

4.5 REDUCING THE COMPLEXITY AND UNCERTAINTY OF THE PLANNING SYSTEM

Headlines

The current system delivers thoroughly considered and evidence-based decisions. But there are three key challenges with the way the system operates:

- It can take too long;
- It can create too much uncertainty for communities, businesses and promoters; and
- It can cost too much for participants and for the UK economy.

The consequences of these problems are diverse and potentially substantial. Delays and the time taken to deliver new transport infrastructure can impact on the ability of communities to participate in the process, and on the UK's international competitiveness:

- Participants (community groups, promoters, and objectors) often face direct costs in participating in a lengthy process and can be affected by blight and uncertainty;
- High-quality projects may not get brought forward because of fears of cost and uncertainty;
- Delivery of the infrastructure needed for the UK economy both to compete effectively and to raise the quality of life for UK society can be delayed. This means that the problems that investment is seeking to address may go unresolved, and in many cases may deteriorate;
- Associated private sector investment, such as information technology investment to manage logistic chains, may also be delayed;
- The direct impact of delays can be accentuated where the markets are European-wide (such as for ports and airports) and European competitors can move more quickly to deliver new capacity. This directly impacts on the UK's competitiveness; and
- Uncertainty and delays can create difficulties for both public and private sector to maintain finance for projects.

There are a number of different features of the planning system that cause these problems, including unclear strategic direction, complex processes, lengthy public inquiries and decision-making periods; and scope for legal challenge.

The nature of the challenges presented by the current planning system leads to a wide range of impacts and costs. Recent reforms have brought improvement to the system, but it is clear that further incremental change is unlikely to be sufficient to fully tackle the challenges at hand.

5.1 The study's stakeholder engagement showed that there was clear consensus that the current planning system can be very costly and inefficient, especially for major projects.¹ The impacts on the UK of the system are potentially wide-ranging. This review is not the only one that is concerned with the relationship between planning and the regimes for delivering major infrastructure. The Barker Review of Land Use Planning will also bring forward recommendations in this area. The proposals below were developed in consultation with the Barker review, which covers a wider range of issues.

¹ Both town and country planning and many areas of environmental policy are areas for which responsibility has been devolved to the Northern Ireland, Scottish and Welsh administrations. Unless the contrary is stated or evident, references in this Chapter to current planning legislation are references to legislation that applies in England and Wales. Detail on recent reforms to the Scottish planning system are discussed below in Figure 5.6.

5.2 This chapter of the report is split into three sections:

- provides an introduction to how the current planning system for major transport infrastructure operates in England and identifies three main objectives that must be delivered by an efficient and legitimate planning system for major transport projects that provides for and responds to current and future needs and expectations;
- assesses how the current system delivers against these objectives – and concludes that there is a strong case for building further on recent reforms; and
- proposes a package of reforms that would ensure an appropriate balance between these different objectives, but which is less costly, less uncertain and has fewer delays than the current system.

5.3 The Annex to this Volume provides more detailed analysis of each of the individual proposals.

INTRODUCTION TO THE PLANNING SYSTEM IN ENGLAND

5.4 This section of the chapter:

- sets out the broad purpose of a planning system in a democratic, modern society;
- explores how the current system has developed from private Bills in Parliament to the current mode-specific processes with Ministers making final decisions;
- provides an overview of the key stages in the current system; and
- concludes with setting out the objectives of an effective transport planning system.

What is the purpose of the planning system?

5.5 The Government's objectives for the planning system are set out in the Department for Communities and Local Government's (DCLG's) *Planning Policy Statement 1: Delivering Sustainable Development*. "Planning shapes the places where people live and work and the country we live in. Good planning ensures that we get the right development, in the right place and at the right time. It makes a positive difference to people's lives and helps to deliver homes, jobs, and better opportunities for all, whilst protecting and enhancing the natural and historic environment, and conserving the countryside and open spaces that are vital resources for everyone."

Planning decisions are about balancing different objectives

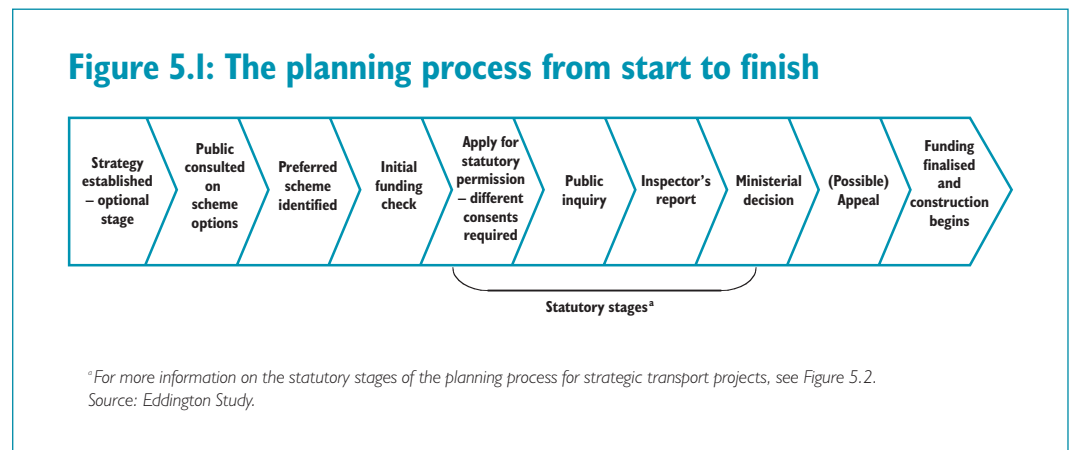
5.6 The planning system therefore needs to play an impartial and transparent role in finding an appropriate balance between costs and benefits. This will involve balancing national, regional and local benefits; economic, environmental and social objectives; as well as possible tensions between an individual's rights and the needs of society as a whole.

5.7 But government intervention of this kind can impose costs. Transaction costs (the costs of participation and the costs of administration) can be significant. Government intervention can itself risk creating further market distortions ("government failure"), e.g. when it favours one development proposal over another. It is therefore essential to ensure that the system is efficient in delivering its objectives, while maintaining thoroughness and fairness.

The current system for major transport projects

5.8 The current planning system for transport projects is highly complex and different elements of it have evolved in different, and often incremental, ways over a number of decades in response to the needs of the different periods in its history. The main changes that have occurred over a number of decades are outlined below. The process for delivering major transport projects typically involves the application of a number of separate, but overlapping, planning systems, that vary between modes. In practice, the different systems are co-ordinated as much as possible.

5.9 The system, as a whole, consists of a number of distinct stages and applies to both government-funded schemes and those proposed by private developers. Figure 5.1 sets out the main stages of the process through which an individual major transport scheme usually progresses before planning permission is determined.² The stages usually operate sequentially, but there are inter-relationships between the different stages.



The early stages of the process

5.10 Before an application on an individual scheme is made, in some circumstances government will have published a strategic policy document such as a White Paper. This document may set out what sort of development it is anticipated will be required. Where this exists, the strategy is fed through into the different spatial tiers of the planning system – the Regional Spatial Strategy (RSS), and then the Local Development Framework (LDF). However, this staged process does not always happen as an integrated and seamless process, either because there is no published government strategy or because the RSS and LDFs are already in place before the White Paper or strategy is published.

5.11 A specific scheme must then be identified and tightly defined before an application can be made. Usually more than one detailed scheme will be worked up to compare different ways of building the scheme, e.g. a rail scheme with slightly different routes or specifications identified. An extensive public consultation will usually be carried out before the preferred option is identified and worked up in more detail, e.g. with relevant local authorities and other statutory bodies, and with the general public via the local press and noticeboards in libraries and community centres. The promoter has discretion as to how to carry out the consultation, and practice varies.

² References to ‘planning permissions’ or ‘necessary powers’ in this document refer to both planning permission under the Town and Country Planning Act, and any other required authorisations (such as Orders or consents under other Acts).

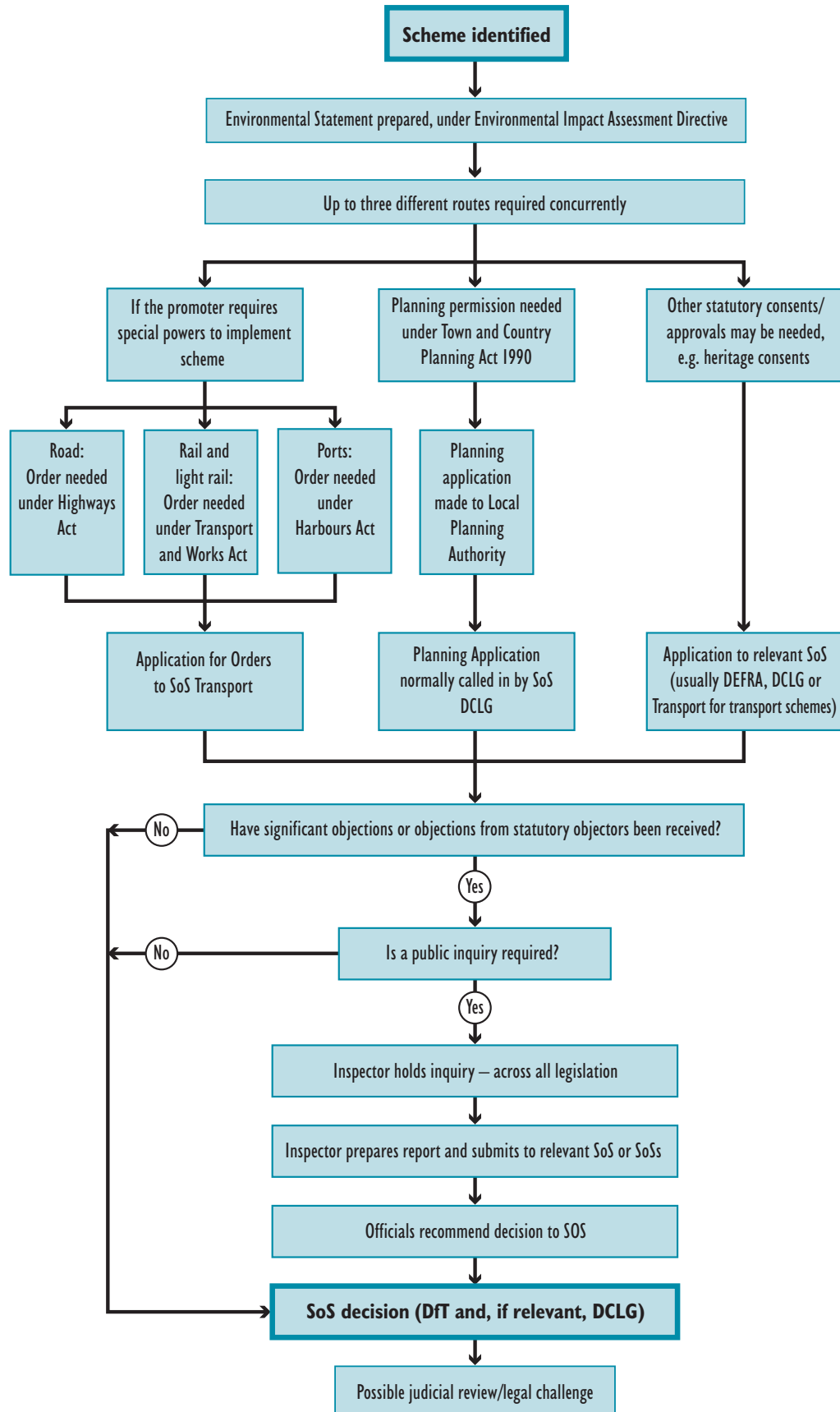
5.12 Once a preferred option is identified, it is best practice for the promoter to then consult the public again on the more detailed scheme. This process helps to identify problems at an early stage and resolve areas of dispute in an informal process. It can also be important to get public buy-in to a proposal.

5.13 During this period, the promoter is also likely to start lining up finance, whether this is from public sources of funding or from private capital markets. This acts as an initial filter for projects that are unlikely to be implemented because of costs (especially for projects funded from taxation) or projects that are too high risk in terms of the possible future returns (for both privately and publicly funded projects).

The statutory stages of the process

5.14 The application for a specific scheme then enters the statutory stages of the planning system. This process is set out in Figure 5.2. The relevant legislation contains all the necessary powers to authorise the various aspects of a development project. It includes powers to impose any conditions that need to be attached to the authorisations, such as environmental mitigation measures, to allow the development to proceed. A wide range of supporting information is required for an application, including an environmental impact assessment of the development.

Figure 5.2: Summary of typical statutory routes for strategic transport infrastructure schemes



Source: Eddington Study.

5.15 Applications for statutory permissions are made to the relevant decision-making authorities. A number of different Ministers may be involved. This will include:

- applications to the Secretary of State for Transport for consents under transport legislation and/or deemed planning permission under the Transport and Works Act 1992;
- applications to the local planning authority, if planning permission is required. For major transport infrastructure proposals, the Secretary of State for Communities and Local Government will almost invariably 'call in' and then decide any applications for planning permission (and related applications), and in some cases will be required to also act jointly with the Secretary of State for Transport in determining the application; and
- for certain projects, other consents may also be required which other Ministers are responsible for determining. For example, applications for listed building or conservation consent are made to the local planning authority, in a similar way to planning permission, and would similarly be called in by the Secretary of State for Communities and Local Government.

5.16 A single project can require many different consents. These are set out in Figure 5.3. For example, BAA's application to develop Heathrow Terminal 5 in 1993 eventually sought 37 separate applications across at least seven different pieces of legislation. More recently, the application made by Hutchison Ports UK to add new capacity to Bathside Bay required applications under at least five different Acts; and the Thameslink 2000 scheme required over 30 consents under four different Acts.

Figure 5.3: The current system is very complex – with a number of different consents required for a single project

The current system has developed in a number of different ways that are mode-specific, as well as often engaging the broader land use planning system. The key consents that are likely to be required for transport infrastructure development are:

- for heavy rail, light rail or applications for inland waterways, an order under the Transport and Works Act 1992;
- for ports applications, an order under the Harbour Acts 1964;
- for roads, an order under the Highways Act 1980; and
- planning permission for development may also need to be sought under the Town and Country Planning Act 1990.

A further complication is that major transport projects often involve a number of inter-related developments, each of which plays a critical role in the potential effectiveness of the project as well as helping to mitigate negative environmental impacts. For example, a ports development will often require improvements to the road and rail links which allow freight to enter and leave the port. Highways development may involve mitigation works, such as tunnelling or noise-shielding in sensitive areas, to reduce environmental impacts. New powers may be required to carry out these works. This usually means that a combination of the above powers would need to be sought, both for new development and for expansion of existing infrastructure such as widening of a highway or expanding an existing port.

The Dibden Bay proposal, which was a typical example of the complexity of a major development such as a port or airport, required a number of consents under the following legislation:

- Harbour Revision Order under the Harbours Act 1964: this was to permit dredging of the harbour to ensure large ships could berth safely at the port;
- order under the Transport and Works Act 1992: to provide for the necessary upgrades to the rail connections to the ports;
- planning permission and orders under the Town and Country Planning Act 1990: to provide distribution and storage facilities for the containers once unloaded from the ships; and
- applications under the Acquisition of Land Act 1981: to acquire the land necessary for the development to go ahead.

5.17 The planning process also needs to be compatible with relevant European Community law requirements and human rights legislation. The key European Directives that impact on the planning process are:

- Environmental Impact Assessment Directive – this requires a promoter to carry out a detailed assessment of the likely environmental impact of the development and consider options to mitigate the impact. The promoter is required to submit an environmental assessment with the applications for consideration by the relevant authorities. This is a critical component for understanding the environmental impacts of the development;
- noise and air quality directives – which provide limits on noise and air quality levels; and
- Habitats Directive – which is aimed at development in ‘designated European sites’, which are environmentally sensitive locations. Where a development would have a negative impact on such a site, and there is no alternative solution, the Directive requires the development to be of ‘over-riding public interest’.

5.18 The requirements of the Human Rights Act 1998 are also applicable to seeking planning permission for transport projects, since the development of transport infrastructure often impacts on individual property rights and interests.³ This creates duties to ensure that the system considers the balance between social need and individual rights in an impartial and balanced way.

5.19 Once the applications for statutory consents are lodged, a public inquiry will most likely be called for any major development proposal, as this will be likely to raise significant objections and a wide range of issues. The inquiry is usually headed up by a Planning Inspector – a civil servant with planning expertise. The inquiry provides a formal forum for:

- public consultation and participation – both objectors and interested individuals, such as property owners or local community members, have an opportunity to present their views;
- accessing information that can improve the quality of the proposal, such as developing a better understanding of the environmental impacts or economic returns of the development; and
- testing and challenging the details and merits of the application.

5.20 After the inquiry, the Inspector takes time to prepare a lengthy written report and recommendations. This period allows both the written and oral evidence which has been submitted to be fully considered. The Inspector weighs up the different evidence, seeking to balance externalities, such as environmental impacts, appropriately. The Inspector’s report will contain a recommendation as to whether the project should be granted the necessary permissions to proceed, and may also suggest extra conditions that should be imposed on the development, such as trees or wildlife that should be protected, or conditions about disposal of waste from the construction works. Usually these conditions relate to environmental mitigation measures. The report is then submitted to the relevant Ministers.

³ In particular, planning cases potentially engage Article 1 of the First Protocol, Article 6 and Article 8 of the European Convention on Human Rights which is incorporated into domestic law by the Human Rights Act 1998. Article 1 of the First Protocol provides for the protection of property; Article 6(1) of the Convention provides, *inter alia*, “In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”; and Article 8 provides for a right to respect for a person’s private and family life, his home and his correspondence.

5.21 As discussed above, the application is likely to cut across more than one consent regime. Each of the regimes has its own departmental home and Minister responsible for making decisions under them. This means that a number of different Ministers, in different departments, can each be involved separately in making a decision in relation to various aspects of a single major transport infrastructure proposal.

5.22 Each of the relevant Ministers considers the Inspector’s report and recommendations and reaches a final decision on whether the project should be granted the necessary permissions to proceed and, if so, whether any conditions should be imposed. In the vast majority of cases, Ministers accept the Inspector’s recommendations. In doing so, Ministers are performing a quasi-judicial role, as set out in Figure 5.4.

Figure 5.4: What is involved in a Minister’s quasi-judicial decision role?

Under the current system, Ministers perform a quasi-judicial role when deciding planning applications (e.g. under the Town and Country Planning legislation or under transport-specific legislation). This imposes strict limits on the factors that can influence their decisions.

In performing a quasi-judicial role of this kind, the Minister/s concerned must act within the usual confines of administrative law. Constraints on the decision-making process exist in both legislation and in the common law. The constraints of EC law and under the ECHR derive from UK legislation but enjoy supremacy. The Minister/s must make a “reasonable” decision i.e. in reaching their decision they must apply logical or rational principles. They must neither exercise their discretion on the basis of irrelevant factors, nor fail to take account of all relevant considerations (including, but not limited, to those prescribed by the legislation concerned). They will, of course, need to consider any relevant policies and how they should be applied in the context of the proposal but they will not be involved in the formulation or development of relevant policy during their period as decision maker.

The decision-making process must be fair, open and impartial. If it is not, it is open to challenge through the courts by judicial review or by means of a statutory challenge in the courts under the relevant Act. Departments go to considerable length to set up appropriate arrangements to ensure that the process does not give a basis for legal challenge against the decision on propriety or other grounds.

5.23 The considerations that will need to be taken into account for a particular planning decision will depend in part upon the specific powers conferred by the specific provisions of the relevant regime. For example, planning applications made under the Town and Country Planning Act must be determined in accordance with the statutory Development Plan, which consists of Regional Spatial Strategies (RSS) and Local Development Plan documents, unless there are ‘material considerations’ which would suggest otherwise. National policy, such as a transport white paper, an environmental white paper, or a DCLG Planning Policy Statement⁴ would all be considered as important material considerations, if not already incorporated into the Development Plan.

⁴Planning Policy Statements (PPSs) are produced by the government to explain statutory provisions and provide guidance to local authorities and others on planning policy and the operation of the planning system. The PPSs relevant to transport cover issues such as delivering sustainable development, biodiversity and conservation, transport, housing, retail, green belts etc. See www.communities.gov.uk.

The final stages of the process

Legal challenges 5.24 Judicial review and statutory legal challenges are important safeguards against the improper exercise of these planning powers. Opportunities for legal challenge arise at a number of stages of the planning process. A consultation paper may in some circumstances be susceptible to challenge by way of judicial review.⁵ Aspects of a White Paper or of other strategic policy statements may also be open to challenge by way of judicial review,⁶ although the law is still developing. This needs to be borne in mind in considering the discussion that follows in this Chapter. The final planning decision is also subject to legal challenge. In the event of a legal challenge, the project generally cannot advance until the case has been heard and determined. Delays of two years or so are possible, although many cases will be heard within six months.

5.25 Of course, not all projects are subject to appeal or judicial review. Legal challenges are most likely to be successful where a process has clearly not been carried out properly or a substantive environmental issue has not been addressed – i.e. where there are valid reasons to revisit the decision. However, legal challenges can also be used inappropriately by a small minority of parties with the main intention of delaying progress on a scheme or a government policy. Currently there appears to be a growing trend towards legal challenge, especially of higher-profile projects.

Finalising funding 5.26 The final stage in the process, finalising the funding, happens outside the statutory planning system. A promoter who has obtained all necessary legal powers to proceed then needs to finalise the funding required to construct the project. Any conditions that have been imposed may also have changed the costs of the project. It is therefore not possible to finalise the funding before this point, whether the project is funded from public or private sources.

Hybrid bill process can provide an alternative

5.27 Instead of an application going through the process outlined above, the Government has the option of introducing a hybrid bill to Parliament for a particular project. Hybrid bills allow the necessary approvals to be granted through a single Parliamentary Act that gives both public and private powers.

Hybrid bills are used infrequently 5.28 In practice, hybrid bills are used infrequently. The Crossrail Bill is currently going through the process. This is the first hybrid bill since the Channel Tunnel Rail Link, which received royal assent in 1998. If enacted, the Crossrail Bill would give the powers needed for the construction, maintenance and operation of Crossrail, a new east-west railway linking Maidenhead and Heathrow with Shenfield and Abbey Wood through new tunnels under central London.

5.29 As a Parliamentary process, rights of legal challenge are reduced and there are more defined consultation processes with a hybrid bill process than in a standard planning inquiry. Hybrid bills also take up considerable Parliamentary time and can add considerable pressure to a crowded legislative calendar and the timetables of Parliamentary committees. The Transport and Works Act 1992 (which provides the necessary powers and deemed planning permission for heavy rail, light rail or inland waterway development) was a deliberate move away from a parliamentary process with a concern over pressure on Parliamentary time being a key driver for change.

⁵ See, for example, the “Medway case” [2002] EWHC 2516.

⁶ See, for example, the “Air Transport White Paper cases” [2005] EWHC 20 (Admin).

Figure 5.5: The planning system in Scotland

Planning responsibility is devolved to the Scottish Executive and, as with the English planning system, the Scottish system continues to evolve. Scotland's planning processes for transport projects have recently changed from requiring an Act of the Scottish Parliament to a decision by a Scottish Minister.

The Scottish Executive published a White Paper, *Modernising the Planning System*, in June 2005, and introduced a comprehensive Planning Bill in the Scottish Parliament in December 2005. The aim of the reforms is to make the Scottish planning system more efficient – with revitalised and regularly updated development plans – and more inclusive, with many measures to improve public participation in the system. One distinct element is a statutory status and role for Scotland's National Planning Framework (NPF), which will both set out the Scottish Ministers' strategy for the spatial development of Scotland and designate "national developments" – projects of strategic national significance. The NPF will analyse development trends, identify key areas of change and highlight the strategic challenges Scotland faces. It will provide a national context for development plans and planning decisions; set out Scottish Ministers' priorities for sustainable development, growth and regeneration; and provide a forum for co-ordinating and integrating the spatial elements of the strategies and policies of the Scottish Executive, public agencies and local authorities.

The Scottish Executive introduced the Transport and Works (Scotland) Bill in June 2006 which confers an order-making power on the Scottish Ministers for the authorisation of rail and tram developments, rather than delivering them through a Private Bill process. The Bill provides for all transport developments of national significance (which includes heavy and light rail, inland waterway, trunk roads and major harbour/port developments) as designated within the NPF to be subject to Parliamentary approval. Since the projects are set out in the NPF, this should ensure that inquiries will concentrate on local effects rather than matters of principle or policy. The Bill also provides a right of access to land to prospective promoters in order to improve the design, development and route specification of proposals and thereby reduce instances of blight and objection. Decisions on individual projects will now be made by Scottish Ministers, rather than by the Scottish Parliament.

The system continues to evolve

5.30 The Transport and Works Act (TWA) was enacted in 1992. This was the most recent substantial reform to the transport planning legislation and is the most recent transport planning Act. But since then, individual elements of the system have continued to evolve in more incremental, and sometimes uncoordinated, ways, without the design of the system being considered as a whole. Reforms to the TCPA (which applies to the planning process more broadly than transport alone) have seen changes being made to the inquiry stage. These changes are in the process of being rolled out but do not currently extend to transport legislation.

Figure 5.6: Major Infrastructure Project procedures – recent reforms to the Town and Country Planning Act

The Planning Green Paper in 2001 (which cut across the whole of planning policy covered by the Town and Country Planning Act: housing, commercial development and infrastructure) included specific proposals on major infrastructure projects (“MIPS” proposals). Some key procedural proposals for infrastructure projects of national or regional significance were enacted in the Planning and Compulsory Purchase Act 2004. The key provisions are:

- the Secretary of State is empowered to “call in”, for his own decision, applications for planning permission and certain linked applications if s/he thinks that the development concerned is of national or regional significance;
- the promoter is required to prepare an economic impact statement for submission alongside their planning application;
- separate sessions of the public inquiry may be held concurrently by a team of Inspectors – this is intended to allow a number of different issues (e.g. environmental impact, design, traffic impacts, etc.) to be considered simultaneously, rather than consecutively; and
- The Secretary of State is required to set a timetable for his decision on “called-in” applications. This may vary between projects.

These new procedures are starting to be rolled out, but have not yet been fully tested. They do not currently apply directly to inquiries under transport legislation which was not amended alongside the TCPA.

The planning system reflects changes in society

The planning system has evolved in response to change

5.31 The current system has developed over many decades in response to a number of different drivers: changes in domestic policy and law; new EC and ECHR law requirements; and cultural and social changes. The three main areas of change are:

- a deliberate move away from the Acts of Parliament used for the 19th century railways and throughout the British Rail era to the system we have now – these changes were instigated at the request of Parliament and reinforced when the TWA was introduced in 1992. More recently, the relevant Select Committee argued against the-then DETR proposals to introduce a Parliamentary process for Major Infrastructure Projects (“MIPs”) as part of the 2004 Town and Country Planning Act reforms. In response to these arguments, the proposal was dropped from the final Bill;
- EC law and ECHR developments – EC law and the European Convention on Human Rights (ECHR) impose requirements that impact significantly on the development of transport projects. The main areas of EC legislation that impact on planning relate to environmental impacts and the need for adequate public participation in relation to such matters. Such requirements have developed in response to growing expectations and awareness of the need for environmental protection; and
- broader social and cultural developments – these mean that more people have views on the role of transport and the need for investment and there is a greater expectation from individuals and communities to have their views heard and taken into account. This can also be seen in the growth of

environmental awareness as people become more aware of the need for sustainable development and want to participate actively in decisions that affect them.

5.32 Given the extensive social and economic change that has occurred over recent decades, it is right to consider if current structures will remain appropriate for the future and will be able to respond effectively to changing challenges and expectations. As social and economic change continues over the next 25 years, the planning system will need to be suitably responsive to continue to support society's expectations, and deal with the increasingly complex environmental issues that we face in delivering the infrastructure necessary to support sustainable economic growth. These changes continue to pose new challenges for ensuring the process remains efficient and accessible.

WHAT DOES THE UK NEED FROM A PLANNING SYSTEM FOR TRANSPORT PROJECTS?

5.33 As set out in PPS1, *Delivering sustainable development*, "Sustainable development is the core principle underpinning planning. At the heart of sustainable development is the simple idea of ensuring a better quality of life for everyone, now and for future generations."⁷ Planning contributes to sustainable development through supporting sustainable economic development and protecting and enhancing the natural environment.

5.34 Within this context, this Study has identified three main objectives that must be delivered by an efficient and legitimate planning system for major transport projects that provides for and responds to current and future needs and expectations. Such a system should ensure that:

1. The infrastructure projects the UK needs to support sustainable development are identified and, where appropriate, brought forward;
2. Environmental, social and economic objectives are balanced appropriately in the final decision;
3. The process is fair, effective, and transparent:
 - Fair – interested parties ("interested" parties throughout this document is intended to also include "affected" parties) should have an opportunity to put forward their views, and these views will be properly considered;
 - Effective – the final decision-maker must be able to have thoroughly determined the relevant facts and strike a balance between different views in a timely and cost-effective manner; and
 - Transparent – participants and the public understand how the process and decision-making works and to what timetable.

In delivering these objectives, the costs and duration of the process should be proportionate, and uncertainty minimised.

5.35 A system that meets these objectives would be able to deliver efficiently the transport infrastructure required to support the UK's quality of life, by supporting the economy, whilst balancing the social and environmental impacts of development and ensuring participation for local communities and other interested parties.

⁷ See Government's Planning Policy Statement 1 at www.communities.gov.uk.

THE IMPACT AND CHALLENGES OF THE CURRENT SYSTEM

5.36 This section looks at how the current planning process performs, and identifies where there are opportunities to build further on previous reforms and recent improvements to the system. It asks whether the current system provides an efficient means to understand and balance the environmental, economic and social impacts of the transport infrastructure that is needed to enable the UK to face future economic and environmental challenges and opportunities over the next 25 years.

5.37 There are many conflicting views as to whether the system achieves the right balance between different objectives in the decisions that it reaches. To a great extent, people's viewpoints are dictated by the weight they ascribe, as individuals, to each element. The balancing exercise that needs to be undertaken in relation to each planning decision is therefore a crucial yet difficult job. The study has not found any evidence to suggest that the planning system often gets the balance wrong: sensible judgements are made that allow the UK to grow and develop without imposing unjustified environmental and social costs.

5.38 However, there are three key challenges commonly identified with the way the current planning system goes about reaching its final decisions:

- it can take too long;
- it can create too much uncertainty for local communities, businesses and promoters; and
- the system can cost too much for all participants and for the UK economy.

5.39 It is clear that a planning system is needed to play an important role in seeking to mitigate some of the costs of development, such as environmental damage. It does this in a thorough and fully considered way that also aims to ensure fairness. At the same time, if a system is poorly designed or operated, it risks imposing large costs on society and the economy. The costs of the system need to be proportionate to the benefits that it can deliver. Although it is difficult to quantify the costs that the system may be having, it is clear that they affect both the direct participants in the system (promoters, local communities, other objectors) and the UK more broadly, including small and medium-sized businesses wanting to make their own private investment decisions.

5.40 The Study has considered a range of case studies both in the UK and further afield to understand different experiences of the system and to consider different options for addressing them.

Clear messages from stakeholders

5.41 During the course of the Study, the team has spoken to a large number of stakeholders from business organisations and individual businesses, local government, Regional Assemblies, Regional Development Agencies and non-governmental organisations. One of the key messages that came out clearly through this engagement was the broad consensus around the challenges of the planning process for major projects.

5.42 Critically, respondents to the Study consistently noted that the length of time the process takes, and its uncertainty, can create significant economic costs – both directly for participants, and indirectly for the UK economy and society as a whole. Over the years, Government has made a number of positive attempts to address the challenges presented by the planning system, with some degree of success. However, it is clear that Government and stakeholders both recognise the need for further, continued, improvement.

5.43 Stakeholders’ comments also supported the view that it is not always the planning system itself which is at fault. For example, deficiencies in the detail of the application of the project selection process as undertaken by the promoter can lead to delay or additional costs while these deficiencies are rectified so that a fair decision can be made.

The process can take a long time

5.44 A selection of the comments received by the Study is included in Figure 5.7.⁸

Figure 5.7: Stakeholders have identified different challenges associated with the current system

Business very much supports the focus on tackling barriers such as planning issues. It is vital to address these issues to ensure that the impact of investment is maximised...The planning system is widely seen as a key barrier to the delivery of transport projects. Experience to date in relation to Terminal 5 at Heathrow, rail and road projects and ports developments reinforce frustrations. In a crowded democratic country, it is inevitable that major projects will take some time to get approval and to deliver, but there is significant scope to increase certainty and improve processes and timescales. This must be a key focus if the impact of investment is to be maximised (not just public infrastructure funding but also private sector investment).” CBI

“There is significant concern expressed, especially by Government and business interests, about the length of time it takes to build transport projects... Where delays occur, they are often blamed on involvement of the public or on the planning system per se, and this is often used as an argument for reducing the level of public consultation or public involvement in the planning of transport infrastructure, or at least to reduce the scope of inquiries... The reason for delays lies elsewhere – in fact...earlier and better public involvement can be beneficial.” Transport 2000

“The procedures for authorising major projects are notoriously slow... the procedures under the [Transport and Works] Act have proved slow and cumbersome and the provision for parliamentary approval in principle for projects of national importance has not been used. Planning procedures for roads and airports are equally slow and cumbersome.... Efforts to speed up the processes in the past have proved unsuccessful”.
London First

5.45 The current process can be very time consuming. It may take a number of years for a promoter to work up their scheme in detail, including considering different detailed options such as route variations or different mitigation or design options. This process all needs to be co-ordinated with the financing horizons, which can be difficult, as economic circumstances and the cost of capital can change markedly over the time periods in question. The total length of the whole process, from scheme development through the public inquiry to the decision process, can make it difficult for local communities to be properly engaged with the process or to understand how the proposals affect them in practice.

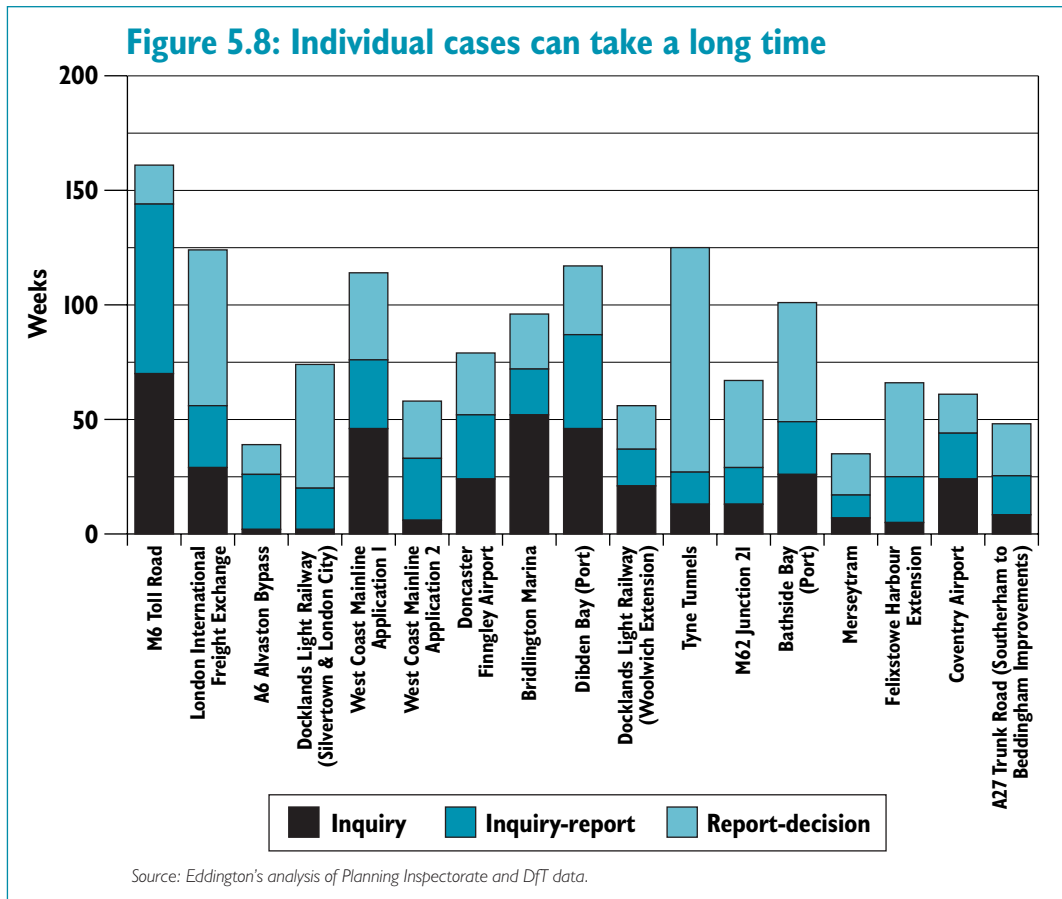
5.46 The Barker Review of Land Use Planning analysed on the length of time taken for cases across the planning system (more broadly than transport). It was clear that transport cases, alongside other major infrastructure, took the longest time of any development to progress through the planning system.⁹

⁸ The full consultation responses are available on the study website.

⁹ Barker Interim report was published on 4 July, 2006. It can be found at www.hm-treasury.gov.uk.

5.47 Individual scheme applications can take a very long time to progress through the statutory part of the planning system. Figure 5.9 sets out the amount of time taken through three distinct phases of the system:

- the time spent at inquiry;
- the time taken by the Inspector in writing up their report; and
- the time taken for Minister/s to make the final decision.



5.48 The above chart demonstrates that the time taken can be extensive - often years, rather than months. There is also considerable variation, which creates uncertainty for promoters and participants. Most major transport applications take a number of years to get through the system. The M6 toll road, Manchester Airport and the London International Freight Exchange all took over three years to reach a conclusion. Terminal 5 is an extreme example of the delays possible in the system. The application was lodged in 1993, the public inquiry sat for a total of 46 months, the Inspector took a year and a half to write his report, and the Government took 11 months to consider the report before issuing a decision. In total, this meant that it took more than seven years from the date the application was made to the issuing of the final decision.

The process can be unpredictable

5.49 Given the complexity of major projects, to ensure a thorough and fair consideration of the issues, some time is required to consider the impacts and likely effects before being able to reach an informed view on whether it should proceed. But one of the challenges with the current system is that given the various different stages; different requirements; and different decision-makers, it can be very difficult to know how long the process will take.

5.50 The situation is further complicated by the different roles that Ministers play at different stages of the process. These range from setting strategy through planning policy statements and White Papers which may be relevant to specific development proposals; prioritising publicly-funded schemes within their own departmental budgets; and then acting in a quasi-judicial way to make final decisions on specific schemes. These sometimes overlapping roles, which are carefully managed through the creation of separate teams and robust information barriers within government, when combined with Ministers' heavily constrained decision role at the end of the process risks creating a misperception externally about where democratic accountability sits within the system. These complexities are also evident where private sector development, such as ports or airports, impacts on public sector infrastructure such as highways or rail capacity. It also means that the process is not always transparent for participants or observers.

The way decisions are made can be unclear

5.51 The sometimes complex process of how decisions are made can also create uncertainty for developers and local communities and businesses. Under the TCPA, the statutory development plan provides the starting point for decision making but a very wide range of factual factors can influence decisions, through the concept of 'material considerations' in planning law. These factors can range from national policy issues as diverse as economic growth and regeneration through to climate change, as well as site-specific issues such as local flora and fauna. For the general public, and non-specialists, it is not clear what the Minister's decision role entails in practice. As discussed above, the extent to which 'political' considerations can influence the final decision is considerably less than is perceived to be the case.

The process itself can be highly costly

5.52 A disproportionately costly process is an inefficient use of resources for all parties directly involved in the process and also for the UK economy and society more broadly. High costs can prevent effective representation for all interested parties. These costs include the lengthy time commitment required to effectively participate. This is likely to impact particularly on smaller businesses, or individuals, who may not have the flexibility or resources to actively participate throughout a lengthy process with an undefined end date. The costs of participating in the system may mean that unless individuals feel very strongly about the merits or costs of a project, they may often choose not to participate at all. Survey evidence suggests that majority local views are not necessarily represented fully in the planning system.¹⁰

5.53 The process can also lead to cost-escalation for individual projects. Cost escalation can occur in two distinct ways:

- the sheer length of the planning process means that cost inflationary pressures are likely to come into effect, such as increased land prices or construction costs (labour, energy and construction materials); or
- the Inspector may suggest conditions be added to a project. These conditions are usually to mitigate environmental effects and can impact substantially on project costs. These conditions can then later be accepted, added to, or reduced by the decision-making Minister.

5.54 In either situation, the promoter could attempt to hedge against the risk of construction cost inflation by entering into contracts before the permission is granted. However, their ability to do this is limited because of the risk that the project specification will be altered during the consents process. The Highways Agency has been trialling a new process of engaging early with contractors on a without prejudice basis to try and identify potential construction costs and pressures earlier in the process to avoid the 'surprise' of new costs. There are mixed views as to how successful this new approach has been.

¹⁰ For example, Saint Index, March 2006 <http://www.communicateresearch.com/poll.php?id=76>.

THE NATURE OF THE SYSTEM HAS CONSEQUENCES FOR PARTICIPANTS AND THE ECONOMY MORE BROADLY

5.55 Although the previous discussion identifies distinct challenges, it is the combination of these that can have the greatest impact. It can create significant direct and indirect costs and implications for the promoter of schemes, participants and the UK economy.

The effects of planning blight can be prolonged

5.56 Delays in the process impact directly on those potentially affected by the development. While permission is being sought for a specific development, planning blight can affect surrounding areas. This can be manifested in reduced property values, or an inability to sell or develop the property further, until the decision on the scheme is made. This can create considerable uncertainty for those people living or working in the surrounding area, as well as local businesses. For example, this has been seen in relation to property affected by developments such as the Thameslink 2000 proposals, where land has stood derelict because planning permission to develop it cannot be sought since eventually it may be required for the Thameslink development. This uncertainty can have economic impacts but it can also have a significant 'uneconomic' impact, for example the stress of waiting and living with such uncertainty.

The public can face high costs of participation

5.57 The complexities and length of the current process mean that the costs of participating for local communities can be significant. In the worst cases, they may act as barriers to participation, and mean that interested individuals do not feel able to be heard. These high costs can also affect organisations such as local authorities. During the Terminal 5 inquiry, for example, the sheer length of the inquiry process and the costs of legal representation throughout the inquiry, contributed to Hillingdon District Council having to pull out of the process, as its funds had been exhausted.

High-value proposals may not be brought forward

5.58 There is a clear risk that economically beneficial projects are not brought forward for consideration and debate. It is appropriate that some projects are not brought forward or do not proceed successfully through the system if this is due to the scale of their environmental impacts, where these impacts are real and impact on the net value of the project by outweighing the benefits of the project. However, where it is the costs of the system or uncertainty about how it operates that is affecting decisions to invest – this suggests that the costs and inefficiencies of the system may be disproportionate.

5.59 By its very nature, it is difficult to quantify or estimate the impact of this risk. Projects may not be brought forward for three distinct reasons which are likely to be inter-related:

- promoters may not be able to afford the process because the transaction costs of the system are disproportionate to the value of the scheme. This means that in some situations, it is not cost-effective to bring forward projects, although they may deliver benefits;
- the complexity of the system may act as a barrier to promoters who are not experienced in its use. In the privately funded transport sectors this may have implications for competition and act as a barrier to entry, especially for smaller businesses. In the public sector, institutional knowledge and experience can be lost between major projects; and
- uncertainty may also impact on the willingness of investors to bring forward projects in the first place.

5.60 A costly system may result in proposals not being brought forward because parties simply cannot afford the process. This is likely to impact particularly on smaller projects, which as the Study has identified can often have good returns per pound spent – a costly system will have a proportionally greater impact on the delivery costs of a smaller project. It may also impact on the ability of small-medium businesses to bring forward proposals. Where good projects are not brought forward, this can mean that the congestion and delays on the transport network remain unresolved and the costs these impose persist.

The realisation of benefits can be delayed **5.61** A long process also risks delaying or not realising the full benefits of schemes at an earlier stage. Again, while the project is being considered, the transport problems that it is seeking to address are likely to be continuing to get worse and imposing greater, direct costs on users of the network and indirect costs on the economy more broadly. These affect all travellers, whether businesses, freight, commuters or leisure travellers. At the extreme, delay may cause projects to be abandoned.

Associated development may not go ahead **5.62** Associated development, including private investment, may also be delayed, when a specific transport scheme is delayed. This investment may encompass a range of things from new offices or housing developments, to different location choices for business. It may also include business investment by firms in new technologies to support innovative practices such as better logistics management. This type of investment can deliver environmental benefits as well as efficiency savings, through better use of resources, such as reducing the number of HGVs required for goods delivery. Where delays and uncertainty are unmanageable for businesses to work within, this investment simply may not go ahead or the funds may get invested elsewhere to fit in with business planning cycles.

The UK's international competitiveness may be threatened **5.63** In an increasingly globalised world, the UK does not operate in isolation from other countries. Transport infrastructure can impact on the UK's international competitiveness, both in the transport sector but also through increasing operational costs to UK businesses. International aviation and shipping, in particular, are EU-wide markets and major UK airports and ports compete directly with EU competitors for the benefits of being used as the hub connection for air or shipping connections. The direct impact of delays that may be faced in the UK when developing new capacity may be accentuated where European competitors can move more quickly to deliver new capacity required by the market.

5.64 For example, while applications for container port expansion have been progressing through the system in the UK, expansion has been delivered at ports, such as Rotterdam and Antwerp, in other EU countries. Future expansion is also in the pipelines in these and other places. Similarly, in the time taken to consider and start constructing Terminal 5 to provide extra capacity at Heathrow, Schipol airport in the Netherlands and Charles de Gaulle in Paris have both increased their capacity with runway expansion and terminal capacity improvements. This comparative delay means that both UK ports or airports may lose business to EU competitors. It also risks imposing extra costs on UK businesses, as goods may have to be trans-shipped or direct connections from the UK may not be possible for air journeys, forcing longer, and often more expensive, journeys to be made.

Alternative proposals may not be advanced **5.65** A long, drawn-out process also means that developers may be limited in their ability to develop or advance alternative proposals while waiting for the decision on their application. Again this risks good projects not being brought forward in a timely way and may delay or stop other options from going ahead. In areas where development is private-sector led, however, alternative proposals can, and to a certain extent are still advanced by competing developers. As with the sheer length of time that the process takes, as discussed above, this uncertainty about the duration of the process can also impact on related investment decisions or the development of alternative proposals.

The cost of capital and risk of investment may increase **5.66** Uncertainty also increases the risk of investment, which may result in higher financing costs. Uncertainty is difficult to fit into business investment planning horizons. This is likely to impact most on the private sector, whether promoters of the transport investment itself, or private business seeking to invest in complementary investment. Uncertainty about the point at which the project will be delivered is likely to be reflected in higher costs of capital, as the uncertainty creates increased risk for investors. These higher financing costs are then likely to be passed onto the final users of the infrastructure.

5.67 Uncertainty may also impact on the public sector's ability to manage the financing for projects, given government budgetary cycles and the 'lumpiness' of major transport investment. The size of the government's capital portfolio may help to make this easier to manage from a macro-economic perspective. However this can be difficult to understand for communities anticipating development of a project in their area but uncertain of when, or if, it might be delivered.

Other EU countries face similar challenges with their planning systems

Other EU countries face similar problems **5.68** The UK is not alone in facing increasing difficulties in delivering major transport infrastructure through its planning process. Other EU countries are faced with similar challenges in balancing increasing environmental pressures and their requirements for infrastructure to support economic growth.

5.69 There is no easily comparable evidence of the relative speed at which different countries deliver projects, but it is clear that other countries have tried to address the uncertainty and lack of transparency faced in the UK, with varying success. It is clear that most countries do not consider that their system is ideal and many continue to seek further improvement.

5.70 A number of stakeholders suggested that France has a system that ensures that local communities buy into the need for development which results in infrastructure proposals progressing relatively smoothly through the process. However, the evidence suggests that the French too are finding it increasingly difficult and highly costly to deliver major projects. Although the French formal system may appear to show faster delivery times than the UK, the complexity of the full process from start to finish is not fully captured in such a comparison.

5.71 The Netherlands has a well-established plan-led system, which includes a national spatial plan, containing a series of maps of infrastructure, which must be approved by the national parliament. The last national plan came into force in February 2006 and is valid for 15 years to ensure it remains responsive to the needs of the Dutch economy. However, depending on the political context, it can sometimes be very difficult to progress the plan through the Dutch Parliament, which creates an extra barrier to delivering infrastructure.

5.72 Ireland has recently adopted major reforms to its planning process for major transport, and other major infrastructure, projects. These reforms consolidate the procedures, which were different for different types of infrastructure, into a uniform planning consent process. Ireland previously had one system for projects brought forward by local government and a different and lengthier system for private sector proposals. Entirely different procedures applied to specific types of state infrastructure such as energy developments. Those differences have been removed, with all types of infrastructure proposals now going directly to An Bord Pleanála (Ireland’s independent planning body) for determination. Ministers in Ireland are not involved in the final decision on a scheme.

WHERE COULD FURTHER IMPROVEMENTS BE MADE?

5.73 The previous section has identified that there are considerable problems with the current system that are having significant impact. To address these problems, we need to know how they have arisen. This section identifies the causes of the problems.

5.74 Our analysis suggests at least six substantive causes of delay, uncertainty and cost in the UK system:

1. **The balance of government policies or priorities is unclear** – This can make many stages of the process lengthier, especially the public inquiry, if there is no published, strategic context to help establish the ‘need’ for development.
2. **Cumbersome, complex system with overlapping statutory and formal processes** – The current system has different legislation for different modes, as well as general planning legislation and other consent regimes, with different Ministers accountable for each and responsible for decisions under their respective legislation. This leads to difficulties in balancing the merits of the project as a whole.
3. **Lengthy inquiry period** – The current inquiry process is an adversarial and costly process, including a large amount of time spent cross-examining witnesses. Evidence is often given orally, as well as in written form, which can create inefficiencies and repetition.
4. **Two separate phases of decision making: the Inspector’s recommendations and the Ministerial decision** – Both the preparation of the Inspector’s report and recommendations and the Ministerial decision stages can be subject to delay, as new matters and evidence arise or issues need to be revisited for clarification.
5. **Multiple decision makers** – Because of the different legislation and the different Ministerial accountabilities, often more than one Minister will be involved in making the final decision on a specific project.
6. **Legal challenge** – The risk of legal challenge is present throughout the process. This legal challenge can be through statutory appeal rights or an application for judicial review of the decision-making process. These challenges can be in respect of (a) decisions about strategic policy and any related consultation exercise and/or (b) final decisions on a specific scheme.

5.75 The impacts of these causes are discussed in more detail below.

1. Clarity of government policy

5.76 Experience has demonstrated that where the strategic context or objectives of government policy are not clearly articulated, this can risk hindering the delivery of some major projects, especially those brought forward by the private sector. It is logical to look to Government to clarify the national strategic interest and objectives for major projects, balancing the various relevant factors.

5.77 The Government's Air Transport White Paper¹¹ set out to provide a clear strategic framework, so that subsequent planning inquiries on specific proposals could focus on understanding and mitigating the local impacts, rather than revisiting issues of national need. For example, with reference to expansion at Stansted, both government administrators and a number of stakeholders are broadly optimistic that the existence of the White Paper, especially once it is incorporated into the Regional Spatial Strategy for the East of England and the relevant Local Development Framework, should help the inquiry be more focused and run more efficiently.

5.78 This remains to be fully tested. The circumstances surrounding airport capacity and development, especially in the greater South East of England, have some unique characteristics. The Air Transport White Paper may not necessarily be the best model for all other sectors. But it does clearly illustrate the principle that prior establishment of the national strategic interest and objectives can help to lift some of the potential burden of debate from inquiries into individual proposals. This may also reduce duplication and potential confusion, where a number of individual proposals arise to be considered simultaneously or sequentially.

5.79 There is also potential confusion caused by the number of strategic documents which can impact on development. For example, the Regional Economic Strategy and the Regional Spatial Strategy can both include regional priorities for transport development.

2. Cumbersome and complex process

5.80 The statutory phase of the planning process – making the application, conducting the public inquiry, and making the decision – is only one stage in the full planning process that is undertaken before a project can be legally developed. It provides a number of challenges for a system that is aiming to provide certainty, speed and reduced costs.

Wide range of consents is often required

5.81 For major transport development proposals, a wide range of consents and permissions is often required before construction can legally begin. This is particularly the case where there are 'linked' applications, such as the required surface access improvements for proposed port or airport development. For example, the application to develop the second runway at Manchester Airport required consents and powers from at least five different statutory regimes. For bigger or complex projects, powers for related parts of the development (e.g. access roads) often also require the co-operation of other bodies from both the public and private sector, such as the Highways Agency or Network Rail. The objectives of these organisations may not always align with the objectives of the promoter. Resolving this can cause delay and uncertainty, with even more delay when the public sector seeks developer contributions from the private promoter.

5.82 Most of the different statutory consent processes have their own procedural rules, which although similar in many respects, have some fundamental differences. In practice, this inconsistency is managed well by Inspectors, when considering linked applications

¹¹ The Future of Air Transport (2003) www.dft.gov.uk.

across different statutory regimes. Where the rules differ, an Inspector will seek to apply them in a manner which gives the most flexibility to the participants. Notwithstanding the best efforts made by Inspectors to make the process more coherent, it is clear that it still has the potential to baffle users who are unfamiliar with how it operates. This can significantly increase the costs of applications and participation, as professional advice is almost essential in order to participate effectively in the process. For communities and small businesses, this can act as a real barrier.

Different processes can add complexity and uncertainty

5.83 The existence of different possible processes adds complexity and uncertainty to the process. As mentioned previously, the Planning and Compulsory Purchase Act 2004 ('the 2004 Act') enacted a set of procedural reforms which apply to major infrastructure projects. These reforms, which have recently come into force, introduce a number of new process mechanisms for use in inquiries. One of the most significant reforms is the possibility of different Inspectors holding concurrent sessions of the same inquiry and reporting to a lead Inspector. Commentators consider that these changes are a positive step in the right direction.

5.84 However, the reforms that were made in this area only apply to applications made under the Planning Acts and do not apply to the part of the inquiry that is considering any accompanying applications under transport planning legislation, such as the TWA or the Highways Act. The development of a second runway at Stansted may provide an opportunity to test these new provisions, but only in relation to the elements of the application that fall under the Town and Country Planning Act. This would include the main application for the runway expansion, but not questions about surface access. Primary legislation would be required to extend the proposals to all transport planning legislation.

5.85 The complexity of the process means that it can sometimes be difficult for promoters and other participants to anticipate all the likely detailed elements of the process that need to be considered. Administrators and environmental groups see a lack of careful promoter preparation early in the process as being a major cause of delay at later stages. However, it could be argued that promoters are strongly incentivised to minimise delay because of the costs it imposes on them directly. The consequences of an ill-prepared application, or an application where late changes are made to project specification, range from a longer and more drawn out public inquiry to new consents needing to be sought (e.g. heritage consents). At the most extreme, this can mean re-opening the public inquiry, as happened with the Thameslink 2000 application.

3. Lengthy inquiry period

5.86 The element of the planning system which has perhaps attracted the most attention over the years is the public inquiry and the length of time that it can take. This stage can also introduce uncertainty to the process because of the absence of any reliable indicator in advance as to how long the inquiry is likely to take.

5.87 In the current system, the public inquiry is a key point for public participation in the system and can often involve significant commitment from participants. Because oral evidence is one of the main ways of giving evidence, attendance at the inquiry is often vital to understanding the issues and evidence being examined. The 'average' inquiry for a major transport proposal takes almost 30 weeks but there is considerable variation within this.¹² The public inquiry for the A303 trunk road around Stonehenge took about 16 weeks; and the two inquiries for the separate West Coast Mainline applications took a total of 52 weeks.

¹² These figures cover applications submitted since 2000, with public inquiries greater than two weeks. The number of weeks includes both 'sitting' and 'non-sitting' days for the inquiry length. The figures given as averages do not include Terminal 5 – this was such an extremely lengthy case that it distorts the figures to include it.

Inquiry process needs to cover complex issues

5.88 Projects that are of national significance or that cut across a number of different transport modes may be substantial in scope and size. By their nature they will have significant effects on the surrounding area, both during the construction period and in their operation, and are likely to generate significant public interest both in supporting and opposing the development. Individuals' property rights are likely to be directly affected (for example, where the development is dependent upon the compulsory acquisition of land to proceed). There may also be public debate about whether there is really the need for such scale of development and what the possible consequences of it may be.

5.89 These are complex issues, and consequently, because of the number of interests involved, the nature of those interests and the scale of development, to ensure a fair and balanced outcome, the inquiry stage of the process will necessarily involve a significant period of consideration. However, it is important that the costs of participation are not prohibitive, the costs of the system are not disproportionate, and that the risks of planning blight are minimised.

5.90 There are a number of hypotheses as to the factors that can make major public inquiries so lengthy. There is also much uncertainty about how much time should be accommodated within project timetables for the inquiry stage. Some of the factors that cause delay are related to the nature of the projects – particularly the complexity and scale of the projects and their significant localised impact. However, there is also evidence that suggests there may be some factors which are more to do with the conduct of the inquiry itself, and the different incentives and approaches that different parties use during the inquiry.

5.91 The main factors that the Study has identified include:

- scope of issues that the inquiry is attempting to cover – from technical issues such as the extent of environmental impacts, to providing a forum for interested community interest groups and individuals, to objectors debating what is current government policy and whether it is 'correct' or not;
- the process is adversarial, with a significant emphasis on oral presentation of evidence and oral cross-examination; and
- timetabling is not always used effectively to manage the process.

Delay can be a tool for objectors

5.92 Participation by interested parties is a key objective of the inquiry, especially where this increases understanding of the proposal and helps to improve the proposal's quality. However, delaying projects can be used as a tool against progress of a proposal by objectors. This is assisted by the fact that the incentives for ensuring efficiency in the process are not balanced evenly between the different parties. For example, there is a significant risk that well-organised objectors to the development are unlikely to be unduly concerned about any extra delay that their actions may cause the promoter, since they face only their own direct costs of participation. The awarding of costs is highly unusual in a planning inquiry and responsibility for ensuring that evidence remains focused and relevant rests mainly with the Inspector holding the inquiry.

Inspectors may not have appropriate incentives

5.93 Inspectors have a range of tools that have been introduced through different reforms to the planning systems. These include such measures as powers to introduce timetables to inquiries, and the power to encourage evidence to be presented efficiently and to focus on relevant issues. In some circumstances, these tools have been used effectively. Although the Inspector has a number of different tools designed to help run an efficient inquiry, they are not necessarily always appropriately incentivised to use them.

5.94 First, concern about possible legal challenge to their recommendations means that Inspectors may be cautious about managing overly long oral evidence or cross-examination or in enforcing timetables.

5.95 Second, there may be a degree of legal experience imbalance between the Inspector and the planning barristers who represent the major parties. Inspectors, appointed by Ministers, are usually civil servants who although very experienced in handling planning applications are unlikely to have had formal legal training, whereas the major parties often employ experienced QCs to represent them.

Allocation of costs may be inefficient

5.96 Third, there is inconsistency across the different planning processes as to the allocation of costs and these may not create incentives for efficiency. Each party is responsible for meeting its own costs of participation, such as the costs of seeking legal or other professional advice. But one party seeking to cause delay does not face the extra costs this imposes on other parties at the inquiry, except in the rare cases where a successful costs claim is made by a party which has incurred unnecessary expense as a result of another party causing unreasonable delay. These costs might be substantial, and for community groups or local authorities may mean the difference between being able to continue participating or being forced to pull out. There is therefore a risk that those with the deepest pockets have an advantage within the current system.

5.97 In addition to the direct costs of participation, there are also substantial administrative and overhead costs from holding an inquiry – such as providing meeting rooms, the costs of the Inspector and secretariat staff. The different regimes have an inconsistent approach to who pays these administrative costs. For example, the Planning Inspectorate meets the full administrative costs of holding the inquiry under the TCPA. Since government meets the full administrative cost, on the face of it, this does not incentivise the promoter or objectors to be efficient. However, promoters are probably already sufficiently motivated to not unnecessarily delay the inquiry given their desire to get the scheme approved in a timely period and because delay can affect the costs of the project. On the other hand, TWA inquiries and Harbour Order inquiries (for ports) provide for the full administrative costs of the inquiry to be charged to the promoter. These can be substantial, with Associated British Ports estimating that the planning process as a whole (including the inquiry cost and preparing an application) cost up to £40 million.

5.98 An inefficient inquiry process impacts on the costs faced by all participants. Both the promoter and society as a whole benefit from an efficient, well-functioning planning system. To reflect this, the costs of inquiry should be shared consistently between the government and the promoter.

4. Two separate phases in decision-making

Inspector makes recommendation, then Ministers make final decision

5.99 Once the inquiry has closed, there are essentially two distinct and sequential phases in reaching the final decision. First, the Inspector draws together the evidence that has been submitted in writing and presented at the inquiry and prepares a report to the relevant Minister(s). This report will identify what the Inspector saw as the key issues, present a summary of the main evidence presented in relation to them, draw conclusions on each of the issues and then conclude with a recommendation from the Inspector as to what the final outcome should be. This can be seen as the first decision point. The Minister/s then consider the Inspector's report and after possibly seeking further evidence or views on issues which they consider unclear in the Inspector's report will make the final decision. This is the second and final decision point.

5.100 It is possible, but highly unusual in transport cases, for Ministers to reject the Inspector's recommendations. Over the last five years, data from the Planning Inspectorate shows that it is very rare for Ministers to reject the recommendations of the Inspector with respect to transport projects, with the exception of some non-substantial conditions that have either been added or removed from the consent. However, without exception, Ministers deliberate for a considerable period of time before adopting the Inspector's recommendations – in some cases, important loose ends have been left unresolved from the inquiry and need to be referred back to parties. This brings into question whether this two-step structure of decision-making is efficient.

5.101 Recent measures have been adopted for TCPA cases to ensure the Ministers set timetables for making their decision. These timetables are set on a case-by-case basis. They have shown positive improvements in the processing of TCPA cases, but currently do not apply to 'linked' or transport proposals, which are often more complex and cover multiple pieces of legislation and require decisions from more than one Minister. Furthermore, although the timetabling may be useful to address unnecessary delay, they are likely to do little to reduce uncertainty because they are introduced so late in the process.

Delay breeds delay

5.102 Delay breeds delay – the longer the process takes, the greater the risk that circumstances change and further information needs to be considered and explored. Until the final decision is made by the Minister/s, anything that becomes an additional relevant consideration, such as a change in relevant government policy, must be taken into account. In the interests of fairness, all interested parties must also be given the opportunity to comment on any such additional changes or considerations. Given the period of time between the closing of the public inquiry and the presentation of the Inspector's report, and then a further delay until the Ministerial decision, this can be a long period of time. During this period new information or changes that need to be made can be substantial.

5.103 A drawn-out process risks creating an endless spiral of new requirements and questions, with new information needed to address them. In the interests of fairness, interested parties will need an opportunity to comment on any new information. For example, recently after the inquiry had closed on the application for a port development at London Gateway, new planning guidance was published,¹³ which meant that the issue it covered had to be dealt with between interested parties through an exchange of written information and meant that at least three months was added to the whole process. The two separate decision stages compound this problem because, by their necessarily sequential nature, they extend the time taken to fully conclude the process.

Multiple final decision makers

Ministerial decisions are often cross-Whitehall

5.104 Each statute has its own responsible Minister, so on major cases there are often multiple decision makers at Ministerial level. Each Minister must consider the application from the perspective of their own respective statute, yet needing to conclude with a coherent response. The decisions and advice that inform the Minister's decisions have to be carefully co-ordinated and managed across Whitehall – a task which can itself cause major delays and administrative complexity. As a result, interdepartmental processes are put in place to manage these issues but it is inevitable that delays can still occur. There is also a risk that splitting individual elements of the project across different decision makers leads to difficulties in balancing the need for the project as a whole and how best to deliver the Government's transport objectives.

¹³ Circular 06/05 Biodiversity and Geological Conservation – Statutory obligations and their impact within the planning system, ODPM/Defra, 2005.

Risk of legal challenge

5.105 Uncertainty about whether the project has permission to proceed is compounded by the risk of legal challenge at every stage of the process. The current opportunities for legal challenge in the transport planning system vary across the different statutory consent regimes.¹⁴ The possibilities are:

- a statutory appeal against the decision; or
- an application for judicial review of the process by which the decision was reached (the consultation exercise, the strategic decision, and/or the detailed decision on a specific scheme)

5.106 There is a clear and valid need for such rights. Legal challenges to government decision making plays a vital role in ensuring that a decision is made in accordance with legal principles, such as that decision makers should address relevant considerations (and should discount irrelevant ones); and should act procedurally fairly. However, legal challenges can be costly and time-consuming and may significantly delay progress on a proposed transport scheme. And such rights are open to abuse – challenges can be a useful delay tactic for objectors. Challenges also create extra uncertainty for local communities, objectors and promoters of schemes and even where unsuccessful can delay the development of the project.

5.107 The risk of legal challenge at the strategic policy-making stage is a relatively recent development and is demonstrated by the Air Transport White Paper cases. Aviation policy was subject to judicial review at two different stages of its development – both at the Green Paper stage and following publication of the Air Transport White Paper itself. In total, these challenges took about two and a half years to resolve. Although certain aspects of the decision-making processes were identified as being defective, such as an inadequate consultation process at the Green Paper stage, the majority of the arguments made by the claimants were rejected by the courts.

¹⁴ Some examples of the rights available include:

Town and Country Planning Act 1990: Planning decisions made by the local planning authority (LPA) may be challenged by way of an appeal to the Secretary of State. This right is conferred on the applicant only. There are no specific statutory grounds for an appeal. There is a 28-day time limit for exercising this right. A third party challenge to a decision by an LPA can only be made by way of a judicial review claim to the High Court. Such claims must be made promptly (and in any event within three months of the decision concerned). This is not an appeal on the merits, but a claim for a review of the manner in which the decision was made. The court cannot, therefore, substitute its own decision for that being challenged. Where the application is “called in” for a decision by the Secretary of State, the decision of the Secretary of State may be challenged in the High Court by “a person aggrieved” by that decision or the local planning authority. There is a six-week time limit for exercising this right. The statutory grounds for such an appeal are (i) that the decision is not within the powers of the Act or (ii) that any of the requirements of the Act (or any relevant secondary legislation) have not been complied with.

Transport and Works Act 1982: Any person who is aggrieved by an order under section 1 or 3 may, within a 42-day time limit, challenge in the High Court the validity of the order, or of any provision contained in it, on the ground that (i) it is not within the powers of the TWA, or (ii) any requirement imposed by or under the TWA or the Tribunals and Inquiries Act 1992 has not been complied with. Where this statutory right of challenge is not available – for example, because the Secretary of State has decided not to make an order – an aggrieved person may seek to challenge the decision by way of a judicial review claim to the High Court.

5.108 It is not clear what impact the judicial review of the Air Transport White Paper has had on when proposals for airport expansion that would be consistent with the Government's objectives as set out in the White Paper might be brought forward. There is always likely to be some lag between publication of a government policy statement and developers being able to come forward with detailed proposals. While a policy is under challenge, this creates considerable uncertainty. However, if a proper and careful process has been carried out, as was almost entirely upheld by the courts in respect of the Air Transport White Paper, the policy is likely to remain largely intact.

5.109 A challenge to government policy may also be made at the end of the process in response to a planning decision on a specific proposal. A claim, for example that the decision maker should not have taken account of a particular government policy, could form the basis of a statutory challenge or proceedings for judicial review.

5.110 The scope for challenging decisions at every stage of the planning process is thus very wide. The existence of a number of independent statutory rights of legal challenge, in addition to the possibility of judicial review claims, with different grounds and time limits, adds to the complexity and uncertainty of the planning system.

BUILDING ON REFORM – PROPOSALS FOR CHANGE

5.111 The following section presents a package of proposals which offer the potential to make a significant difference to the UK's ability to deliver the transport infrastructure schemes that the UK economy needs to support sustainable development.

5.112 This part of the chapter:

- presents a package of proposals, designed to deliver a more efficient system with extensive and defined opportunities for participation;
- identifies what the proposals offer as a package;
- assesses how the proposals meet the objectives set out above, and the gains that can be delivered through these changes.

5.113 The Annex to this Volume looks in more detail at the proposals.

5.114 The proposals outlined aim to address the challenges identified and discussed earlier in this chapter – length of process, uncertainty and cost – while delivering against the objectives for the planning system. The proposals have the potential to have a significant impact without limiting the ability of the process to ensure balanced, considered judgements.

Recommendation 5(d)

Significantly reform the planning process for strategic transport infrastructure schemes to improve efficiency and predictability without compromising fairness; specifically act, including introducing new legislation where necessary, to:

- (i) Put Ministerial direction and accountability at the heart of the process: at the outset, the government should produce clear statements of strategic objectives which articulate the need for strategic transport capacity and development, balancing national economic, environmental and social considerations and the balance between national needs and possible local impacts.
- (ii) Introduce new statutory provisions to reinforce the requirement for full and wide-ranging public consultation when drawing up these national strategies, enshrining the role of individual members of the public and interested organisations in shaping the national priorities for the future.
- (iii) Provide increased certainty for all interested parties, by establishing a presumption in favour of development for schemes the main aims of which are consistent with the objectives set out in a strategic statement.
- (iv) Encourage best-practice consultation requiring scheme promoters to consult with the local community and interested parties at an early stage of individual scheme development, so that promoters are adequately prepared for issues likely to arise, and applications can proceed efficiently through the inquiry stages.
- (v) Establish a new independent Planning Commission for strategic transport schemes comprised of well-respected experts of considerable standing. Having conducted an inquiry stage, the Commission would take the decision in relation to planning applications for strategic transport schemes.
- (vi) For those schemes that fall to the Planning Commission to determine, Ministers would have no planning decision-making role. The Commission would determine whether the main aims of a planning application are consistent with the objectives set out in a strategic statement, within a sustainable development context. Where they are consistent, there would be a presumption in favour of granting permission for the scheme, subject to ensuring that the scheme is compatible with:
 - EC law, including EC environmental law requirements;
 - ECHR law requirements; and
 - any other exceptional circumstances that Ministers may have specified in the Strategic Statement.

The Commission would have the power to determine appropriate mitigation measures, including environmental mitigation measures.

- (vii) Provide for a more focused inquiry process with more accessible opportunities for participation by all parties, by moving to an inquisitorial, rather than adversarial, inquiry process. There would be a presumption in favour of written representations.
- (viii) Impose challenging, but achievable, statutory time limits on the key stages of the inquiry process, to provide greater certainty for all those likely to have an interest in a specific scheme.
- (ix) Simplify and consolidate the statutory process for strategic transport schemes, by creating a new statutory consent regime under the jurisdiction of the Commission. There would be one set of procedural rules.
- (x) Establish clear and defined statutory rights of legal challenge at key stages of the process to form a complete framework for challenges to decision making under these proposals. The definition of these rights, along with the opportunities for participation set out above, provide extensive and defined opportunities for interested parties to participate in and influence the full decision-making process.

5.115 The Study has not considered the devolution-related issues that would arise if its recommendations were accepted and taken forward by the UK government. Such issues are outside the scope of this work. The recommendations in this section do not, therefore, seek to address the possibility and/or desirability of any new legislation extending to the territory of a devolved administration. Such fundamental issues would clearly need to be addressed and resolved, should the UK government wish to take forward these recommendations.

THE PACKAGE OF PROPOSALS

5.116 The proposals summarised in this chapter offer substantial reform and should be considered as a package. Together they help balance the national need for and potential benefits of well-targeted transport infrastructure with the social and environmental impacts that development may have. Together they create a system that retains Ministers at its heart while delivering a fair and transparent system with increased certainty for all those affected by the development.

5.117 The package seeks to separate out the distinct roles of determining strategic questions of ‘need’ – how much development does the UK need? – from questions of ‘implementation’ – what should detailed implementation of this look like? How should its impacts be mitigated?

5.118 In developing these proposals, which are focused on the problems and causes identified above, the Study has sought to build on recent experience and to engage with experts. The proposals:

- draw on previous experience and improvements adopted in the UK;
- draw on best practice from systems in other countries; and
- have been tested with experts in the planning field as they have been developed.

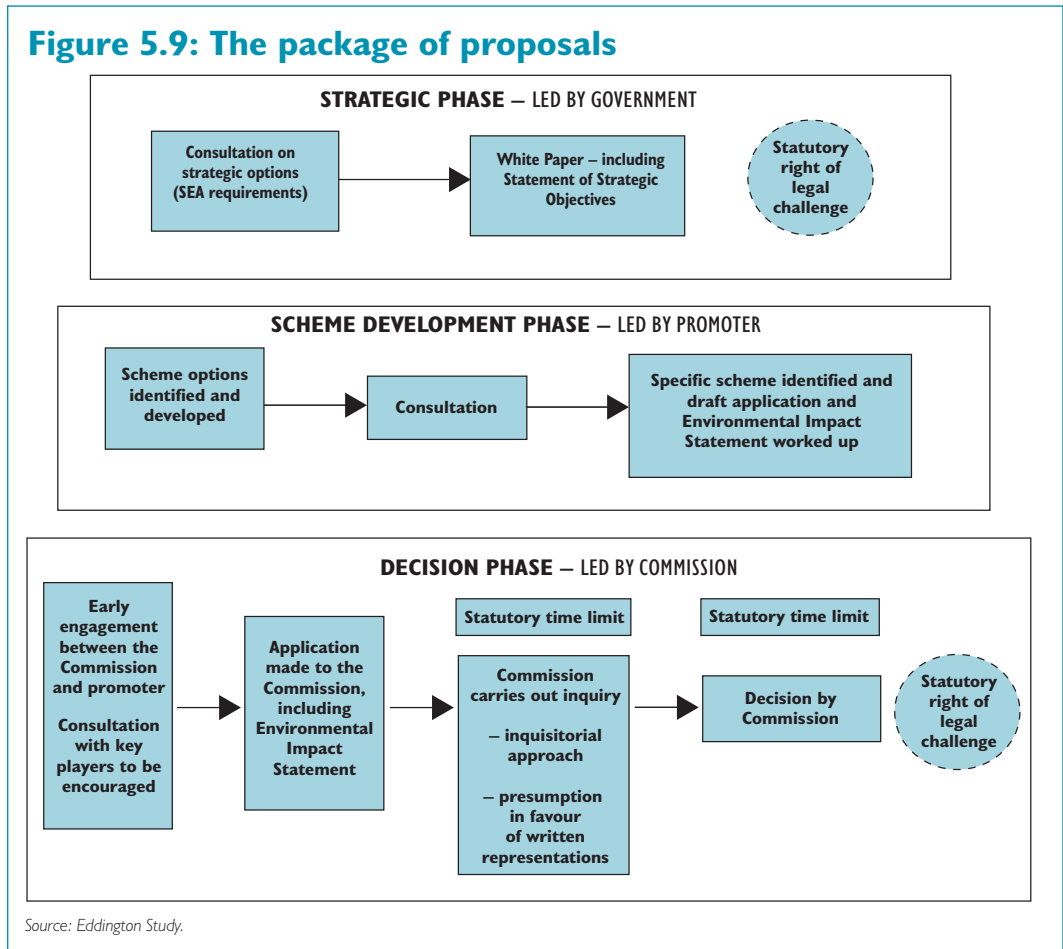
5.119 Some of the elements of the proposals have been advanced in previous proposals for reform, or have actually been reflected in recent reforms of the non-transport planning system. They also draw on successful practices operated elsewhere in the UK domestic legal system, or from further afield in Europe. But, to date, such ideas and reforms have not been brought together into a coherent system to fully capture the possible benefits.¹⁵ Detail on the individual proposals is discussed in the Annex to this volume.

The proposals

5.120 The proposed new process would have three main phases, as set out in the following diagram.

¹⁵ Hybrid Bills provide a parliamentary route for the consents required for a project to proceed. However, as set out above, they involve complex parliamentary processes and can be very time and resource intensive. They also have more defined consultation processes for members of the public compared to an inquiry process. This Study’s proposals would not remove the ability to use the hybrid bill process, where that was considered to be the most appropriate route. But it is clear that simply putting all projects through the hybrid bill route would not be a sustainable solution for delivering the infrastructure needs of the UK economy. The Study also considered developing an alternative Parliamentary process but concluded that it was not worth pursuing further. Detail can be found in the Annex.

Figure 5.9: The package of proposals



5.121 The package of proposals would significantly reform the planning process for major transport projects to improve efficiency and predictability in the system without compromising fairness.¹⁶

Strategic phase

5.122 The strategic phase seeks to put Ministerial direction and accountability at the heart of the process. At the outset, the government should produce clear statements of strategic objectives which articulate the need for strategic transport capacity and development, balancing national economic, environmental and social considerations (such as the government’s climate change objectives) and the balance between national needs and local impacts. Ministers could also make clear any significant environmental or social restrictions where they would not consider development appropriate.

5.123 New statutory provisions should be introduced to reinforce the requirement for full and wide-ranging public consultation when drawing up these national strategies, enshrining the role of individual members of the public and interested organisations in shaping the national priorities for the future.

5.124 Increased certainty should be provided for all affected parties, by establishing a presumption in favour of development for schemes the main aims of which are consistent with the objectives set out in a strategic statement.

Scheme development phase

5.125 Best-practice consultation should be encouraged to require scheme promoters to consult with the local community and interested parties at an early stage of individual scheme development, so that promoters are adequately prepared for issues likely to arise, and applications can proceed efficiently through the inquiry stages.

¹⁶ References to ‘transport projects’ in this part of the Study are references to ‘transport infrastructure projects’ unless the context otherwise requires.

Decision phase 5.126 A new independent Planning Commission for strategic transport projects should be established, comprised of well-respected experts of considerable standing. The Commission would oversee the inquiry stage, and would take the decision in relation to planning applications for strategic transport schemes.

5.127 For those projects that fall to the Planning Commission to determine, Ministers would have no planning decision-making role. The Commission would determine whether the main aims of a planning application are consistent with the objectives, set out in the government's strategic statement. Where they are consistent, there would be a presumption in favour of granting permission for the scheme, subject to ensuring that it is compatible with:

- EC law, including EC environmental law requirements;
- ECHR law requirements; and
- any other exceptional circumstances that Ministers may have specified in the Strategic Statement, such as any environmental or social restrictions on development.

The Commission would have the power to determine appropriate mitigation measures, including environmental mitigation measures.

5.128 A more focused inquiry process should be provided for, with more accessible opportunities for participation by all parties, by moving to an inquisitorial, rather than adversarial, inquiry process, with a presumption in favour of written representations. Challenging, but achievable, statutory time limits should be imposed on the key stages of the inquiry process, to provide greater certainty to those with an interest in specific schemes.

5.129 The statutory process for transport projects of strategic importance should be simplified and consolidated, by creating a new statutory consent regime under the jurisdiction of the Commission. There would be one set of procedural rules.

Legal challenge 5.130 Clear and defined statutory rights of legal challenge should be established at key stages of the process to form a complete framework for challenges to decision making under these proposals.

The proposals work as a package to deliver against the objectives

5.131 Together these proposals create a fair and transparent system. The statutory opportunities for participation set out above provide extensive and defined opportunities for interested parties to participate in and influence the full decision-making process, supported by the definition of the rights of legal challenge. At the same time, the system would be more efficient and provide increased certainty for promoters and communities, while retaining thoroughness and fairness.

5.132 Each individual proposal offers benefits. However, the separate proposals are designed to function most effectively, and to deliver the greatest overall benefits against the objectives, when established as a coherent and complementary package.

Figure 5.10: The objectives of an efficient and legitimate planning system for major transport projects

Such a system should ensure that:

1. The infrastructure projects the UK needs to support sustainable development are identified and, where appropriate, brought forward;
2. Environmental, social and economic objectives are balanced appropriately in the final decision; and
3. The process is fair, effective, and transparent:
 - Fair – interested parties (“interested’ parties throughout this document is intended to also include “affected” parties) should have an opportunity to put forward their views, and these views will be properly considered;
 - Effective – the final decision maker must be able to have thoroughly determined the relevant facts and strike a balance between differing views in a timely and cost-effective manner; and
 - Transparent – participants and the public understand how the process and decision making works and to what timetable.

In delivering these objectives, the costs and duration of the process should be proportionate, and uncertainty minimised.

Delivers the right infrastructure **5.133** The full and wide-ranging public consultation would help Ministers to determine the strategic need for infrastructure projects to support sustainable development. Statements of Strategic Objectives would balance the national social, economic and environmental impacts and allow government to articulate the need for strategic transport capacity and development.

Balances social, environmental and economic objectives **5.134** Environmental issues would be considered thoroughly at a number of different stages of the process. The consultation on the Statement would, where relevant, satisfy the requirements of the Strategic Environmental Assessment Directive and, where relevant, the Habitats Directive, and Ministers would consider the strategic environmental issues, such as the Statement’s climate change impacts, when articulating the need for strategic transport capacity in the Statement.

5.135 Environmental issues, particularly local impacts, under relevant EC directives would be thoroughly tested and considered during the decision phase. Early engagement between the promoter, the local community, and other interested parties would help to identify the key environmental questions relating to a specific scheme. These would then be addressed in detail in the promoter’s environmental impact statement that would be submitted as part of their statutory application.

Ensures participation is fair, effective and transparent **5.136** The package would ensure multiple opportunities for participation by local community groups and other interested groups or individuals during the process. The public consultation on the Statement would enshrine the role of individuals and interested organisations in shaping the national priorities for development, and the balance between environmental, social and economic objectives.

5.137 Scheme promoters would be encouraged to consult with the local community and interested parties at an early stage of individual scheme development so that promoters are adequately prepared for issues likely to arise, and applications can proceed efficiently through the inquiry stages.

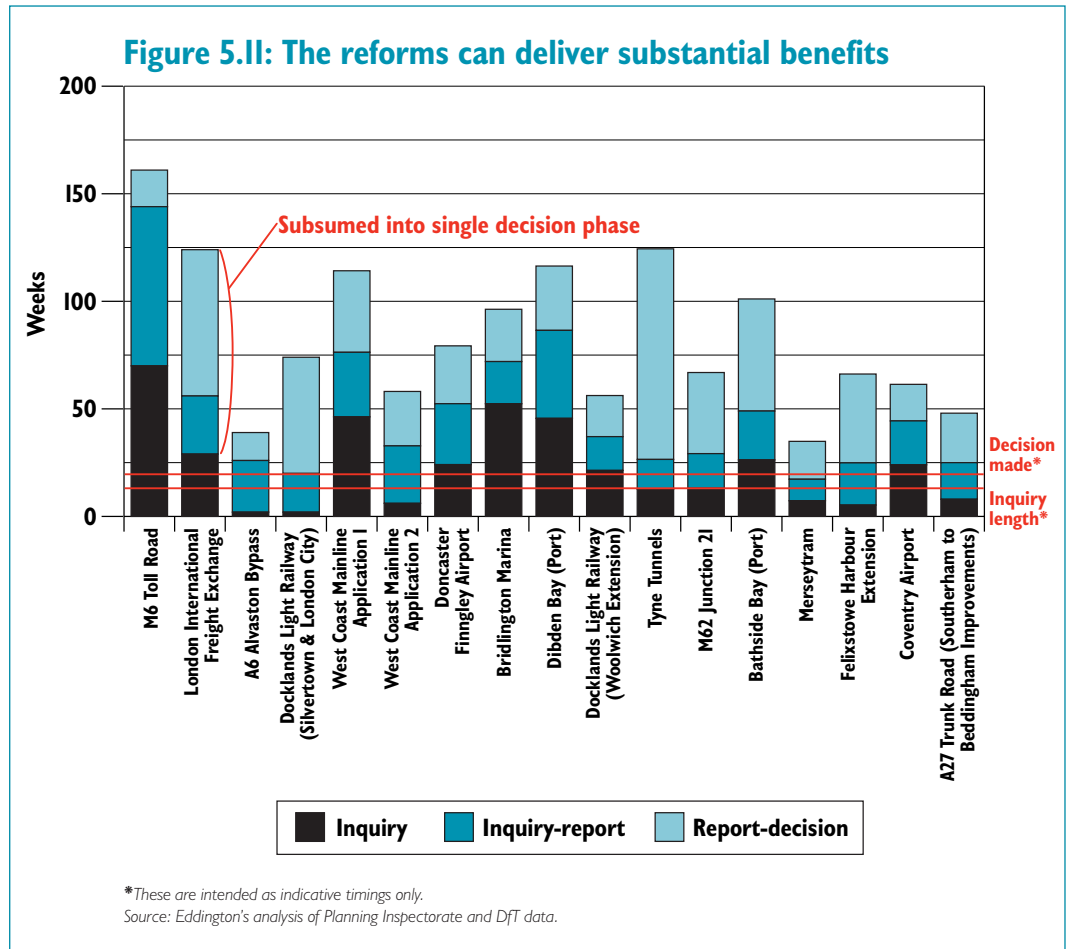
5.138 The proposed inquiry process would also contribute to ensuring the process is fair, effective and transparent. The inquiry would provide for parties to present their case and challenge the evidence of others through written representations and would also provide an opportunity for individual views to be presented.

5.139 The inquiry process would also be the main mechanism for ensuring the process is effective. It allows the Planning Commission to determine the relevant facts needed to take the final decision on the balance between national benefits and local impacts and, specifically, to ensure that a specific scheme is compatible with ECHR and EC law requirements. Transparency would be delivered through the clear distinction between a Minister's strategic role in publishing the Statement of Strategic Objectives and the scheme-specific decision made by the Commission. Although the Minister's decision-making role under the current system is quasi-judicial, there is a perception that they can make purely political decisions, which is not the case. This incorrect perception would be removed and the process made more transparent with the establishment of an independent Commission.

The proposals can deliver major gains by ensuring uncertainty, costs and duration are proportionate

5.140 The elements of the package would complement one another in a coherent system to ensure that the uncertainty, costs and duration of the proposed process were proportionate. This in itself would help to remove a significant barrier to participation.

5.141 The proposals have the potential to increase the certainty for interested parties (both developers and local communities) and have a substantial impact on the length of time individual schemes take to progress through specific stages of the system. The time limits that should be introduced at key stages of the process should be challenging, yet achievable. Figure 5.11 demonstrates the impact that indicative time limits of a six-month maximum for the public inquiry and three months for the Commission to make its final decision could have. There would need to be provision for extension of the time limits in 'exceptional circumstances'. The Study's analysis of case studies to understand why delays occur in the current system, and input from stakeholders, suggests that time limits of this scale of duration should be achievable.



5.142 A number of measures in the package contribute to this conclusion - not simply the time limits themselves:

- a clearer strategic framework is established by the Statement of Strategic Objectives;
- consultation at scheme development stage will help to ensure that the Promoter's applications would be better prepared;
- the inquiry is be more focused using an inquisitorial approach and applying a presumption in favour of written representations; and
- a single decision-making phase replaces the existing two stages of an Inspector's report, followed by a Ministerial decision.

5.143 There are two key risks in being able to achieve these, or any, fixed timetables. First, there is the risk that issues arising at the inquiry cannot be resolved within the allotted timeframe of the inquiry, e.g. because they require agreements between key parties. An adjournment of the inquiry may help to overcome this, although sometimes issues such as these can take considerable time to resolve. Encouraging parties to engage with key parties earlier would also help mitigate this. Secondly, there is the risk that important new issues or evidence arise after the inquiry has been completed but before a decision has been taken. The greater the reduction in the timescales, the more this risk reduces. Having only a single decision phase should help in this regard.

CONCLUSIONS

5.544 It is clear that the current planning system can act as a significant barrier to the delivery of transport infrastructure. The system can take too long, can create too much uncertainty and can impose too many costs on promoters of schemes, local communities, participants in the process and the UK more broadly.

5.545 The costs of the system materialise in a number of ways:

- the benefits that projects can deliver can be delayed;
- private sector investment by businesses may be unable to proceed while waiting for certainty about delivery of the infrastructure; and
- costs of participation can be significant.

5.546 When taken together it is clear that the challenges presented by the current system are complex and that to build on the improvements that recent reforms have made, further change is needed.

5.547 The proposals presented in this chapter provide a package that can deliver substantial benefits for the UK economy – ensuring that environmental objectives are balanced appropriately while delivering a fair, effective and transparent process and that the uncertainty, costs and duration of the process are also proportionate.