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PLANNING INQUIRIES – THE NEW DIMENSION

MAJOR ROAD INQUIRIES - A CHANGE OF DIRECTION

by

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Paper by Mr Nigel MacLeod QC, BCL, MA

1. Introduction

Road inquiries have been subject to considerable criticism over the past few years. I believe this to be due to a combination of factors which apply mainly to trunk road schemes. The basic factors which I identify are that trunk road schemes are usually substantial, require much property demolition, and cause significant environmental impact, yet they do not require planning permission, and are proposed by a Minister who appears in the statutory local inquiry to be judge in his own cause. The private citizen has seen himself helpless against that combination of circumstances. He has felt that it is not possible for him to take any effective steps within the system to prevent the construction of the road proposed by the Minister, even though he believes that there are good reasons why that road should not be constructed. Hence he has become dissatisfied with the system. That dissatisfaction has been expressed not only by criticism but by taking active steps within and outside the system.

It has become quite usual at trunk road inquiries for the opening day or days (dependent upon the Inspector's approach) to be taken up by lengthy submissions as to the lack of legality of the proceedings.

These submissions are usually, but not always, entirely without merit. The same submissions are made at different inquiries into different schemes, usually by objectors who have little, if any, direct connection with the scheme under inquiry.

There is obviously liaison between objectors at different inquiries, as to the nature of submissions which should be made. Indeed there are persons and groups who devote considerable time and energy and skill in putting forward procedural submissions at various inquiries, though not quite so much time is spent by them on substantive objections. The sort of procedural submissions which have been made include complaint of defective statutory notices (still going strong after many years despite rejection by the High Court), failure to debate transport policy in Parliament, bias of the Inspector, and failure to provide information, all used as grounds upon which it is urged the Inspector should adjourn or abandon the inquiry.

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If, as is usually the case, the Inspector refuses to adjourn or abandon the inquiry, disruption has not infrequently been attempted, by such diverse methods as chanting, reciting, shouting abuse, lighting candles, playing with toy motor cars on Counsel's table, or even rushing the Inspector and the Department of Transport representatives and trampling over desks and papers so as to cause difficulties in the smooth running of the inquiry. On occasion disruption has been so violent that any attempt to continue the inquiry has been abandoned and some of the persons involved taken before the Courts, as at Airedale in 1975.

While these tactics of endless procedural submissions and disruption have little to commend them they do show that there is concern about the nature of road inquiries, stemming, fundamentally, I believe, from the Minister of Transport appearing to be judge in his own cause. They also show that there is a misunderstanding about the purposes of trunk road inquiries.

2. The Purpose of Trunk Road Inquiries

The three main subject matters of trunk road inquiries are line Orders, side roads Orders and compulsory purchase Orders. Sometimes these are all the subject of one public inquiry, but more frequently they are not. Inquiries into compulsory purchase Orders do not in themselves appear to attract overmuch criticism as by the time the relevant scheme has reached compulsory purchase Order stage there is obviously little scope for manoeuvre. The main problem is in relation to line Orders because on the face of it that is the time when the road scheme might be prevented or moved elsewhere. But side roads Orders inquiries follow the same procedures and have suffered their fair share of criticism and I do not think it necessary for the purposes of this paper to distinguish between these types of trunk road inquiry.

In order to appreciate fully the purpose of a trunk road inquiry it is helpful to look at the evolution of a typical trunk road scheme. This is very conveniently set out in the Appendix to Policy for Roads: England 1978.[1]

> "This appendix gives a brief outline of the different stages through which typical trunk road schemes have to pass. The times shown are indications of the shortest preparation period that would now be needed for a typical scheme. If as a result of factors arising from the public consultation or public

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inquiries the design of the scheme is radically altered during the preparation process, completion can be substantially delayed. For many schemes in the programme fifteen years or more will have been necessary.

Years from start of Preparation	Stage
	problem identified Congestion, accidents or environmental problems suggest that a road improvement is needed. If the Secretary of State for Transport is satisfied that a strong case exists for preparing a scheme an addition is made to
0	the preparation pool Traffic surveys and economic and environmental assessments begin. Possible solutions are outlined for the preliminary work on design. A provisional estimate of cost is made. Local authorities are consulted formally about their own plans. Possible routes are identified to prepare for
2	public consultation on the choice of route This is the first stage where the public are directly involved in planning a road scheme. It is a non-statutory process where the Department of Transport presents an exhibition of possible solutions and seeks the views of individual members of the public, local authorities and national and local interest groups. Comments and a questionnaire response are invited. The views expressed are analysed and included with the results of preliminary assessments of traffic, environmental and economic factors and design work in the Department's preliminary report. In the light of the report the Secretary of State for Transport reaches a decision and announces

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3 the preferred route

This decision concentrates design work and frees other routes from blight. Large-scale drawings of the design and a detailed assessment of the scheme are prepared to lead to

4½ the publication of draft Orders

Draft statutory Orders are prepared and published defining the line of the road (the line Order) and the alterations that will need to be made to other roads (the side roads Order). Concurrently the Department prepares a firm programme report which examines the overall justification of the scheme in greater detail than the preliminary report. Local authorities and interested groups put forward their views on the proposals as part of the formal statutory processes. Once the firm programme report is approved and if there are objections to the proposals there will often be

5 public local inquiries into the line and side roads Orders

The inquiries are intended to assist the Secretaries of State for Transport and the Environment in reaching their decision on the proposals. Independent inspectors conduct the inquiries, prepare reports of them and made recommendations to the Secretaries of State.

6 The Secretaries of State then jointly decide whether or not to make the Orders, or to make them with modifications, and they announce their decision. If the scheme goes ahead the next step is

the acquisition of land

Usually draft compulsory purchase Orders will be required. These can be published with the line and side roads Orders or at a later stage. A further public inquiry may follow. If the compulsory purchase Orders are made the scheme enters the final stages of preparation.

7½ works commitment

The works commitment stage sees the completion of the proposals and, after a final check that the scheme provides value for money and that the necessary resources

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are available, authorises tenders to be invited. The contract is let and

8 construction begins

Most contracts take about two years to complete before

10 the road is opened to traffic."

From this analysis it will be seen that the public inquiry is simply one step (albeit an important one) in the decision making process of the relevant Minister, as to whether he should provide a new trunk road, and if so, where and to what standard. What is not seen from this analysis is that the Minister keeps each scheme under review right up to entry into contract for construction, and may modify or abandon the scheme up to that time if he thinks it appropriate to do so.

The trunk road inquiry is not a make or break event as would be the case, e.g., with a private developer taking a planning appeal to a public inquiry. The analysis also shows that it is inevitable that the Minister must be "judge in his own cause". However he is not judge in his own cause in the normal sense of the term, because for him, the public local inquiry is a fact finding mission. The Department of Transport have long claimed that the purpose of the public inquiry is to inform the Minister for Transport and the Secretary of State for the Environment of the weight and nature of objections to a road scheme, and that the key tasks of the Inspector are to take account of objections from people affected by the proposals; to report on those objections and to make recommendations on the proposals.[2]

This claim received the blessing of the House of Lords through Lord Diplock when in Bushell and Brunt v Secretary of State for the Environment[3] he said "The purpose of the inquiry is to provide the Minister with as much information about those objections (i.e. from local authorities and from private persons in the vicinity of the proposed stretch of motorway whose interests may be adversely affected) as will ensure that in reaching his decision he will have weighed the harm to local interests and private persons who may be adversely affected by the scheme against the public benefit which the scheme is likely to achieve and will not have failed to take into consideration any matters which he ought to have taken into consideration."[4]

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When this limited purpose of a trunk road inquiry is considered in the context of the long period of time between conception and construction, and of the fact that schemes are under consideration and may be rejected during the whole of that period - including the period following inquiry approval, it must be clear that trunk road inquiries are so much administrative processes that criticisms which are based on a belief or understanding that road inquiries are akin to civil litigation, and will themselves present a final decision are unsound.

My personal view is that there is little wrong with the principles behind trunk road inquiries procedures bearing in mind the proper purpose of such inquiries - but in practice the inquiries function inefficiently. I will return to this later.

3. The Scope of Trunk Road Inquiries

It might be thought to be perfectly straightforward that if the purpose of the public inquiry is to inform the Minister as to the nature and weight of public objection, then that will be the scope of the inquiry.

Unfortunately things have become much more complicated than that. Much difficulty stems from the fact that the merits of government policy are not open to debate at local inquiries. It may be simple to say and understand that questions of policy are outside the scope of the inquiry, but it is far from simple to identify what is or is not policy, and therefore is or is not outside the scope of the inquiry. Even more difficult to understand is the question as to whether 'need' is within the scope of the inquiry, because of the problems of determining what 'need' means.

These two issues are matters of vital importance to an objector. It is almost axiomatic that the first question that an objector will want to ask will be "Is there a need for this scheme?' If it is the Department of Transports's case that a particular scheme is needed because a particular existing road is overcrowded and congested and will get worse, and the objector's local knowledge is such that he knows that scarcely a vehicle ever passes along that stretch of road, he will want to challenge the need for the proposed road by way of objection. Commonsense tells us that he should be allowed to do so.

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However if it is Government policy that relief is required for that particular existing road then the objector will have to be ruled out of order because he cannot challenge Government policy, however nonsensical that policy may appear.

On the other hand if it is not specifically Government policy to carry out the scheme under consideration it is perfectly in order for the objector to object to the proposal on the ground that very little traffic uses the existing road and therefore there is no need for the Department of Transport's proposals.

It follows that it is important to know what is Government policy and what is not Government policy. The basic principle is that what is stated to be Government policy is Government policy. So far as the provision of specific new roads are concerned information as to whether or not they form part of Government policy is given in Government White Papers. In Cmnd. 7132 Policy for Roads, England 1978, the only specific new road which it was Government policy to provide was the M25. This remains the position in Cmnd. 7908 Policy for Roads: England 1980.

Therefore, under present policies, an objector is perfectly entitled to argue that there is no need to construct the length of trunk road under inquiry, provided that it is not the M25 which is under inquiry. But even at an M25 inquiry it would theoretically be possible to argue that the particular link was not needed for fulfilment of the policy of an orbital motorway around London because some existing road is capable of fulfilling the policy function of the link under inquiry. (I have not investigated whether this could be so factually).

From this it can be seen that the situation does accord with commonsense.

But how does all this apparently reasonable situation accord with the findings of the House of Lords in Bushell and Brunt v Secretary of State for the Environment[3] that need is not an appropriate subject matter for discussion at public local inquiries?

The answer is that 'need' in Bushell and Brunt v Secretary of State for the Environment[3] has a different meaning to that which many mortals lesser than their Lordships would attribute to the word.

In that case, need, as considered, was equated to policy.

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The case of Bushell and Brunt v Secretary of State for the Environment[3] is of extreme importance in defining the scope of a trunk road inquiry. In order to follow the reasoning of the speeches it is necessary to understand a little of the facts as set out in their Lordships' speeches:-

> 'There has been local inquiries into the Bromsgrove Section of the M42 and the Warwick Section of the M40.
> In its Policy Statement to the inquiry the Government stated that it was its policy to build these motorways and that the Bromsgrove and Warwick Sections were integral parts of them. Witnesses were called by the Department to explain the Department's case and the grounds upon which it was proposed that the motorways should be made. This evidence included evidence of the traffic predictions made by the Department. In making their traffic forecasts the Department had applied the methods prescribed in a booklet published by them in 1968 called "Traffic Predictions for Rural Areas", otherwise known as 'the Red Book'. Objectors called expert evidence to establish that different methods of traffic prediction would produce more reliable forecasts, which would show that need for the motorways was not established. The Inspector admitted this evidence but would not permit cross examination of the Department's witnesses on the methods of the Red Book.'

This refusal to permit cross examination was one of the issues before the House of Lords.

It is important to remember that the Bushell and Brunt case concerned motorways which were stated policy, i.e. as only the M25 is today.

It is in this context that Lord Lane (as he then was) said

> "It would have been inappropriate for the Inspector to have made recommendations as to the need for the motorway as a whole .... If every Inspector at every local inquiry is to determine the question of need and make recommendations accordingly one will along the course of a proposed motorway, as local inquiry follows local inquiry, get a series of decisions, doubtless differing from one another, as to the need for the motorway. The effect, apart from the appalling waste of time and money would be that the Secretary of State

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> would have to make up his mind on the evidence available to him rather than on the various recommendations. That end can better be achieved by the method adopted here. In short, the question of need is a matter of policy or so akin to a matter of policy that it was not for the Inspector to make any recommendation. Just as his ruling on cross examination was in the circumstances correct so was his decision on this aspect."[5]

It is Lord Diplock in the leading speech who clearly explains the relationship between need and policy.

"Policy as descriptive of departmental decisions to pursue a particular course of conduct is a protean word and much confusion in the instant case has, in my view, been caused by a failure to define the sense in which it can properly be used to describe a topic which is unsuitable to be the subject of an investigation as to its merits and an inquiry at which only persons with local interests affected by the scheme are entitled to be represented...."[6]

"....Priorities as between one stretch of motorway and another have got to be determined somehow. Semasiologists may argue whether the adoption by the Department of a uniform practice for doing this is most appropriately described as Government policy or as something else. But the propriety of adopting it is clearly a matter fit to be debated in a wider forum and with the assistance of a wider range of relevant material than any investigation at an individual local inquiry is likely to provide; and in that sense at least, which is the relevant sense for present purposes, its adoption forms part of Government policy."[7]

From this consideration of their Lordships' speeches it seems to me that the following scope of a public local inquiry emerges:

> To consider the nature and weight of local objections. Unless it is Government policy to construct a specific road link, its need may be challenged as a local objection. But many of the methods which the Department of Transport uses to assess need may not be attacked because these are tools which the Department of Transport, i.e. the Government, considers are best fitted for assessing need countrywide, in many instances on a comparative

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basis. These tools include traffic forecasting techniques, economic evaluation techniques and noise calculation techniques.

This is a scope which I think is sensible.

4. Expressions of Dissatisfaction

The inquiries in 1973 into the M42 and M40, Bromsgrove and Warwick sections provided a significant turning point in the attitude which the public has taken towards major new road proposals, and the reaction of the Government towards that attitude.

The case of Re Trunk Roads Act 1936[8] in 1939 illustrates earlier attitudes. There the Court rejected an attempt to set aside an Order on the grounds that the Minister had not called evidence at the inquiry in support of the draft Order. His engineer had explained the proposals and answered questions on that explanation - but objected to questions on need or alternative routes. It was held that the inquiry was directed to the objections not to the Order itself.

It is probably still the correct legal position that the Department of Transport need not call evidence at a local inquiry provided that it presents a fully reasoned statement in explanation of its proposals, so that objectors have sufficient information to enable them to check the accuracy of facts and validity of arguments relied upon by the Department. There is also a requirement by the Highways (Inquiries Procedure) Rules 1976 that a witness be available to answer questions on the statement.

But, in practice, that which was acceptable to the public in 1939 is no longer so.

In the latter half of the nineteen fifties there was a very substantial increase in vehicles on the roads. The number of private cars almost doubled in that period and a massive road building programme began. The first motorway opened in 1958 (Preston By-Pass, now M6), and by 1970 many hundred miles of motorways had been completed, and the Government planned a strategic network of improved inter urban roads.

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The early roads completed their statutory procedures without significant or organized opposition. Possibly because the public had not visualised the disruption and upheaval which major road construction caused. Possibly also because appreciation of the environment was not then such an important factor as it is today.

But in 1973 the objectors to the M40 and M42, Bromsgrove and Warwick Sections put forward determined opposition. They appeared by Counsel and put forward technical evidence to show that the Government should not proceed with these road proposals. It is not difficult to imagine that the objectors were disappointed and frustrated when it appeared that their experts views would not be taken into account. Although admitted in evidence the objectors' experts' views were not cross examined on or to, and were clearly regarded by the Inspector as irrelevant.

There was, however, a significant change of direction at this inquiry. In its pre-inquiry documents the Department claimed that the need to build the new motorways (i.e. M40 and M42) would not be open to debate at the inquiry. Following submissions by the objectors and rulings by the Inspector, the Department agreed to delete these restrictive claims on the basis of the Inspector's ruling that it was for him to decide what was relevant, and the Inspector did rule that he would admit evidence which was aimed at rebutting the Department's case on need for the motorway - but would not allow the inquiry to be made into an inquiry into the Government's general transport policy.

This was a somewhat curious situation, but it was the first time objectors had challenged the need for a Trunk Road, and was the first time that evidence on need was admitted. In that case it was regarded as irrelevant insofar as it attacked Government methodology, but, in the normal sense of the word, the issue of need has thereafter remained a material element for consideration at trunk road inquiries and recognized as such by the Department. As Mr. John Silkin, Minister for Planning and Local Government said in Parliament in January 1976 "....within the constraints of national policy the objectors are given every opportunity to question the need for the road".

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But people were dissatisfied. During 1975 that dissatisfaction was being expressed by representations made at various trunk road inquiries seeking adjournments or abandonment of the inquiries. Whether or not those making the applications anticipated that they would succeed in their immediate purpose I do not know, but when the grounds are examined it seems fair to comment that they were in substance protests at the system of trunk road inquiries and complaints about the attitude of the Department to trunk roads and to the public.

It was during this period that a particular group of submissions were being presented to various trunk road inquiries and were a representation of the way in which public disquiet was being formulated.

It is useful to look at some of these points which were being made.

(i) It was complained that there were no rules for inquiries under the Highways Acts, although statute gave power for such rules to be made. Therefore the holding of highways inquiries without established rules, available to all parties was contrary to the law of natural justice in that it left the public without protection. For inquiries to proceed before rules were agreed and published was therefore wholly improper.

From the legal point of view this argument was without substance. There was no statutory duty to provide rules, and in any event the inquiry would have to be conducted in accordance with the laws of natural justice, i.e. in a way which was fair. Rules would simply lay a statutory framework for fair procedures. As a matter of self discipline, the Department did at that time act in accordance with compulsory purchase Order procedure rules, which were an appropriate guide, and not significantly different to those highway procedure rules ultimately published.

Although without legal merit what was significant in this submission was its general underlying basis - viz that because the Government was not bound by any specific written rules, it could act, in its own inquiry, with its own Inspector, unfairly to the prejudice of objectors. I consider that many reasonable thinking members of the public could have held this point of view.

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(ii) It was complained that statutory procedures prior to inquiry relating to publicity for the proposals had not been complied with, and in particular the requirements of the Highways Acts that notices should state the general effect of the schemes. It was complained that the public could not, from the Department's notices, visualise what the real effects of the scheme would be. Consequently they did not object, and indeed did not realise the true nature of the adverse effects of the road until it was under construction - by which time it was too late. Again the theme was unfairness to the public.

(iii) It has been argued also that it was unfair that the inquiry Inspector should be appointed by the Minister for Transport. He would be biased towards the Department.

I am not aware of any evidence that has been adduced in support of such a claim, and I would be surprised if any were available. But again, it is not difficult to see how some members of the public, in a disquieted frame of mind, could be unhappy about the situation.

(iv) A further claim being made was that although Section 7 of the Highways Act 1959 required that the transport minister take account of national and local planning when reviewing the trunk road system, this was not being done because there was no national or local planning. I have never quite understood the basis of the argument that there was no local planning in the 1970s but the lack of national planning was based upon a claim that there was little or no parliamentary control of the road programme.

Although it is difficult to conceive that this was a consideration which was appropriate for a discussion at a local highway inquiry, it was a way of expressing a fear that not only were the public unable to voice any effective protest over the construction of trunk roads, but that the decisions relating to construction of the roads were in very few hands and not, in real terms, subject to parliamentary control.

These submissions were not acceded to by Inspectors, and it is difficult to see how they could properly have been acceded to by Inspectors exercising their discretions properly within the appropriate legal framework.

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(v) A further criticism which was made related to policy in a different way. It was claimed that the Department was unwilling to explain in detail and in an intelligible way the relationship between the particular road scheme and Government national policy, even though at that time it was practice before inquiries opened, to supply all objectors with a statement explaining the general background of national transport policy and the case for the trunk road network, together with a further statement explaining the purpose which the new road was intended to serve within the framework of the national road system, the proposed route and its effect on the environment. It was also practice at that time, as it is today, to supply detailed information about relevant matters if objectors asked for this.

Coincident with these procedural expressions of dissatisfaction some trunk road inquiries were being disrupted. The first Airedale inquiry was abandoned for this reason in February 1976, and the seriousness of that situation was reflected in the words used by the Minister for Planning and Local Government (Mr. John Silkin) when he announced the abandonment in the House of Commons:

> "I think he (the Inspector) has been through far more than anybody in that position ought to be put through. This man has been subjected to a continuous barrage of abuse and personal threats, and I do not think that is fair."

5. Government Reaction

At the same time as he abandoned the inquiry, Mr. Silkin gave an indication of some of the possible changes in the inquiry system which could emerge from a Review of Highway Inquiries procedures which he had announced the previous month. They included the appointment of Inspectors from a panel set up by the Lord Chancellor's Department, and the right of objectors to call on witnesses from the Department for cross examination on how a local road proposal fitted in with national transport policy.

It was not until April 1978 that the Review of Highway Inquiry Procedures (Cmnd. 7133) was presented to Parliament, following an examination by the Council on Tribunals and the Department of Environment of these procedures.

In the Introduction to the Review it was said "....it is clear that there are many responsible people, with moderate views, who are deeply concerned about the fairness of the highway inquiries system."

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During the course of the Review one of the main stated criticisms of highways inquiries was met by the coming into force in June 1976 of the Highways (Inquiries Procedure) Rules 1976. These made no material difference to the way in which the Department presented its case or inquiries procedures operated - as the Department already abided by the very similar compulsory purchase Order inquiries rules. But the criticism was met.

Concurrently the independent Advisory Committee on Trunk Road Assessment (the Leitch Committee) had been examining matters relevant to the conduct of local inquiries, and reported in January 1978. The Department has accepted almost all the recommendations of that Report, the most important single one of which is probably the use of a framework so as to enable environmental factors to be assessed against economic and traffic and engineering factors.

In one way or another the Review sought to meet all the criticism which had been levelled at the procedures, and which had not already been met.

There was to be a new series of annual White Papers on roads 'designed to provide a better basis for reporting to Parliament and for debate.... (and serving) as authoritative background against which local issues can be examined at public inquiries into particular road schemes'.[9]

There was no White Paper in 1979 due to change in Government but the second of this 'new' series of White Papers has been issued in June 1980 (Cmnd.7908).

A library was to be made available shortly before and during the inquiry of all the material which the Department would present and use as the basis of its case for the road.[10] This would include any Notes of Guidance for the Inspector.[11]

Reports of the Landscape Advisory committee would in the future be open to inspection, as, normally, would be those of Consultants.[12]

More information would be available. The Department would provide details of "the facts and assumptions on which the case for the scheme is based; results of analyses; explanations of methodologies; and any other information which, although not part of the Department's case could be provided without costly special research".[13]

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Inspectors were to be nominated individually by the Lord Chancellor for each Inquiry.[14]

There would be 'closer association between public consultation and inquiry procedures'.[15]

Where appropriate alternative routes, or variations of the published route, would be worked up in more detail and open to consideration at the Inquiry.[16]

Pre-Inquiry procedural meetings were to be tried out. The purpose was stated to be 'to agree a programme for hearing objections at the inquiry; to establish as far as possible, policy matters relevant to the inquiry; and to see if any questions of fact could sensibly be resolved in advance of the inquiry.[17]

The new Standing Advisory Committee on Trunk Road Assessment (SACTRA) would have a continuing responsibility to monitor technical assessments.[18]

So these were steps which the Government stated would be taken to meet public disquiet over highway inquiries. All this was admirable. But it is interesting to note that apart from the issue of the Rules, no legislative steps were promised or taken.

It is also fair to note that all these promised steps were taken.

I think it is also true to say that disturbances at highways inquiries have become increasingly less frequent since the issue of the Review, and implementation of its proposals, and that the public has more confidence in highways inquiries than previously. Indeed the last inquiries which were subject to serious disruption were those concerning the Swanley-Sevenoaks section and the Leatherhead interchange on the M25 nearly 2 years ago.

But having said all this, many of the proposals of the Review and other apparent changes were merely reflections of the Department's then current practice. For example, we have seen that the issue of rules made little practical difference; the Review tells us (para 27) that the appointment of Inspectors had formerly been made by the Ministers from a panel of highways inquiries Inspectors whose names were approved by the Lord Chancellor; the Department, in its practice of following other statutory rules, listed and deposited documents upon which it based its case; the Department (in my experience) always provided relevant detailed information to those who sought it; public consultation was already in operation; the inquiry was already statutorily obliged to consideralternative routes (see e.g. S.14 Highway Act 1971).

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Exceptions were that the pre-inquiry meeting was new; the future availability of the Landscape Advisory Committee Reports and Consultants' Reports was new; the production of a framework to the inquiry was new; and the Standing Advisory Committee on Trunk Road Assessment was new. The role of the last of these (another of the Leitch Committees) is particularly significant. There has been considerable criticism by objectors at Inquiries of the Department's techniques and methodology. These committees have provided a suitable forum for such criticisms to be evaluated. Nevertheless, I believe the real importance of what the Government did on its review was not substantive, but was the statement of, and commitment to, a fair and open procedure and practice, notwithstanding that the practice was in reality little changed.

This is not a criticism of the Review, nor of the Department's practices, but a reflection that it is important for people to be satisfied that fair practice and procedure exists.

6. The Effect of Bushell and Brunt v Secretary of State for the Environment[3]

When the Court of Appeal, by a majority, quashed the M40 and M42 Orders on the grounds that the objectors were denied natural justice by the Inspector's refusal to allow them to cross examine the Department's witnesses on the Department's traffic forecasting methods there was indeed a major change of direction, but, that change was very short lived, and was reversed by the House of Lords.

The House of Lords' decision itself however raised the question as to whether road inquiries procedures had merely been put back on course, or whether there had been 'overkill' of Lord Denning's Court of Appeal decision to the extent that procedures had reverted to the pre 1973 position that need was not within the scope of a local road inquiry, (as had been specifically held in Re Trunk Roads Act 1936).[8] But, as I have argued, the House of Lords did not introduce a new approach. It left untouched that which has been practice since 1973. The changes of direction insofar as there have been changes came in 1973, and between 1976 and 1978.

7. Conclusions

Although unease amongst some members of the public at road inquiries has lessened considerably, there still remains some dissatisfaction. This is

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still based upon what is regarded by some objectors as the unequal contest between objectors and the Department, for the inquiry is still seen by objectors as a contest.

My own view is that the present system of road inquiries does have one very important advantage, namely that it does the job for which it has been set up. It informs Ministers fully as to the nature and weight of local objections of people directly affected, not just about the objections of people or groups who object to the principle of new major roads generally.

But the system is dreadfully inefficient in the way in which it goes about obtaining information as to the nature and weight of objections. Many days are wasted by objectors in cross examination which has no apparent direction, or in seeking knowledge of elementary concepts of the expert witnesses' subject, or in seeking factual information which could be obtained by asking for it at some time other than in cross examination, or in repeating questions which have been asked many times by other objectors, or is not relevant to the issues before the inquiry. Many days are taken up by repetition of the same points.

Many road inquiries last for weeks, or even months when the issues involved do not justify anything like that length of time being taken.

It is one of the penalties of being fair to the objector in the sense of letting him present his objection informally in his own way, that road inquiries as now operated are inefficient cumbersome and expensive.

The solution might be that Inspectors, fortified by Lord Diplock's speech in Bushell and Brunt v Secretary of State for the Environment[3] must be firmer in excluding or limiting cross examination, but, taken to an effective degree, this could seem to the public to be unfair. Lord Diplock said "....Refusal by an Inspector to allow a party to cross examine orally at a local inquiry a person who has made statements of facts or has expressed expert opinions is not per se unfair".[19]

I believe that the ideal solution is the provision of legal aid to objectors. This would meet the current criticism of 'uneven contest' and would shorten inquiries by exclusion of most irrelevant or repetitious matters, to a sufficient extent to save the cost of the provision of legal aid.

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I accept that it would not be easy to administer the provision of legal aid to objectors in such a way that it would not in itself become an enormous drain on public funds, and, in the end, counterproductive, by a multiplicity of representation each seeking to justify its presence.

To prevent this, the approach would have to be somewhat unorthodox. I do not believe that the objective of saving time and money whilst preserving fairness would be achieved if legal aid were to be available, but limited to statutory objectors. On the whole statutory objectors are not responsible for the unnecessarily inordinate length of road inquiries; they have a special interest and have little difficulty in identifying and stating their objections. If the interest of the statutory objector is a substantial one he usually has funds to provide his own professional representation.

I consider that it is the residents groups, or amenity groups, or other local action groups, who can raise some funds, but insufficient, who should be provided with legal aid to include lawyers and appropriate expert witnesses. These are important groups who fear for loss of amenity to their homes, or to their villages or their parks or their valleys.

There are obviously dangers of abuse in this idea, in that national pressure groups may batten on to a local amenity group, and use them to present a general anti road lobby argument. This means that the legal aid committee considering the applications would have to have a wide discretion, virtually unfettered, in the way in which they would make their decisions.

But it is important that it should be a group, and one group only who should receive this assistance. It is important so that there can be at least one objecting representation present throughout the inquiry so as to avoid repetition, and to attempt to represent all who are objecting in principle to the proposals. It would almost be a form of amicus curiae.

This would not in any way prevent individual objectors appearing, but my experience is that if they are satisfied that their objection is being properly and expertly put by someone else, the majority of people are content to register their objection and leave it at that.

I do not believe that it is impossible to devise a workable system, and I do believe that it would give people much more confidence in road inquiries, and that these in their turn would be effective and efficient.

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I have specifically suggested legal aid as the vehicle for public funding because there is an existing system of committees (including appeal committees) experienced in considering a wide variety of applications for legal aid, and because it is a lawyer's presentation of the case for the objectors which is most likely to produce the time saving which justifies the expense of funding the objector, and which is most likely to ensure that the case is directed to relevant issues within the scope of the inquiry.

Another approach which has been suggested is that there should be earlier, fuller and more meaningful public participation. The Department spends such a long time in the thorough preparation of a scheme before it comes to inquiry, that it is much more likely than not to have got its proposals right. At inquiry therefore, except on matters of detail, objectors are unlikely to have the merits of the main issues on their side, and are more likely to fail than to succeed. If, however, they were able to influence the shape of the scheme at an early stage, the situation at inquiry may not seem so unacceptable to them. This is an attractive approach in theory. But already public participation is an essential part of the overall process of formulation of road schemes, and, in practice, even if it were possible to improve public participation, I suspect that those who did not succeed in influencing the nature of the proposals would be no more satisfied than they are now.

A further question arises as to whether there should be any overall radical change to the road inquiry system. In this respect it has to be remembered that the big motorway programme is drawing to a close, and the general future programme is on much lesser scale. It also has to be remembered that the nature of the beast is such that the planning of a trunk road is an ongoing process which does require continual monitoring and continual comparison with schemes across the country with which it is competing for funds. It is not therefore easy to see in practical terms any improvement on the system which produces full knowledge of the weight and nature of local objections. What is clear is that any meaningful change would require a fundamental change to the Highway Acts. This country has seen a surfeit of legislative changes in recent years and I would prefer to see the deficiencies in highways inquiries remedied in some other say such as by the provision of legal aid.

1. Cmnd. 7132 pp. 28-29
2. Cmnd. 7133 Report on the Review of Highway Inquiry Procedures. Para 11.
3. 1980 2 A.E.R. 608.
4. pp 2/3 transcript. Bushell & Brunt v Secretary of State for the Environment
5. p. 25 transcript. Bushell & Brunt v Secretary of State for the Environment.
6. p. 5 transcript. Bushell & Brunt v Secretary of State for the Environment.
7. p. 6 transcript. Bushell & Brunt v Secretary of State for the Environment.
8. (1939) 2 K.B. 515
9. Para 23 Cmnd. 7133
10. Para 39 Cmnd. 7133
11. Para 35 Cmnd. 7133
12. Para 37 Cmnd. 7133
13. Para 31 Cmnd. 7133
14. Para 23 Cmnd. 7133
15. Para 28 Cmnd. 7133
16. Para 29 Cmnd. 7133
17. Para 40 Cmnd. 7133
18. Para 24 Cmnd. 7133
19. p. 5 transcript. Bushell & Brunt v Secretary of State for the Environment.