

4.A ANNEX: PLANNING PROPOSALS – THE DETAIL

I This Annex looks in more detail at the separate components of the package. The risks of the individual proposals are also explicitly discussed in this section. It is clear that there is no silver bullet to tackling the problems with the planning system and although the proposals are not risk-free, on balance, the Study's analysis supports proposing these recommendations for further consideration by government: Significantly reforming 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 direction from Ministers at the right stage in 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 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 parties 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 affected parties to participate in and influence the full decision-making process.

Figure 1: Which projects would go through the system?

These proposals were originally developed to provide a new system for ‘major transport projects’. As the proposals have developed further, it has become clear that there may be value in extending the proposals further to encompass a wider range of transport projects. There appear to be three advantages to having a single system for all projects:

- it would avoid imposing a relatively arbitrary threshold;
- it would offer the advantages of speed and certainty outlined above for all applications; and
- it would avoid the potential anomaly whereby Ministers had a role in determining less important/major projects, but were removed from the direct process for the most important planning applications.

The major disadvantages of having no threshold and having a single system for all transport projects are that:

- if the Commission were required to decide all transport infrastructure development applications, it may be swamped and create pressures on achieving the proposed time limits; and
- decisions on smaller schemes that may be more appropriately determined at a local level would be drawn into a centralised scheme.

Recommendation

(i) Put direction from Ministers at the right stage in 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.

(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.

2 The process would start with Ministers establishing a clearer strategic framework for major transport projects by producing Statements of Strategic Objectives, to articulate the need for strategic transport capacity and development. There would be no single model for

such statements, and the level of detail is likely to vary, for example between sectors where development is primarily delivered by the private sector in a commercial, competitive environment and where development is delivered by the public sector. There is a need to avoid pre-empting the detailed working of the market or distorting competition. At the same time, statements of strategic objectives should add value to the planning process by setting a clearer context within which individual development applications can be decided.

3 Thus such statements might include:

- demand and capacity projections for strategic transport capacity and development for the time period covered by the statement;
- where practicable and desirable, the strategic spatial and environmental impacts of development (including with respect to climate change), potentially including strategic environmental assessment and habitats issues;
- the wider consequences of development, including linked transport development;
- statements about other issues which Ministers exceptionally wish to bring to the attention of the Planning Commission, including significant local social considerations.

4 In deciding planning applications, the Planning Commission would be required to apply a statutory presumption in favour of specific schemes the main aims of which are consistent with the Statement of Strategic Objectives. Further details on what this would mean in practice for decisions on a specific scheme is set out below.

5 As part of the process for balancing local and national environmental, economic and social considerations when producing the Strategic Statement, Ministers would need to consider how they wish the Statement to fit with other relevant government policies, such as government's objectives on climate change, to ensure the intent of the Statement is clear. Ministers could also make clear any significant environmental or social restrictions where they would not consider development appropriate. The statement would need to be capable of being amended or revoked to respond to changes in government policy. It is likely that there would be a need to re-consult where any substantial change were made. The statements would also need to be as up-to-date as possible. Government should consider how best to deliver this in practice. It will be important to consider how to ensure there is sufficient accountability to Parliament with regard to the Statement.

6 A clear and defined statutory right of legal challenge to the Statement should be established. See below for more detail.

Figure 2: Air Transport White Paper

The 2003 Air Transport White paper^a provides an example of the types of issues that a Statement of Strategic Objectives might provide direction on. This White Paper looks at the future needs of the UK's air transport market through until 2030 and identifies the likely capacity requirements for new capacity. It also identifies spatial priorities for the new capacity – such as South East airports, particularly Stansted.

The Study's proposal would provide a clearer status to such Statements by establishing that it would create a presumption of development for subsequent specific schemes that are consistent with the Statement.

^a *The Future of Air Transport*, DfT, 2003.

7 The proposal delivers the following:

- Ministerial accountability. Ministers are clearly responsible for articulating the need for strategic transport capacity and development and for establishing the legal framework for future decisions on implementation of specific schemes;
- opportunity for broad and wide-ranging public debate about strategic priorities;
- can help speed up later stages of the process, especially the inquiry; and
- increased certainty for promoters and communities about the strategic need for projects.

8 The strategic phase of identifying transport priorities is a core central government role. Central government is best placed to manage the balancing of national sustainable development objectives, such as responding to transport demand while balancing environmental outcomes such as climate change impact, landscape and biodiversity. Strategy is best done in a coherent way, rather than on a case-by-case basis during the local inquiry in response to individual applications. This allows a broad and wide-ranging national public debate to be held rather than immediately focusing on the merits of detailed specific proposals in a particular location.

9 As identified in Chapter 4.5, an unclear view of strategic objectives and priorities makes later stages of the consent process more complex and uncertain for promoters, objectors, and local communities. In particular, it can mean that the public inquiry stage, which should be used to focus on local issues, ends up trying to reconcile and balance different national interests and policies without full open debate on these questions outside of the inquiry.

10 As set out above, a presumption in favour of development for schemes consistent with the Statement of Strategic Objectives would provide increased certainty for promoters and communities. This presumption would be capable of being overridden on EC and ECHR law grounds and any other exceptional circumstances that Ministers may have specified in the Strategic Statement.

11 This clear status for the Statement would minimise the need for the decision maker, the Planning Commission, to attempt to reconcile different government policy statements that may seek to deliver different objectives. Under the current system, the decision maker may be required to balance national planning policy (which may be contained in a number of different policy statements) against other national policies, such as environmental, social or economic policy (often set out in White Papers). The presumption in favour of development for later schemes has the effect of doing this balancing of national policy upfront, within government. This would help provide increased certainty for promoters and communities alike. It would be clearer which issues remain to be resolved at a later stage, particularly those concerned with managing significant local impacts of development and mitigation options, rather than balancing a number of different national priorities. All interested parties, including local communities, would face less uncertainty as to the conditions their schemes would have to meet in order to have a good prospect of approval. This would provide a more confident climate for investment.

Risks 12 The proposal carries the following risks:

- the status of Statements means the policy process may become risk averse;
- preparation of Statements, including the necessary evidence-gathering, analytical, and consultation phases, could prove very time-consuming and risk eroding the benefits of time saved in later stages of the process; and

- for private sector led development, in particular, a White Paper that is too specific could result in government inappropriately ‘second-guessing’ the market.

13 The first major risk of establishing a presumption in favour of development for schemes the main aims of which are consistent with the Statement is that the government policy process to develop them becomes risk averse. This might mean that Statements err on the side of caution or are too vague to have significant enough impact at later stages. Since the process of preparing the Statement allows government to balance strategic social, economic and environmental impacts upfront rather than leaving to a later stage, other departments and Ministers may also be less willing to commit to its conclusions.

14 However, mechanisms such as the established Cabinet Committee process are already in place to support Ministers to make the judgments on balance between different government objectives. Later Statements could amend, revoke or replace an earlier Statement. The process of developing Statements is therefore suitably flexible to allow government to be responsive to external changes that might mean a shift in relative priorities across government policies over time. It is clear that the potential benefits of the full package of reform will be significantly reduced if a clear, strategic direction is not provided up-front.

15 The second risk is that the preparation of Statements is so time-consuming that it may add time to the whole process compared to the current system. However, offsetting this risk is the fact that government already prepares strategic documents in a number of sectors, which could potentially be adapted easily for this role. The overall impact that the Statement would be expected to have in terms of reducing uncertainty, also needs to be taken into account when considering how much detail a specific Statement should go into. Retaining flexibility and avoiding a ‘one-size fits all’ approach to producing Statements should help to mitigate the risk of their being unduly time-consuming to prepare. Updating Statements and underlying forecasts is unlikely to be as time-consuming as going through the process for the first time.

16 The third major risk of placing a significant emphasis on the role of the Statement within the system is that it will create a risk that government will be tempted to second-guess market decisions. This risk would be of particular relevance where the private sector is responsible for bringing forward investment proposals. If the Statement becomes too overly specific, it risks unnecessarily slanting market decisions. It is worth observing, however, that the planning system already potentially distorts market decisions because of the scope of its regulatory impact on investment decisions. In drawing up the Statement, government will therefore need to determine the appropriate balance between providing sufficient detail to establish a framework for later decisions, while still supporting the freedom of the private sector to bring forward commercially sensible proposals, where this is appropriate. In practice, having regard to the consultation process described below will further mitigate this risk.

Recommendation

(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.

Wide, public consultation would be key part of developing strategy **17** In working out the need for development and any preferences for where it should be spatially located, Ministers would balance strategic environmental, economic and social objectives, and local and national needs to ensure the development is sustainable. Because of the potential significance of such policies, it is envisaged that a wide public consultation exercise, based on clearly defined statutory requirements, would need to be undertaken.

18 Prior to the final publication of a Statement of Strategic Objectives, there would be a wide and open public consultation exercise. The requirements for consultation would be given statutory force to reinforce their importance. The purpose of this exercise is to:

- elicit a wide range of views on the environmental, economic and social impacts of the possible strategic options in order to assist the Government in shaping a balanced and relevant set of strategic aims; and
- encourage full public participation in the process and provide individuals, communities and interest groups with the opportunity to help shape the national priorities for the future.

19 The statutory provisions could draw on the best practice guidelines set out in the Cabinet Office Code of Practice on Consultation. They would include a requirement to undertake a written consultation exercise with a minimum consultation period, such as 12 weeks.

20 The statutory provisions could reflect the requirements of the Strategic Environmental Assessment Directive 2001/42/EC (“SEA”), which requires an environmental assessment of certain plans and programmes. The SEA requires the preparation of an environmental report “in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated”. The designated environmental authorities and the general public are required to be consulted on the draft plan/programme and the environmental report before it is adopted. Following the adoption of a relevant plan/programme, the UK is required to publish a statement describing how it integrates the environmental considerations and how it took account of the report, the consultation responses and the reasons for choosing the plan/programme in the light of other reasonable alternatives identified.

21 If the policy proposals were likely to have a significant effect on a protected European site, they may also be subject to the requirement in the Habitats Directive 92/43/EEC for an “appropriate assessment” to be undertaken. This also entails a public consultation exercise, which may need to be reflected in the proposed statutory consultation provisions.

22 Full and open consultation plays a very important role in enhancing transparency and ensuring that Ministers, when taking a decision to adopt a Statement, are fully apprised of the views of the local communities, potential developers, local and regional authorities and interested groups such as environmental groups. In that way, democratic accountability is assured. It is also the best way of ensuring the process is fair. A wide, and thorough, statutory consultation process should reduce the risk of legal challenge and any subsequent delays.

Recommendation

(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.

23 Well-prepared applications, where the promoter has engaged early with the local community and key players, tend to proceed more smoothly through later stages, such as the inquiry. This is clear from case studies of applications made under the current planning process. A well-prepared application has often anticipated possible areas of concern and considered ways to address them.

24 Once a formal application and proposal have been made and the process proceeds through the various stages, it can become increasingly difficult and costly for changes to be made to the original proposals. One of the most effective ways of avoiding late changes is to identify potential problems early on. Consultation can play a key role in this, as can early engagement with those administering the process to draw on their familiarity with the system.

25 To ensure the fairness of the process, interested parties should have an opportunity to put forward their views, and those views should be properly considered. It is important that this happens both at the point where strategic priorities are being determined and also as individual projects get developed in detail.

26 Promoters should therefore be encouraged to consult on project options with the local community and interested parties at an early stage of developing individual schemes and before committing to a final preferred option. This provides an early, low-cost opportunity for interested communities to understand the proposals and influence their direction and development.

27 There are potentially a number of informal opportunities for interest groups to feed into the process. At a minimum, this process should be viewed as ‘best practice’ with promoters being strongly encouraged to carry it out. Consideration could be given to giving this greater status, but care would need to be taken to allow for the different requirements for different projects. For example, who should be consulted, and what type of consultation is most suitable, will depend to a large extent on the size and nature of the project.

28 Experienced promoters already recognise the value of consulting with interested groups, especially environmental and community groups, before finalising their application:

- while drawing up and considering different scheme options, e.g. different alignments of roads, different options for environmental mitigation; and
- in drawing up the draft application and draft environmental statement.

29 The main benefits of early engagement with interested parties are to address community concerns and to identify potential problems with the proposals at an early stage of development. The end result should be a better-prepared application, which is likely to have a greater appreciation and consideration of the environmental and social impacts. Interested communities should also have an increased understanding of what the project might mean for them. This should reduce delay, uncertainty and cost at later stages, especially the inquiry stage.

30 The promoter of a project would also be required to engage with the Planning Commission a number of months before a formal application is submitted. During this stage, the Planning Commission would not be giving views on the likely success of the proposal. Instead, the focus would be on ensuring the application and environmental statement are properly prepared and that the promoter has consulted and spoken to those groups who are likely to have an interest in the inquiry or the proposal. This draws on existing best practice in other areas of planning.

31 The Planning Commission would be able to encourage the promoter to consult with key players (e.g. statutory environmental bodies, Highways Agency, key non-governmental organisations) with a view to avoiding or reducing possible disputes at a later stage by encouraging parties to engage earlier. Measures would need to be in place to ensure the propriety of the engagement. The Commission's role at this stage would be solely advisory and it would need to be clearly set out that their advice is without prejudice to any later decision. Early engagement, in the form of pre-application discussions, is already encouraged between private developers and local planning authorities on significant developments, such as housing or commercial developments. Where carried out well, these are often highly valued by prospective applicants as they can reduce delays at later stages of the process.

32 This proposal would mean that:

- problems that are identified could be remedied earlier, when the costs of responding to them are lower;
- the promoter, who may only have irregular or one-off contact with the planning process, could benefit from the experience and expertise of the Planning Commission; and
- the inquiry process would be speeded up leaving fewer unresolved issues.

33 The Planning Commission would be very familiar with the formal processes of the planning system and how these play out in practice. This expertise can be very valuable, especially for promoters new to the process. Early engagement allows the proponents to benefit from this expertise and identify potential problems that they need to address while it is still relatively easy to make changes. In turn, this reduces the risk of an ill-prepared application and means that the inquiry can focus on really understanding what is being proposed, rather than needing to spend time addressing the problems of ill-prepared applications.

Risks 34 This proposal has the following risks:

- a possible perception that the Planning Commission would be pre-determining issues without having heard the full evidence;
- objectors will dominate the process and cause unnecessary delays; and
- possible risk of legal challenge – if, at this stage, the Planning Commission oversteps its proper role in managing and advising on the process.

35 There is a risk that early engagement with the Planning Commission may create the expectation of a certain outcome. Early engagement is already encouraged through pre-application discussions between developers and local authorities for local projects, and managed appropriately to ensure propriety. The practice of early engagement could be further supported through relevant statutory provision, and the establishment of relevant procedures, such as careful documentation of all engagement that occurs.

36 There is a risk that objectors to the scheme, particularly those who object to it in principle, will dominate this process and cause delays. It is therefore important to ensure that the promoter has sufficient flexibility to determine how best to carry out the consultation. Later stages of the process, particularly the inquiry phase, will continue to be an important forum for objectors to the scheme to engage and present their views.

37 It will be essential to ensure that propriety issues are managed carefully throughout the process but this should be achievable. Consideration could also be given to whether there would be a formal separation between the ‘advice’ team and the decision-makers themselves.

Recommendation

(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 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.

38 A new independent Planning Commission (the “Commission”) should be established to take the final decision in relation to strategic transport schemes. Since the Commission would play such an integral role in the planning process, it would be critical to ensure it would be able to command respect and has the necessary skills to perform its job. The Commission would consist of a panel of well-respected experts of considerable standing. This group would need to include planning expertise but should draw from a wider range of skills to ensure that complex transport schemes can be considered thoroughly. This would be likely to include skills such as legal, engineering, economic, and environmental expertise, so different and broad backgrounds can be brought to bear on the final decision. All decisions would be made by panel decision to reflect the equal role of members and the skills they brought to the table.

39 Ministers would have no day-to-day involvement in the Commission. They would however play a critical role in its creation, by introducing the necessary framework legislation which would establish the Commission and set out the rules regarding its constitution and powers. This would ensure the appropriate accountability and monitoring arrangements for the Commission in its decision-making role. Ministers would appoint members to the Commission. Ministers would have no planning decision-making role in relation to specific schemes, but would have a greater strategic role, as discussed above. For publicly funded projects, Ministers would retain the final funding decision on whether the project should proceed – the planning decision does not commit government, or a private promoter, to proceed with the project at any cost.

40 The Commission would perform the following roles:

- engage with the promoter prior to the formal application being made;

- ensure the inquiry is conducted in a manner that means the key issues are appropriately tested and the right information is made available to the Commission to reach its decision;
- take the final planning decision on whether the specific scheme should proceed in the manner described in recommendation (vi).

41 The Commission would have a set time limit after the close of the inquiry to reach and issue a decision. Extensions of this time limit could be sought in exceptional circumstances.

42 To ensure the fairness and legitimacy of the process, it is important that the Commission's decision was subject to the possibility of legal challenge but that the ability to challenge is balanced against the risk of unnecessary delay. The detail of how this would be delivered is discussed below.

Figure 3: Independent expert body determining issues within a strategic framework

Although the Planning Commission would be a radical change to the existing English planning system, a number of parallels can be seen with other policy areas and internationally.

As noted in Chapter 4.5, Ireland has had an independent planning board since the 1970s. The role of this Board has recently been extended to include determining all major infrastructure proposals.

The Enterprise Act 2002 introduced a new regime for the assessment of mergers and markets in the UK. In most merger and market references the Competition Commission is responsible for making decisions on the competition questions and for making and implementing decisions on appropriate remedies. This decision role was previously carried out by Ministers.

Similarly, the establishment of the Bank of England Monetary Policy Committee took responsibility for detailed decisions on monetary policy away from Ministers. Decisions are still, however, taken within a framework established by Ministers through the setting of the inflation target.

43 This proposal would deliver the following:

- a single, independent body would be involved in all key stages of the application;
- there would be a single phase to the decision making (rather than the current two phases of an Inspector's report and recommendations, followed by the Minister's decision);
- experts would be engaged throughout the process and have the skills necessary to understand the local impacts of development; and
- time limit for decision provides certainty for promoters and participants.

44 The Planning Commission would be involved both before a formal application is made and then throughout the formal process of inquiry and decision-making. This should help to ensure effective case management. Because the Commission would be involved directly throughout the process, the different stages of scheme consideration are dealt with consistently. This reduces the risk of delay at later stages and the consistency also reduces uncertainty for promoters.

45 The Commission would make the final decision on an individual transport scheme. Ministers would cease to perform this role. This would mean that there would be only one phase to decision making, rather than the current two phases (where the Inspector prepares a report and recommendations for the Minister, who then makes the final decision), and that there would be a single decision-maker. This would ensure that unnecessary delays could be avoided and expert skills brought to the final decision. Reducing the period of time spent on the decision stage also avoids creating further delays because of new information arising that needs to be considered for the application. This minimises the problem of delay causing further delay.

46 Given the other measures proposed in the package, these efficiencies would be delivered while still retaining thoroughness and democratic accountability, and without compromising the quality of the decision-making. The Commission would be involved throughout the process – from carefully managed pre-application discussions to the inquiry stage. They would therefore be familiar with the application and its likely impacts and have had the opportunity to thoroughly test the application through the inquiry stage. The independence of the Board would also potentially be a significant benefit in being able to objectively consider the impacts of a scheme.

Risks 47 The proposal has the following risks:

- a perception of lack of democratic accountability in the system;
- a risk of cost-escalation or risk-averse decision making by the Commission; and
- time limit is set to an unrealistic period and means the Commission cannot fully consider the evidence.

48 The major substantive risk of this proposal is that because it would be such a radical shift from the current process, it may create a perception of a lack of democratic accountability in the system. However, in practice, this would not be the case. Taking the package as a whole, there is clear and proper accountability, with Ministers taking the role that is properly performed by them (to clarify the national interest through the Statement of Strategic Objectives) and being involved at the most appropriate stage (at the front end of the process). Moreover, under the current system, Ministers perform a quasi-judicial role when making transport planning decisions on specific projects; and so a purely political approach is not open to the decision-making minister. That said, Ministers do sometimes reject the recommendations of planning Inspectors and that possibility would be excluded under these proposals. Under the proposed package, the upfront Statement from Ministers would help provide greater clarity about the policy framework and remove this possible reason for different decisions. Ministers would also play a critical role in establishing the statutory framework and rules that would govern the operation of the Commission.

49 There may also be a concern that if mitigation issues are left to the Commission to determine, rather than Ministers, they might impose substantial and disproportionate new costs on projects through the setting of conditions to address the environmental impacts. This could risk cost-escalation of projects and may mean that projects are no longer financially viable, or more costly for the public-sector. This is already a risk under the existing system, since conditions are usually recommended by the Inspector and then affirmed or changed by the Minister.

50 However, a number of elements of the package would help to mitigate this risk:

- the increased efficiency and reduced uncertainty of the whole system will itself lower the risk of cost-escalation, which often relates to factors external to the planning system (such as construction cost inflation). The longer the system takes, the greater the risk of such inflation;
- the measures in the proposed package which encourage the promoter to engage early or seek mediation with key stakeholders should help to identify mitigation opportunities earlier in the process when it is easier to incorporate them effectively into the proposal;
- a greater use of price signals and an increasing ability to quantify impacts would help ensure a greater understanding of the relative merits of different mitigation options to ensure the most efficient balance. The establishment of the Commission provides the opportunity for Ministers to set out the more detailed framework that decisions should be taken within; and
- in drawing up their Statement, Ministers could consider whether they wish to set out in the Statement any policy parameters which decisions should consider, such as in what circumstances particularly costly mitigation would be appropriate to consider (e.g. tunnelling).

51 The final risk is that the time limit is considered unreasonable and means the Commission cannot fully consider the evidence to reach an informed decision. Again, the Commission's familiarity with the project because of their early and sustained engagement throughout the process; and the clear focus of the inquiry because of the Strategic Statement; means that a shorter and defined time period in which to determine the final decision should be achievable.

Recommendation

(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 parties likely to have an interest in a specific scheme.

52 The inquiry process is a critical and valuable element of the planning process. The consideration and testing of the application and the promoter's environmental statement are a fundamental part of ensuring a fair and efficient process and outcome. It is also important to provide a forum for publicly voicing views and concerns. The inquiry therefore needs to be understood to be more than simply an oral hearing and testing of evidence. As such, the inquiry stage needs to achieve a number of different objectives:

- testing questions of fact – under the current system, this is done both through written submissions and lengthy oral cross-examination by parties’ legal representatives;
- providing a forum for participants (promoters, objectors and supporters) to give their views on how different interests should be balanced; and
- giving legitimacy to the process by allowing interested individuals, communities and other interest groups an opportunity to participate in the decision-making process.

53 It is not clear that the current adversarial approach overseen by a Planning Inspector is the most effective forum to deliver these outcomes. It can be inefficient in testing questions of fact because it is heavily dependent on the parties and their advocates focusing on the issues that they consider most important and using cross-examination to test them. This means there is a risk that the inquiry is not focused on the issues that the Inspector considers most important. There is also the risk of repetition of information and evidence that is common ground between parties or is unlikely to be integral to the final decision. Under the current system, Inspectors do have some powers to run the inquiry more efficiently, but it is not clear that they feel sufficiently empowered to use these effectively.

54 The inefficiencies of the adversarial process mean that it is also difficult to judge how long the inquiry is likely to take or when particular issues are likely to arise. This can make it difficult for people to participate in the process because they cannot anticipate the level of involvement to which they will need to commit. The adversarial approach, which has become increasingly legalised in major cases, can also be daunting for community representatives and individuals to participate in. The recent shift towards greater timetabling of inquiries under the current system may help this to a certain extent, but is still only done on a case-by-case basis so does not provide certainty until a very late stage in the development of a specific scheme.

55 Instead, the Study proposes a radical rethink to the inquiry stage:

- move to an inquisitorial process with the Commission, or their representative, leading the process and focusing it on the issues they consider to be important;
- establish a presumption in favour of written evidence; and
- establish a challenging, yet achievable, statutory maximum time-limit for the length of the inquiry stage.

56 An inquisitorial model would require a proactive Commission, who take a strong lead in managing the full inquiry process, ensuring that it remains focused on the central issues. Their role is critical in ensuring the process runs efficiently and as a consequence, they must be held in high regard by participants.

Inquisitorial approach

57 In practice, the Chairperson would have sufficient discretion to adjust processes on a case-by-case basis to provide flexibility while ensuring a fair process. After the promoter has submitted the formal application, the Commission would consider and make publicly available the written submissions from the developer and all other written submissions from other parties. The Commission would then identify the issues, if any, they think need to be tested more fully during the inquiry. These are likely to include technical issues and issues of fact where the evidence is inconsistent, where issues have been inadequately addressed by the parties, and where legal issues require resolution. Other parties could also submit to the Commission a list of the issues that they think need to be considered and tested further in the inquiry.

Presumption of written evidence 58 The Commission would then choose how best to test the evidence and provide for public participation. A presumption in favour of written representations would be the norm. The inquiry could have two distinct phases, which could be held concurrently:

- inquisitorial phase to address issues of fact that the Commission has identified as being appropriate to consider in this way; and
- ‘open floor’ phase to allow interested individuals or parties to speak to their concerns.

59 The presumption of written evidence would mean that there would be no right to present oral evidence, or to conduct oral cross-examination. Written representations would be the main way of submitting evidence to the inquiry. The majority of cross-examination of issues would also be carried out by exchange of written materials. This would allow technical questions to be explored and tested in depth, where necessary, to feed into the final decision. The Commission would be assisted by a secretariat to support this process. The Commission would have the powers to call witnesses and could orally question them directly themselves, or could appoint an advocate to ask questions on their behalf. They may decide there is no need to call any oral evidence.

60 The second phase – the ‘open floor’ phase – would provide the opportunity for interested individuals or other parties to have their say within a defined period of time. This would not be intended to be the place to introduce new factual information, but, typically, would rather allow advocates to draw out the key features of their arguments (building on written representations) and to provide an opportunity for people to voice their opinion and state how the development is likely to affect them personally. Each oral representation would be subject to a time-limit, as happens (for example) in the European Court of Justice where the presentation of arguments is limited to a short span of time. Even though the ECJ does not routinely determine factual issues, the scope for a time-limited, yet fair, oral procedure is a valuable way to ensure the key issues are addressed publicly. If advocates or other participants feel that they have not had sufficient time to represent their views, a further written submission could also be made to the Commission.

61 At the close of the inquiry, the Commission could choose to seek written closing submissions from key parties: identifying what they see as the key issues that need to be addressed in the final decision and their views on how they should be determined. As with oral closing submissions in the current adversarial approach, this allows the Commission to draw on the expertise of the parties as to how the evidence should be balanced or determined.

62 The maximum length of the public inquiry would be established by statutory time limits. Provision would need to be made for the time limits to be extended in exceptional circumstances. Further consideration would need to be given to appropriate enforcement measures.

63 The Commission would also have powers to direct parties to mediation or other forms of dispute resolution to ensure a resolution of disputed issues, both before and during the inquiry. For example, these powers could be used to encourage parties to agree mitigation measures.

Figure 4: ‘Examination in public’ for Structural Plans

The recent planning reforms to the Town and Country Planning Act (TCPA) include an ‘examination-in-public’ process (EIP) for consideration of Structural Plans and to resolve outstanding questions, such as conflicts with national or regional policies, or where changes need to be made to the plan.

As with this Study’s proposals for an inquisitorial inquiry, the examination-in-public process is driven by the examiner. The examiner is responsible for selecting the issues on which they need to be more fully informed by means of public discussion in order to reach their decisions.

The changes to the TCPA have only recently been introduced and to date only two Structural Plans have been through this process. The evidence from the two EIPs to date suggests that it has allowed the testing period to be significantly reduced.

The Study’s proposals take elements of this model and extend them further.

64 These proposed changes would deliver the following:

- removes most oral cross-examination from the inquiry. Stakeholders suggest this can be a cause of considerable inefficiency in the current system;
- because of the Commission’s breadth of powers and the nature of the inquiry, the inquiry can focus on understanding the issues of local impact; and
- the time limits provide increased certainty for participants of time-scales and provide incentives for the Commission to run a focused and efficient inquiry.

65 Cross-examination has traditionally been used within an adversarial process to test evidence. It therefore has value, but is far from being the only, and certainly not the only effective, method of testing evidence. Stakeholder evidence suggests that, in practice, oral cross-examination can lead to “grandstanding” by parties’ legal representatives. The inquisitorial process and presumption of written representations would largely remove oral cross-examination as a means of testing the evidence from the process. The existing system, even where very carefully handled by the Inspector, has the potential to create delays as repetition comes into the process as different parties present their cases, and issues that could be more quickly resolved are extensively cross-examined by different parties.

66 Mechanisms to test evidence are retained in the inquisitorial model but adapted to suit the needs of the Commission. The Commission would be able to direct the questioning through focusing on the questions and witnesses that they see as important and core to understanding the merits of the case. This would ensure that the process remains thorough.

67 The Statement would have established Ministers’ strategic priorities and articulate their views on the ‘need’ for strategic transport capacity and development. This means that the inquiry can focus on issues of local impact and options for mitigation, because this strategic need has already been established and tested through wide public consultation. With an inquisitorial model, the Commission drives what the inquiry examines and more actively controls what the time of the inquiry is spent on. It is therefore easier for the Commission to maintain the focus on identifying and understanding the local impacts of the proposal, and whether they are consistent with ECHR and EC environmental requirements, than is possible under the existing adversarial system.

68 Time limits on the length of the inquiry would provide increased certainty for promoters and other participants. The possibility of an extension provides the necessary flexibility to deal with exceptional cases.

- Risks 69** The proposal carries the following risks:
- lack of buy-in to the process from stakeholders and participants;
 - written representations process may be unduly time-consuming and resource intensive;
 - the Commission could become risk averse in the way it conducts the inquiry to avoid legal challenge and consequently any possible time savings are reduced; and
 - the time limits are too short for complex applications.

70 A move to an inquisitorial model may appear to be a radical departure from the current planning inquiry approach. The current adversarial approach draws heavily on traditional UK legal traditions of oral hearings and oral challenge. However, a number of other European countries operate a much more written-based approach to their inquiries while still retaining the essential elements of thoroughness and procedural fairness. In the UK, there is no legal requirement to have oral hearings, since representations can be made fairly through other ways. An inquisitorial approach also has parallels with the examination-in-public approach undertaken for testing and adopting the London plan and Regional Spatial Strategies discussed in Figure 4.

71 A proposal to move to a presumption of written representations and to an inquisitorial model does therefore create a risk of a lack of buy-in to the process from stakeholders and participants, especially where people may perceive this as a diminution of their rights. This can be mitigated through clear communication of how the new system will work. This should particularly emphasise the ‘open floor’ phase of the inquiry which provides people with the opportunity to voice their views; and that written evidence is a more effective way to present complex evidence.

72 A move to a presumption of written representations and the removal of oral cross-examination from the inquiry stage would not be costless to administer. The Study considers that this could operate effectively but recognises that it is likely to require greater secretariat support to facilitate the process than is currently available to decision-makers and inspectors. The extensive use of electronic technology to store, reproduce and circulate information, as well as adopting procedures that let parties opt in or out of receiving papers depending on their interest, could help make this less paper-intensive. Such procedures have recently been adopted under the TWA. If people do not wish to receive the full version of documents, they can opt to simply see the relevant parts of it, or not at all.

73 Clear, firm and fair direction would be required from the Commission. This is required for any well-run inquiry, under any model, but would be of particular importance for an inquisitorial process. They would need to make effective use of the powers, including focusing on the key issues in the inquiry, and the presumption of written representations. There remains a risk, however, that due to concern about the potential for legal challenges based on alleged procedural unfairness, the Commission might adopt an increasingly risk-averse approach to conducting inquiries. This would risk any time-savings from switching to an inquisitorial model being lost.

74 The risks of this could be mitigated by providing the Commission with the appropriate training and guidance, but also necessary expert (including legal) support. The composition of the Commission would also be a critical component in ensuring it has the necessary standing. Provision could, for example, be made for the inquiry to be headed by a High Court judge. The statutory time limit on the length of the inquiry, with extensions available only on an exceptional basis, would also act as an incentive for the Commission to be efficient. The possibility of an extension also helps to manage the risk around exceptionally complex projects not fitting within the standard time limits.

Recommendation

(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.

75 This could deliver benefits of increased clarity. A single set of procedural rules should govern the regime.

76 There are various ways in which the necessary powers for deciding relevant transport planning applications could be conferred on the Commission. One possibility would be for the necessary framework legislation to amend each piece of existing transport planning legislation (and other relevant primary legislation, e.g. the Town and Country Planning Act 1990) in order to transfer the decision-making powers, and related powers/duties, in relation to strategic transport projects, to the Commission. This, however, is not an attractive option. It would entail tinkering with a number of pieces of existing legislation which, whilst overlapping in some respects, are framed in very different ways. Some of the legislation is old and is in need of reform. Understanding the Commission's powers would require a read-across to other legislation and it would be very user-unfriendly. This option would most likely be a complicated exercise with a potentially messy outcome and for these reasons it is not recommended.

77 An alternative approach would be to create, within the necessary framework legislation, a bespoke consent regime for relevant transport planning projects under the jurisdiction of the Commission. This would confer on the Commission all the powers necessary to authorise proposals for relevant transport development projects (including compulsory purchase powers) and any related statutory duties. Ideally, there would be little or no read-across to other primary legislation, although matters of process might need to be dealt with in secondary legislation. There would be one set of procedural rules governing the conduct of the planning inquiry and all other process elements of the system. This would result in a self-contained, up-to-date consent process which would be tailor-made for use by the Commission and promoters, both public and private, seeking permission to develop transport infrastructure. Although the creation of a new statutory regime would be far from straightforward, it would seem to offer significantly greater clarity for participants in the process.

Recommendation

(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 affected parties to participate in and influence the full decision-making process.

78 The right of legal challenge is a vital check on the proper exercise of power by the decision makers in the system, whether Ministers or the Planning Commission.

79 There are two distinct stages where participants should have a right of challenge:

- following the publication of a Statement of Strategic Objectives; and
- following the Planning Commission's decision in relation to a specific scheme.

80 Clear and defined statutory rights of legal challenge should be established to form a complete framework for challenges to decision making within this new planning system. The definition of these rights, along with the opportunities for participation set out in earlier sections, provide extensive and defined opportunities for interested parties to participate in and influence the full decision-making process.

81 More specifically, the proposals would:

(1) Create a statutory right of challenge to the High Court in respect of the content of a Strategic Statement and the process by which it is adopted:

- it is recommended that the grounds for such a challenge should be limited to those that are strictly necessary. Under section 288 of the Town and Country Planning Act 1990 (right of appeal to High Court against planning decisions of the Secretary of State), challenges may only be mounted on the basis that the Minister has (a) acted outside the powers in the Act (which includes a right of challenge on EC and ECHR law grounds) or (b) breached a relevant procedural requirement;
- it is recommended that similar provisions should be adopted in connection with this proposal. It is recognised, however, that in taking these proposals forward the Government may decide to widen the grounds of appeal; and
- the challenge should be made within a set period (e.g. 6 weeks) from the publication of the statement and no other form of legal challenge would be permitted. Provision would need to be made to ensure that the statement could not have any legal effect on planning applications until the appeal was resolved.

(2) Create a statutory right of challenge to the High Court against the decision of the Planning Commission:

- the grounds of appeal would be the same as for challenges against Strategic Statements, the same time limit would apply and, again, other forms of legal challenge would be precluded. It is also recommended that challenges to the content of any relevant Strategic Statement or the process leading to its adoption should be precluded at this stage (save as required by the law) because that possibility would have been available at an earlier stage in the process. It would defeat the object of the Strategic Statements if they were susceptible to repeated legal challenge at every stage of the process.

Risks 82 The Strategic Statements would be subject to an express right of legal challenge – this risks causing delay and uncertainty. Given the proposed impact of the statements on the planning decision-making process and the intention that (so far as the law permits) they should not be questioned at the planning inquiry stage, it is vital that there are clear and well defined rights of challenge against the decision-making process that leads to their production.

83 The Air Transport White Paper cases have in any event shown that strategic government policy statements are, under the present regime, subject to legal challenge by way of judicial review. The creation of an express, clearly defined legal right is preferable to the current position.

84 The only way to prevent the delays and uncertainty of judicial review is for the Statement of Strategic Objectives to be introduced into Parliament as a Bill. This option is discussed below as a separate option but is not recommended for the reasons set out there.

85 Although it is difficult to remove the use of judicial review as a delay tactic, it is, however, possible to substantially reduce the risk of a successful challenge that might require a re-writing of the Statement (i.e. a change of government policy). This is essentially through ensuring that the correct process is carried out carefully. It is clear that:

- full consultation on a broad range of options must occur. Options should not be excluded prior to consultation, and options that are not consulted on should not be included in the final Statement.

86 A clear and defined statutory right of legal challenge helps to achieve the appropriate balance between ensuring the process is fair, while minimising the risk of the misuse of legal challenges.

87 A clear and defined statutory right of legal challenge helps to achieve the appropriate balance between ensuring the process is fair, while minimising the risk of the misuse of legal challenges.

Not recommended: Establish a new Parliamentary process for Government’s strategic priorities

88 As an alternative to the hybrid bill route, the Study also considered whether a new parliamentary bill process should be introduced as an optional additional step for enacting strategic priorities that the Government considers to be of particular significance, in order to protect them from the risk of delays caused through challenge on domestic law grounds. This would entail a bill being introduced as soon as possible after publication of a Statement of Strategic Objectives.

89 A bill would be required each time the Government wanted to make use of this option. Unlike the hybrid bill process, it would not grant planning and other permissions for a specific development. Relevant planning applications would need to be made and considered at a later stage, after the legislation was passed, and following a planning inquiry. Such applications would need to be capable of being rejected on EC and/or ECHR law grounds. This would mean that even with an Act of Parliament that approves one or more strategic aims, there would be no guarantee that any specific scheme would be permitted.

90 This proposal would have one major benefit – successful passage of a bill would remove the possibility of the delays and uncertainty that can be caused by judicial review of the Statement of Strategic Objectives on domestic law grounds. Any such primary legislation would still be open to challenge on EC law grounds such as a failure to comply with environmental requirements.

Risks 91 There are, however, some substantive risks raised by the proposal:

- a new Act, and the associated parliamentary time, would be required every time this option is used; and
- Parliament has previously indicated that it does not consider that Parliament is the best forum for communities to feed into the planning process.

92 Parliamentary time would be required each time Ministers wished to make use of this provision. To provide for Parliament to reject or modify the proposals, any Statement of Strategic Objectives going through this process would have to be precluded from having any effect on planning decisions, until the Act was in force. This might therefore delay the Statement having any effect by up to two years, to allow for drafting and introduction to the next available Parliamentary session.

93 Even where the Bill was successfully enacted, detailed scheme proposals would still need to be brought forward and considered by the Planning Commission through the public inquiry process. It is not clear, therefore, whether there would be any substantive time-savings delivered by this proposal.

94 A similar proposal was considered in the 2001 Planning Green Paper¹ (that led to the Planning and Compulsory Purchase Act 2004). This option sought to provide Parliament with a role in approving the ‘need’ for a specific major project so that the planning inquiry could focus on the detail of the application. In that case, the process was intended to result in a Parliamentary order, rather than primary legislation, so would still have been susceptible to the delays and uncertainty of legal challenge. The Select Committee’s main concerns were:

- whether it would save any time;
- risk of the public losing confidence in the inquiry system since long-established rights of hearing would be restricted, and difficulties in aligning Parliamentary procedures with the Human Rights Act;
- risk of whipping of MPs in the passing of legislation in the House of Commons;
- potential duplication at inquiry – how could you avoid discussing need for and location of a major infrastructure project?; and
- inappropriate use of Parliamentary time: this was why private bills for transport were replaced with the TWA process.

95 The ODPM response to the Select Committee recognised particularly the concern about whether the process would be speeded up. The proposal was removed from the Bill following the Select Committee process.

Conclusion 96 On balance, the Study has concluded that the practical consequences, including pressures on Parliamentary time and the potential barriers that a Parliamentary process might create for public participation, mean that a legislative proposal for Strategic Statements should not form part of the final package.

¹ *Planning – delivering a fundamental change*, Office of the Deputy Prime Minister, 2001. See www.communities.gov.uk.