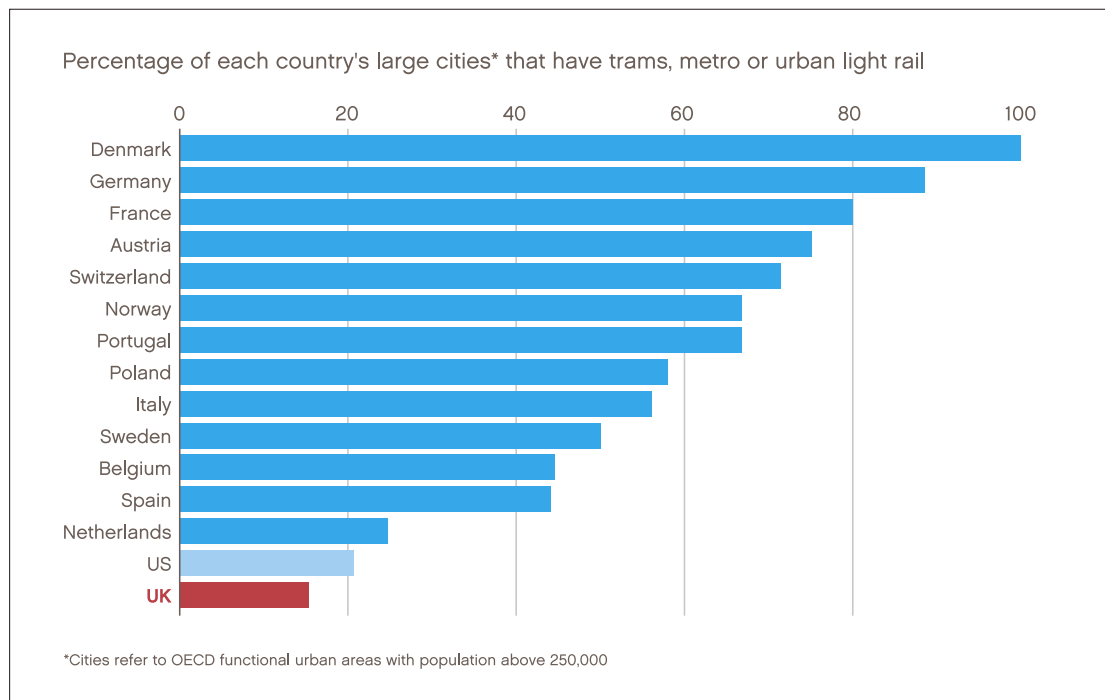
7 UK Government, International Domestic Energy Prices (2023). [Link](#)

8 Rob Hamikian, 'The challenge of building more reservoirs to ensure the UK's water resilience', *New Civil Engineer* (2022). [Link](#)

9 Department for Energy Security and Net Zero, International Domestic Energy Prices (2024). Australian data is for 2021. Japanese data is for 2021. US data is for 2019. The IEA average does not include the Australian, Japanese or American figures, and they are included here only for reference. [Link](#)

Meanwhile, most British cities are distinctively poorly served by public transport. The country that once had the best public transport system in the world is now outclassed by most of its continental rivals. London is a partial exception, with its extensive pre-1914 radial rail system, but elsewhere the situation is poor: one recent study found that 67% of continental Europeans in major cities live within a 30-minute commute of their city centre, while only 40% of British people do.¹⁰ By certain metrics, Britain is even beaten by the United States, a country notorious for car dominance.

Britain's cities are more poorly served by public transport than those of any other wealthy Western country, including the US



Source: FT research

FT graphic: John Burn-Murdoch/ @jburnmurdoch @FT

This matters for economic productivity, as Guilherme Rodrigues and Ant Breach (among many others) have influentially argued.¹¹ Cities raise productivity because they enable people to interact with each other, the effect known in economics as 'agglomeration'. The amount of agglomeration that can happen in a given city centre is capped not by how many people live physically near it, but how many can get to it on a given working day. To the extent that a city's transport is bad, it is unable to deliver on the basic economic function of a city.

For example, Birmingham's roads are so congested and its public transport is so limited that at peak times the number of people within commutable distance of the business centre collapses. As Tom Forth eloquently puts it, 'at peak times, Birmingham isn't a big city'.¹²

10 Cf. Guilherme Rodrigues and Ant Breach, *Measuring Up: Comparing public transport in the UK's and Europe's biggest cities* (Centre for Cities, 2021). Rodrigues and Breach stress that the difference is partly a matter of the greater density of Continental cities rather than the greater absolute size of their public transport systems, though this plays a role too. [Link](#)

11 Rodrigues and Breach, *Measuring Up*. For an introduction to the wider literature on agglomeration, see Ed Glaeser, *Cities, Agglomeration and Spatial Equilibrium* (Oxford University Press, 2008). [Link](#)

12 Tom Forth, 'Birmingham is a Small City' (2019). [Link](#)

When we do build infrastructure, it is more expensive than in almost any comparable country, sometimes by fantastical margins. The cheapest recent tram network in the UK (Nottingham) still cost more per mile than the most expensive recent tram network in France (Orléans). The most expensive British network (Manchester) cost eight-and-half times more than the cheapest French one (Besançon).¹³ Britain's record for recent underground rail systems is similarly unimpressive, with British underground networks costing two or three times more than those in continental countries.¹⁴

Meanwhile, HS2 is still expected to be one of the most expensive rail projects in world history, costing over eight times more than comparable rail projects in France.¹⁵ The Lower Thames Crossing, a project of enormous and obvious value to the country, has spent 15 years in planning and cost nearly £300m without so much as a hole in the ground being dug.

Tram construction costs (GBP/mile)

France	
Besançon tramline 1 (2014)	29
Le Mans Tramway (2007)	34
Mulhouse Tram Extension to Bourtzwiller (2009)	35
Dijon Tramway (2012)	37
Avignon Tramway (2019)	38
Angers Tramway extension (2023)	39
Valenciennes Tramway Line 1 (2006)	44
Brest Tramway (2012)	46
Tours Tramway (2013)	48
Reims Tramway (2011)	52
Le Havre Tramway (2012)	53
Orléans Line B construction (2012)	60
UK	
Phase 2 Nottingham Trams (2015)	66
Edinburgh Trams Extension to Newhaven (2023)	87
West Midlands Tram Extension Wednesbury to Brierly Hill (In construction)	88
Edinburgh Tram 1st Phase (2014)	113
Manchester Trafford Park Line (2020)	119
West Midlands Tram Extension to Wolverhampton Rail station (2023)	125
Manchester Second City Crossing (2017)	252

Source: Britain Remade Created with Datawrapper

These problems would be grave under any circumstances, but they are especially so at present. Britain is currently engaged in immense efforts to reduce its greenhouse gas emissions, requiring the development of an enormous quantity of green infrastructure. National Grid's CEO estimated in 2022 that we would need 'about seven times as much infrastructure in the next seven or eight years than we built in the last 32'.¹⁶

¹³ Sam Dumitriu and Ben Hopkinson, 'Britain's Infrastructure is too Expensive', Britain Remade (2023). [Link](#)

¹⁴ Ibid.

¹⁵ Olivier Devos, 'UK's Colossal HS2 Project is in Danger of Going off the Rails', Britain Remade (2023). [Link](#)

¹⁶ BBC, 'Blackouts would be the last resort, says National Grid' (November 1, 2022). [Link](#)

British infrastructure delivery does not just need to improve enough that it can effectively meet Britain's existing infrastructure needs. It needs to improve enough that it can meet drastically expanding needs. Without profound reform, the system simply won't be able to deliver what we require.

The sources of Britain's poor infrastructure delivery are complex, and encompass many areas of policy. France has cheaper power partly because it has an extensive network of nuclear power stations. European cities have higher population densities, which makes public transport more effective.¹⁷ Japan still allows private rail companies to capture some of the value they create by building railways, the model used to fund the Metropolitan Line extension in the 19th century, but long since extinguished in the West by more statist approaches. Even if Britain wanted to build more nuclear power, allow suburban intensification, or revive the 'Metro-land Model' of commuter rail provision, any measures to achieve these ends would take some years to bear fruit.

At the other end of the spectrum, there are some key upcoming decisions on particular projects where the new Government could simply move decisively in favour of building. For example, in 2022 the then government refused consent for the Aquind Interconnector, a submarine power cable to France that would meet up to 5% of the UK's electricity demand. The downsides of the interconnector are trivial compared to its benefits, and the project should obviously go ahead. The Government's decision was quashed by the courts and is currently being redetermined: Labour should simply reverse its predecessor's decision and swiftly give consent to the project.

‘ One of the key drivers of Britain's poor infrastructure provision is simply the length, expense and above all the riskiness of the infrastructure planning process ’

Similarly, the remarkable Xlinks Morocco-UK project would run a submarine cable to the UK from the vast Moroccan solar fields, potentially meeting another 7% of UK electricity demand. This project is currently at an earlier stage than the Aquind Interconnector, but the Government could easily draft the relevant National Development Management Policy in such a way as to ensure that the project is not imperilled in the grossly disproportionate way that the Aquind Interconnector has been. These two decisions alone could enable us to meet an astonishing 12% of our electricity needs.

The main focus of this report, however, sits somewhere between individual decisions and fundamentally restructuring how the British state works. One of the key drivers of Britain's poor infrastructure provision is simply the length, expense and above all the riskiness of the infrastructure planning process. Most large infrastructure decisions take years, and some take many years. More troublingly still, their outcomes are unpredictable. Applicants who have made immense efforts to follow the rules can be and frequently are rejected. Favourable decisions can be and frequently are overturned by judicial review.

This unpredictability is enormously discouraging to investors, who desperately want to avoid the huge deadweight losses it can entail. They respond by making less ambitious applications, spending huge sums on planning and legal work, and often by not applying at all.

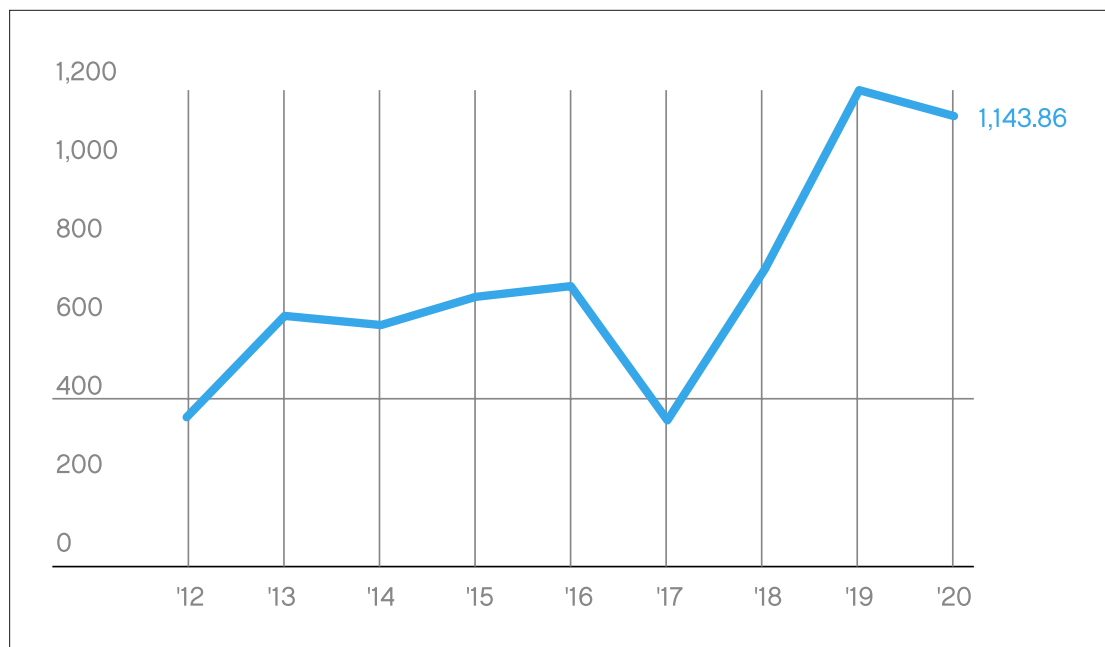
¹⁷ Cf. Rodrigues and Breach, *Measuring Up*.

Governments have recognised this problem before. The system was reformed in the 2008 Planning Act with a view to streamlining the decision-making process and making it more predictable. Even its harshest critics tend to agree that the post-2008 system is an improvement on its hopelessly inefficient predecessor, which had become especially notorious after the eight-year planning process for Heathrow's Terminal 5. Indeed, for the first few years the reformed system actually seemed to work fairly well. But in the course of the 2010s, it has become markedly slower, riskier, and prone to delays or reversals.

This tendency has been examined in detail in recent work by Sam Dumitriu of Britain Remade.¹⁸ While 20% of Nationally Significant Infrastructure Projects (NSIPs) were delayed between 2012 and 2016, 43% were delayed between 2017 and 2022. The average process took 17 months in 2012 and 22 months by 2020. The average number of documents required in an application has also been increasing, from 381 in 2012 to 1,143 in 2020. Judicial reviews have been becoming more common, and they are increasingly likely to be successful. Before 2020, NSIP decisions were judicially reviewed 16 times, and only one challenge was successful. Since 2021, there have been seven legal challenges, of which four succeeded.

Successful judicial reviews have a chilling effect on the system, making every potential investor mindful that there is a substantial risk of the project being derailed even after it has gone through the tortuous application procedure successfully. And even judicial reviews that ultimately fail can generate hugely expensive delays. The reopening of Manston Airport in Kent was consented in 2020, but work has been repeatedly pushed back by legal challenges. These ultimately failed to prevent the reopening of the airport, which was finally cleared in the summer of 2024, but the foregone revenues and unpredictable construction timeline are tremendously costly for investors. The risk of such delays adds to the chilling effect exerted by the risk of complete failure.

Average number of documents for major infrastructure projects



Source: Sam Dumitriu / Britain Remade / Planning Inspectorate / Datawrapper

¹⁸ This analysis is from Sam Dumitriu, 'Why Britain Struggles to Build Infrastructure', Britain Remade (2022). [Link](#)

It is clear that the cumbersomeness of the NSIP process also has a chilling effect on applications. Various kinds of energy infrastructure can be permissioned by local authorities if they stay under a 50MW limit, but are required to go through the NSIP process if they go any higher. It is widely reported that this leads to developers ‘clustering’ around 49MW to avoid triggering the NSIP threshold.¹⁹ In 2020 the Government acknowledged this problem and scrapped the 50MW threshold for energy storage, allowing developers to local authorities to permit larger energy storage facilities through their (relatively) smooth processes. But the 50MW threshold still applies to, for example, solar farms, with the associated deterrent effects.²⁰

‘ Decisions are made on the basis of outdated or inadequate policy documents. Hazily defined legal duties create pervasive risks of legal challenge. Decision-making processes are gratuitously complex and liable to obstructionism ’

It seems, in short, that latent flaws in the post-2008 system are emerging, and it is increasingly clear that it needs a round of reform for it to work more efficiently. There is no one fundamental problem, but a range of defects, each of which needs bespoke fixes. Decisions are made on the basis of outdated or inadequate policy documents. Hazily defined legal duties create pervasive risks of legal challenge that are almost impossible to avoid. Decision-making processes are gratuitously complex and liable to veto-player obstructionism. The Government lacks the power to break logjams even if it wishes to. Together, these yield a system of infrastructure planning that is gradually breaking down.

The good news is that these problems are not necessarily hard to fix. In fact, many of them are surprisingly easy. We have therefore developed a list of the most important changes, working in consultation with a team of experienced planning lawyers. Some of these reforms require small pieces of primary legislation. Remarkably many, however, can be done by simply amending policy or guidance. Though some are individually modest, collectively they would amount to a comprehensive reform of English infrastructure planning, generating one of the most streamlined and effective systems in Europe.

¹⁹ Department for Business, Energy and Industrial Strategy, Proposals regarding the planning system for energy storage (2020). [Link](#)

²⁰ In a positive step, the recent consultation on NPPF reform proposes raising some of these thresholds. See MGCLG, Proposed reforms, (2024).

Fixing Britain's infrastructure provision

In this section, we outline a series of reforms to England's system of building infrastructure, applying equally to energy and transport projects. We have indicated by each proposal whether it requires primary legislation. The new Government can and should bring forward an Infrastructure Bill enshrining these changes, but as will become clear, it can also achieve a great deal through faster and simpler processes.

I. Accelerating the planning process

The most obvious obstacle to swift provision of infrastructure is the planning system. As outlined above, it operates slowly and unpredictably, and it is getting worse over time. We have worked with a team of planning lawyers to develop a suite of fixes that would reverse this. These changes may seem technical, but collectively they would have a striking impact on the efficiency of the system. The first four can be done with existing statutory powers, entirely without primary legislation: the Government could easily implement them all in the early days of this Parliament. The remaining two would require small pieces of legislation.

i. Fix statutory guidance

The Government should rewrite statutory guidance established under the Planning Act 2008 to remove increasing demands on developers of critically needed infrastructure, including both energy and transport. Recent projects have been delayed because of demands for information which is not legally required, the absence of information which could easily be provided as part of the process, and onerous requirements on consultation. Some improvements were brought through by Lee Rowley during his term as Housing Minister, but much more remains to be done. The rewrite should acknowledge that the last two years have produced decisions which are not in the public interest. Key amendments include:

- After promoters submit an application, the Planning Inspectorate makes an initial decision on whether it is of sufficient quality to proceed to a full examination. In deciding this, the Planning Inspectorate should be required to consider whether an alternative to outright refusal would allow for the rectification of any problem that it identifies with the application. Costly and time-consuming applications should not be thrown out in their entirety if they only require some small specific fix to proceed. A delay to the start of the section 56 notification period (which follows acceptance), whilst an issue is rectified, must be considered as an option.
- Statutory guidance should make it explicit that there should be no merits-based decision making at the application submission stage. The preliminary assessment is only supposed to check procedural conformity: merits-based consideration takes place at the proper examination, and it is wasteful to duplicate this at the submission stage.
- There should be a presumption that the pre-examination phase will be no more than four months. This would assist in applying the suggestion in the first bullet point directly above.

ii. Take final responsibility for NSIP approvals

Nationally Significant Infrastructure Projects (NSIPs) have five steps: application submission, pre-examination, examination, recommendation, and decision. The Government's role is currently confined to the last of those, whereas the Planning Inspectorate is responsible for the first four.

In the last two years, the number of refusals or withdrawals at the first hurdle (that is, the point at which an application is submitted) has equalled the first 10 years of the regime combined. While it is right for the Inspectorate to provide an independent view, the Government should not wholly abandon responsibility for such decisions. We believe the relevant Government department should take the ultimate decision on whether the project should proceed at each stage, rather than outsourcing responsibility for this to the Inspectorate at four of the five.

‘In the last two years, the number of refusals or withdrawals at the first hurdle for big infrastructure projects has equalled the first 10 years of the regime combined’

iii. Enforcing deadlines

Many projects have been delayed at the decision stage (i.e. after the examination phase). We suggest that as a matter of policy, internal meetings are established with the relevant Cabinet minister, or even the Prime Minister, whenever the three-month decision phase is exceeded, to focus minds on meeting the deadline and, if that is insufficient, to enable ministers to help with any blockages. The number of such projects is small (an average of about 10 a year, of which only a minority are delayed) and they are often of enormous value to the country, so the investment of executive time required would be modest and its impact potentially considerable.

A second cause of delays is that the relevant departments tend to wait until the very end of the three-month deadline before asking questions, allowing them to delay the decision until the questions are answered. We should therefore introduce a policy (or statutory requirement) for them to pose questions within two months of the start of the decision phase, allowing applicants to answer them within the intended deadline rather than after it.

iv. Automatically permit project changes that help the environment

Currently, large infrastructure projects are able to make changes to a consented project where there are no ‘materially new or materially different environmental effects’. Astonishingly, this terminology has already prevented environmentally better solutions in a number of various cases because such solutions could be ‘materially different’.²¹ This is simply a mistake: there is no reason we should want this result. The Prime Minister and the Secretaries of State who make decisions on these orders should instruct that in future, all Development Consent Orders should permit changes where these do not lead to ‘materially new or materially adverse environmental effects’. Paragraph 13 of the statutory guidance under the 2008 Planning Act should also be deleted to ensure this.

²¹ Such cases are generally private, but National Highways publicly stated that this is an issue here. [Link](#)

v. Fix the one-stop shop (requires legislation)

A 'one-stop shop' was created by the Planning Act 2008, with the idea that the Secretary of State could give a single definitive permission for a new piece of infrastructure. This was a good idea: it is right that the Government should be able to make decisive interventions like this in the national interest. In practice, however, it has proven ineffective, because other veto players can still get in the way.

The best solution is to amend section 150 of the Planning Act 2008, which currently requires the consent of particular bodies to disapply particular consents. For example, it requires the consent of the Environment Agency in respect of environmental permits, the consent of drainage authorities for drainage consents and abstraction licences, and the consent of Natural England for protected species licences. The provision should be replaced with a duty for the Secretary of State to have due regard to comments from the relevant bodies. The Secretary of State can consider relevant representations and make a decision on all consents. Until he or she has the power to do this, the one-stop shop is simply not a one-stop shop.

Furthermore, the consents caught by section 150 differ across England and Wales, meaning promoters of projects often have to pursue alternative consenting mechanisms for substantially the same project. This should be remedied.

‘ It is right that the Government should be able to make decisive interventions on major infrastructure projects in the national interest ’

vi. Reinforce Development Consent Orders (requires legislation)

Development Consent Orders are one of the instruments by which a Secretary of State can permission infrastructure projects and compulsorily purchase land for them, a power that is especially useful in dealing with the holdout problems that beleaguer transport projects.

In many respects they are a powerful instrument, but they have a curious weakness. DCOs can compulsorily purchase land, but they cannot enable the temporary use of common land, e.g. for construction work, even though this is a less severe intervention than compulsory purchase. To enable this, a separate consenting process is required, creating expense and delay. This situation is doubly inconsistent, because Transport and Work Orders can enable both compulsory purchase and temporary use. This significantly compromises what should be one of the Secretary of State's key instruments for making major infrastructure projects happen. This anomalous situation should be remedied through modifying section 139 of the Planning Act (2008).

vii. Shorten timelines to 12 months (requires legislation)

According to the Government's current proposals, a new shorter 12-month process will be available only to projects that meet specified 'quality standards'. If these standards are onerous, proving they have been met could easily prove as time-consuming as the process they supposedly replace, merely transferring delay from the post-application phase to the pre-application one. We suggest simply allowing the Secretary of State to make a discretionary decision balancing the need to prolong consultation procedures with the critical need for infrastructure.

II. Fixing judicial review

In recent years, numerous infrastructure projects have been delayed or derailed by judicial reviews. This problem is worsening. Between 2010 and 2020, 10 development consent orders issued by ministers were reviewed, but none was quashed. Since 2020, four have been. Between 2010 and 2019, the Planning Inspectorate recommended refusal in just two cases. Since then, they have recommended refusal in 10.

‘Unclear and unpredictable laws are straightforwardly worse than clear and predictable ones: they make it difficult or impossible to know what the law actually is without wasting huge amounts of time and money on judicial review’

This has led to claims that the scope of judicial review needs to be circumscribed. Such claims are based on a misunderstanding. Judicial review is a process whereby a court assesses whether a Government decision complies with the law. It is entirely proper that the Government should only do lawful things, and that, if a decision’s lawfulness is doubtful, it should be investigated. If the Government’s projects are unlawful, it should adopt different projects, or change the laws. It is, after all, the Government.

This is emphatically not to say that there is not a problem with the rising volume of judicial reviews. There is, and it can be fixed. There are two main solutions here:

- First, on a number of questions, the law has become unclear as a result of a developing case law that is hard to interpret and possibly mutually inconsistent. This creates large grey areas in which it is hazy whether decisions are legal or not. Unclear and unpredictable laws are straightforwardly worse than clear and predictable ones: they make it difficult or impossible to know what the law actually is without wasting huge amounts of time and money on judicial review processes. So the Government needs to pass legislation clarifying what the law actually is in these areas. We discuss two of these in sections II.i and II.ii, namely the principle of legitimate expectations and the duty to consult.
- Second, the policy documents that control Government infrastructure decisions are out of date, meaning that the Government’s own policy documents sometimes make it do dubiously lawful things. They obviously need to be updated. We discuss this in section II.iii.

i. Reform legitimate expectations (requires legislation)

Many claims in judicial review are founded upon the principle that a public body has given a ‘legitimate expectation’ that it will, or will not, do something.²²

Paradigmatically, a public body creates a legitimate expectation if it unambiguously promises someone that it will do something. For example, in the 1999 Coughlan case, the local health authority promised a severely disabled woman in clear and unqualified terms that she would be able to remain in a new home for life if she gave up her existing accommodation. The health authority then changed its mind and announced she would be rehoused again. Coughlan successfully challenged this.

²² For discussion, see Pinsent Masons, ‘Legitimate Expectations as a Ground for Judicial Review’ (2017). [Link](#)

The principle of legitimate expectations is a good one. It is right that public bodies should be held to their word. However, there is much ambiguity about its boundaries. For example, there is debate about whether interdepartmental statements or statements not intended for service users create a legitimate expectation. Not all of the case law is consistent, and the ambiguity creates scope for legal challenge.

This is a clear case of expensive and wasteful legal ambiguity. Passing a Legitimate Expectations Bill which defines the concept and provides certainty would reduce the number of legal claims. We have no view on whether the principle ought to be defined more or less expansively. The point is that it be defined clearly, so that applications can proceed with confidence that they have satisfied it.

‘ There is systematic ambiguity about things as basic as the number of weeks that consultations need to take ’

ii. Streamline consultation (requires legislation)

In various contexts, the Government is under a legal obligation to consult before it does things. Broadly speaking, this means that it is required to publish draft plans and invite public comment on them.

The problem is that it is not always clear how much or what kind of consultation is required. There is systematic ambiguity about things as basic as the number of weeks that consultations need to take. It is often possible for objectors to hold up a project on grounds of its having violated obscure procedural requirements in the consultation process. The case law here, again, is not entirely consistent.

To reduce the number of legal challenges, we suggest a Consultation Bill that ensures the adequacy of consultation, taking into account the need for speed, and emphasises proportionality. Here too we take no general view on how expansive the duty to consult should be, although we have a broad presumption that it should be relatively restricted. The point is that requirements need to be clearly defined so that projects can meet them and then move forwards with confidence.

That Bill should also provide for a ‘Consultation Unit’ which can legally certify that a given consultation is adequate, which would radically reduce consultation-based legal challenges. Applicants would not be required to seek certification from the Consultation Unit, but given the immense usefulness of what it could provide, we expect that most or all would do so. Comparable institutions operate successfully abroad, notably in France.

iii. Bring National Policy Statements up to date

Infrastructure decisions are made on the basis of documents called National Policy Statements (NPSs). There are NPSs for renewable energy, energy networks, ports, water resources, and so on. NPSs set out criteria for whether any given infrastructure project should happen.

NPSs are in turn supposed to comply with relevant law, such that if a project complies with the NPS it will also be robust against judicial review. Unfortunately, this is not always true, because the law changes faster than the NPSs do.

In theory, the NPSs are supposed to be updated every five years, meaning that there can be a maximum of five years’ worth of legal changes to occasion judicial reviews at any given time. But this has not happened in practice, so infrastructure decisions are still being made in accordance with NPSs that are now outdated. In other words, the

Government has passed laws that make certain decisions unlawful, but it is still the Government's own policy to make those decisions.²³

This extraordinary situation needs to be rectified: all NPSs need to be swiftly reviewed and brought up to date. There have been signs that this priority is beginning to be taken seriously, but the last Government fell far behind the schedule it set itself to update them. And the schedule was hardly an impressive one. For example, the NPS for nuclear power was not due to be updated until 2025, until which point the Government would remain prone to essentially self-inflicted legal debacles on this vital area of infrastructure provision. It is remarkable that a Government that claimed to want to build a nuclear power station every year so completely failed to prioritise ensuring that it actually had up-to-date policies on building nuclear infrastructure.

‘ The Government has passed laws that make certain decisions unlawful, but due to these outdated policy statements it is still the Government’s own policy to make those illegal decisions ’

The new Government promised to rewrite and update all 12 NPSs within six months of taking power.²⁴ But we are three months in and the level of progress remains unclear. So ministers need to not only reaffirm that commitment (in particular as regards nuclear power), but take steps to ensure that we do not slide back into the current situation in the future. If the Government cannot ensure that policy documents are reliably up to date through normal Civil Service process, there is a case for passing a law requiring that it be done regularly, as has been recommended by the National Infrastructure Commission. Furthermore, the NPSs will probably need to be restructured into a more modular format that makes them easier to update in line with legal changes, alongside the other changes discussed in the next section.

iv. Reform the Aarhus Convention rules (requires legislation)

It is an ancient principle of English civil law that the losing party pays the winner's costs – that is, the wrongful party pays the costs of the wronged, or of those acting on their behalf. Recent interpretations of the Aarhus Convention have weakened this principle, especially since 2019.

The Aarhus Convention is an agreement among a number of European and Central Asian countries governing decision-making and public participation in matters relevant to the environment. It has been in force since 2001. Under this system, where an individual or an organisation litigates wrongfully on environmental grounds and loses, they are required to pay a maximum of £5,000 (for individuals) or £10,000 (for organisations) to the wronged defendant. Curiously there is also a cap on the costs that wrongful defendants are required to pay litigants, though a higher one (£35,000).

Predictably, this has led to a wave of frequently baseless judicial reviews against infrastructure projects, since most of the potential costs to litigants of bringing cases have been eliminated. A number of organisations do this routinely. This practice can be enormously costly to those putting such schemes forward, less because of the legal expenses themselves than because of the delays to projects that the cases entail. Because of infrastructure's social value, this is also a great cost to the country as a whole.

²³ This bizarre phenomenon has attracted attention since it was discussed in 'The real reason it takes so long to build infrastructure in Britain', *The Economist* (November 7, 2022).

²⁴ 'Contractors back Labour pledge to speed up infrastructure planning decisions', *New Civil Engineer* (Oct 9, 2023)

The Government should legislate to reform these rules. The ideal would be to return to the English legal principle that the wrongful party pays the costs of the wronged one, a practice that has worked well for centuries and that continues to work well in every other context. It is however unclear whether this is possible without withdrawing from the Aarhus Convention, which would be contentious. Even within the Convention, however, it should be possible to greatly raise the cap on wrongful litigants' costs: one possibility would be to raise it to parity with the cap on costs for wrongful defendants (£35,000), though a higher figure for both would be preferable, say of £150,000. If this transpires to be legally impossible within the Convention after all, Britain should leave the Convention.

‘ The cap on costs under Aarhus has led to a wave of frequently baseless judicial reviews against infrastructure projects, since most of the potential costs to litigants of bringing cases have been eliminated ’

III. Reforming National Policy Statements

As discussed in the last section, the Government's decisions on infrastructure are governed by a series of documents called National Policy Statements (NPSs). There are 12 NPSs, covering energy, transport and water. In the preceding section, we noted that these need to be updated more regularly to avoid judicial review. But they also need substantive revisions to make them more effective, consistent, predictable and proportionate.

There is probably scope for a systematic review of NPSs, but in this section we highlight a number of important particular changes with which to get started, and which should inform the new Government's thinking as it begins the process of updating them.

i. Make policy threshold tests consistent

In the current NPSs, the presumptions against development for the likes of ancient woodland, Sites of Special Scientific Interest, National Landscapes and heritage contain varying benchmarks for the level of benefits which are needed to overturn the presumption – e.g. ‘clearly outweigh’, ‘benefits outweighing the costs very significantly’, ‘substantial public benefits that outweigh that loss’. It is not clear that there is any agenda behind this inconsistency, which may simply be a result of the policies being cobbled together from various different sources drafted at different dates. But this inconsistency generates unpredictability, which is costly. To aid certainty, the Government should standardise ‘substantial public benefits that outweigh that loss’ as the term used to ensure certainty on the high level of environmental protection required.

ii. Set reasonable thresholds for triggering derogations cases

The current National Policy Statement for energy states that the mere ‘indication’ of adverse impact from Natural England (or Natural Resources Wales) requires a developer to propose a Habitats Regulations derogations case. This includes the responsibility to provide compensation for the supposed adverse impacts, which can be hugely expensive and time-consuming. A mere ‘indication’ should not be sufficient for this: it is unreasonable for huge costs to be incurred at such a low bar. A more conclusive view from Natural England should be required before a derogations case is triggered.

iii. Remove maximum capacity output rules

Energy infrastructure is often permissioned through an instrument called a Development Consent Order (DCO), discussed above in section I.vi. At present, DCOs for energy often include rules on maximum capacity outputs. This means that the DCO not only prescribes where the infrastructure should be, how much space it may use, and so on, but also the maximum quantity of power that it may produce.

This has some bizarre effects. Suppose that a wind farm could be made more efficient through installing better, more modern turbines, and suppose that this improvement had no detrimental environmental effects. The DCO under which the wind farm had been built would still block this from happening, and the farm would have to go through a new process to get permission, with much cost and delay.

This is clearly a defective result: DCOs should be designed to restrict the adverse effects of infrastructure, and should stop infrastructure from getting better only inasmuch as doing so has such adverse side effects. There should therefore be a strong presumption against maximum capacity output rules for energy projects: DCOs should nonetheless explicitly allow for increases in output provided it can be certified that negative environmental impacts will not arise as a result.

iv. Reform indirect impact policy

At present, it is unclear whether road and rail schemes are required to mitigate all their indirect impacts. For example, a new railway might increase pressure on certain roads as people drive to the new railway stations. Under current policy, it is unclear whether the application for such a scheme must identify and demonstrate mitigations for every such impact – although a growing body of case law, in particular over the carbon emissions from oil and gas drilling, suggests that the courts are taking an increasingly expansive view of this issue.

‘ In reality, it is extremely difficult to mitigate every indirect impact, and it is not necessarily right that the Government does so ’

In reality, it is extremely difficult to mitigate every indirect impact, and it is not necessarily right that the Government does so. For example, it might be that the increased pressure on the roads near a railway station can only be mitigated by widening those roads, but that this money would be better spent on improving other infrastructure elsewhere that already has worse congestion problems. Mitigating all indirect impacts of new infrastructure will seldom, if ever, be the best use of scarce resources.

The National Networks NPS (and ideally others) should therefore make this clear, explicitly confirming that there is no general responsibility to mitigate all indirect impacts associated with each scheme. This will simplify individual infrastructure applications and allow the Government to allocate its resources in the most efficient way possible.

v. Clarify carbon assessments

As mentioned above, an increasing number of legal challenges are based on carbon impacts. Policy should therefore include a suggested methodology for carbon assessments, providing clarity for developers and helping to forestall future legal challenges.

Conclusion

There is a tendency to treat Britain's poor infrastructure delivery as an unalterable fact, like the weather. This is profoundly mistaken. For much of the modern era, Britain was the best country in the world at infrastructure delivery. It could be so again.

Returning to transformative rate of infrastructure delivery that Britain saw in the 19th and early 20th centuries may require deep systemic changes. We need to look at why private businesses deliver so much less infrastructure than they used to, and at why so much of the public sector's infrastructure delivery now runs through central rather than local government. We need to study the incentives this creates for gold-plating, delay and expensive payoffs, and develop politically durable models for reversing them. We may need a whole new political economy of infrastructure.

‘None of these changes require a revolution in British statecraft. Many do not even require legislation. Some require little more than an email from the relevant minister’

But not all our problems are deep. Britain's consenting system can be greatly improved through relatively straightforward technical fixes with few real downsides for anyone. None of these changes require a revolution in British statecraft. Many do not even require legislation. Some require little more than an email from the relevant minister. British politicians have been far too intimidated by the supposedly intractable complexity of the country's problems. Many important solutions are not hard to implement at all.

Reforming infrastructure consenting is not the only thing we need to do to accelerate infrastructure, but it is an essential first step. The measures outlined in this paper show how we can take it.



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