

Major Infrastructure Projects—Where to Now?

By Paul Thompson

Introduction

For so many purposes, including energy, heavy manufacturing, mineral extraction, storage, transport, telecommunications, water supply and waste disposal, we are dependent on large-scale infrastructure. In consequence, whilst it may sound somewhat dramatic to say so, the development of large infrastructure projects is fundamental for our own economic well-being and also, perhaps more critically, by virtue of typical project lead-in times, for that of our children and future generations. Put another way, however difficult or controversial individual projects may be, unless we have adequate (or preferably excellent) infrastructure facilities, fit for their purpose, sufficient for our needs and available at the right cost when and where we need them, we are liable to suffer as a nation. Without them, to a lesser or greater extent, the generation of wealth is hampered, everyday life rendered unnecessarily burdensome, inward investment frightened off, external competition given a helping hand and, in many instances, if the wrong choices are made, our urban and rural landscape is unnecessarily scarred and blighted.

A fundamental premise of this paper is therefore that, quite apart from their tendency to be controversial and to have wide-ranging impacts, the design, authorisation and delivery of major infrastructure projects (MIPs) is a matter of vital interest that deserves special attention. It happens also to be the case that there are a great many MIPs which are now in contemplation, many of which involve difficult choices. Prime amongst these are the proposals for additional airport capacity which are the subject of the six regional consultation documents launched by Alistair Darling on July 23, 2002 and which are intended to lead to a new White Paper to be issued next year. Then, there are the new proposals, intended to be put in place by 2007, for securing the management of nuclear waste. Other examples which can be cited, of varying size and complexity, include a number of major rail projects (20 are listed in the SRA's Ten Year Plan) and the large number of new incineration facilities of up to 200,000 tonnes capacity (possibly 40 to 50 or, as some opponents appear to claim, as many as 165) which are needed to comply with the Landfill Directive. Of course, in any such illustrative list, not all will necessarily be of "national significance", the definition of which is a matter of some debate. However, leaving that issue to one side, whatever illustrations are chosen, in most sectors, it seems that there is real pressure for substantial infrastructure development and that this will not abate.

There has also been a broad consensus that something does need to be done about our existing authorisation arrangements. What has been in issue is therefore not whether to do something but what it should be and how best to mix the sometimes conflicting demands of project development, due process, expedition and democratic accountability to yield effective results and ones which will enjoy a reasonable degree of public confidence.

All who are likely to read this paper will be aware of the new procedures for MIPs proposed by the Government in December 2001¹ only to be abandoned in July of this year. At the time of writing, it is perhaps still a little too soon for the precise fall-out from that about-turn to become fully apparent. However, what does seem clear is that the prospect of any new parliamentary procedure has for the time being disappeared, that no radical alternative is to be proposed and that major projects will remain to be dealt with in the same manner overall as smaller projects, that is to say, ordinarily, without any

¹ *New parliamentary procedures for major infrastructure projects*, DTLR, December 2001.

parliamentary process and (subject to possible developments concerning public policy formation) with the emphasis generally remaining on confronting all issues at a public local inquiry but subject to tighter procedural requirements. All the difficulties which led to the call for a new procedure will therefore still have to be tackled in the main within the context of the ordinary development control framework.

It is in this context that I want in this paper to examine some of the things which make MIPs distinctive and then look at recent developments in the procedures for their authorisation, at the application of national policy and political considerations to them, at issues that arise concerning their appraisal and at the role of politicians in relation to them. In addition, I will touch upon the role of Parliament generally for, notwithstanding the abandonment of the proposed new procedure, a number of extant parliamentary procedures are still available. In addition, the potential for Parliament to become involved in the settlement or scrutiny of national planning policy remains and could well prove more significant in the future.

The distinctive features of major infrastructure projects

A number of features distinguish the authorisation of MIPs from other development proposals. The relative size and cost of such developments are obvious examples as is the likelihood of there being multiple impacts to consider which will give rise to the need for environmental impact appraisal (whether or not the development in question is an Annex 1 or Schedule 1 project).

There are also other distinctive features which are perhaps no less obvious. Because of their size and complexity, such projects tend to have an enormous lead-in time prior to any application. This necessarily places an added strain on the financing of such projects and upon the acceptability of any late change in design or delay in the authorisation process. Typically, they also tend to fulfil one or more perceived public needs and, for that reason as well as their size and general impact, are much more likely to involve difficult questions of public policy as well as being generally more sensitive in political terms. Very often, they will also cross, or have impacts beyond their immediate, boundaries, either locally, regionally or even internationally and, even when this is not a particular feature, they are more likely than not to involve a multiplicity of consents from several government departments and other public bodies who will be operating differing statutory regimes and may be working to differing and sometimes conflicting plans and agendas. Due to their exceptional nature, it is also often the case that they do not fit readily within but rather tend to conflict with the local development plan process.

There is also, of course, the tendency for such projects to involve interference with private property rights, to be generally contentious, to result in a substantial public inquiry and to involve, often simply for reasons of political expediency, a very substantial delay in the issue of a final determination following the Secretary of State's receipt of the inspector's report.

Then, very often, such projects require either to be advanced or to be procured by or on behalf of a public body or otherwise to involve significant public funding. In consequence, particular appraisal arrangements tend to apply from an early stage. Public procurement rules and Treasury sanction also then come into play, which are matters which may need to be taken into account from the very beginning of project development and which, even when this happens, may involve further difficulties and possibly delays following authorisation.

All these factors help to make the authorisation and eventual implementation of MIPs particularly difficult. Whilst they can be said to be readily apparent, the simple point which I wish to make in now highlighting them is that, by and large, no special allowance is made for them. Although a great emphasis has recently been put on streamlining inquiry procedures, that is plainly only one part of the

process and not by any means the cause of all or in some cases any particular difficulties. Particularly as arrangements for public participation in the development process increase, any substantial improvement in the authorisation and implementation process may therefore need to involve looking at the whole life cycle of project development, from initial concept, through all the stages of design, authorisation, implementation and commissioning, and then on, where appropriate, to operation and eventual de-commissioning or replacement.

The now abandoned proposals for a new parliamentary procedure could not be said to do that but, if nothing else, they have certainly helped to bring into focus the issues surrounding major project authorisation. Although this can now only be by way of post mortem, I think it therefore remains worthwhile examining the form which they took and the criticisms which preceded their abandonment.

The 2001 Proposals

As will be well known, the Government's now abandoned proposals were published as one of the daughter documents to the Planning Green Paper² last December. They reflected very much and without material elaboration proposals earlier canvassed in a 1999 consultation.³ What they envisaged was the referral of MIPs to Parliament for endorsement in principle, once a conventional application for their authorisation had been made. The parliamentary stage would be triggered by designation of the MIP by the relevant Secretary of State followed by the deposit of application documents and a draft order in Parliament and general advertisement of the designation. A 42 day period would then be allowed for written representations to be made. During the same period but within 21 days, a statement of the wider economic benefits would have to be laid in Parliament by the applicants. Not later than fourteen days after the end of the representation period, the relevant Department would lodge a summary of the representations lodged. Parliament would itself give scrutiny and consideration to the MIP in such manner as it saw fit (some form of select committee proceedings being assumed) and, then, not less than 60 days later, the Government would lay before Parliament the actual order it proposed for endorsement of the proposals. Approval of that Order on the floor of each House would fix the principle, need for and location of the project precluding consideration of these matters at the subsequent inquiry to which the application would be referred to in the ordinary way. Then, notwithstanding the earlier parliamentary approval and in the light of the inspector's report, the final determination would be made by the Secretary of State who would remain entitled to reject the MIP in the unlikely event that the inspector's report or other factors provided cause to do so.

Reasons for their abandonment

Criticism of the Government's proposals as announced in December 2001 was widespread. Few appeared to find the task too difficult, which is perhaps unsurprising given that most of the issues arising on the Government's earlier consultation paper did not appear to have been addressed.

The Council for the Protection of Rural England, together with Friends of the Earth, Restore UK and Transport 2000 were particularly vocal, taking advertisements in the national press and inviting the public to respond by way of a question posed against a beautiful rural landscape "Your new power station goes here—(what colour would you like the gates?)".

But how, as put on behalf of Friends of the Earth, could the proposals be viewed as "unworkable, illegal,

² *Planning: delivering a Fundamental Change*, DTLR, December 2001.

³ *Streamlining the processing of major infrastructure projects and other major projects of national significance*.

counter-productive, and counter to government policy”? At the risk of doing an injustice to one or both sides of the argument and without necessarily supporting the contentions, the criticisms levied can be categorised on my analysis under six headings and summarised as follows—

Lack of detail or analysis of sensitive issues

Most of the difficult issues seemed to have been overlooked or just skated over. Fundamentally, no real indication was given as to how critical issues of national policy (*e.g.* capacity and need) were to be determined. Some prior national policy statements were promised but what the nature and extent of these might be and the opportunities for public participation in their evolution was not addressed. The question of what projects would be designated (and whether these would be limited to a few national ones) was left very open, the form of the necessary designation orders was not described and, upon the basis that this was a matter for Parliament, the form of parliamentary scrutiny was left largely unexplained but with a strong indication that the whole process should be so expedited as to preclude detailed scrutiny. Then, whilst the proposals made clear that matters of principle would be determined by Parliament and precluded from consideration at the subsequent local inquiry, no analysis was given of how principle and detail were to be separated.

The wrong target

Whilst the Government appeared to blame the form and length of local inquiries as the root of all difficulties, this did not brook scrutiny. The 524 day Heathrow Terminal 5 inquiry was clearly quite exceptional, most inquiries last a good deal less than a week and major inquiries being truly rare, with only a dozen or so national scale projects having involved a public inquiry lasting more than three months since 1984. The cause of lengthy inquiries, when they do happen, is also often caused not by the inquiry process but either by government’s failure to establish national policy in advance or by lax inquiry management which can be and is now being addressed. Furthermore, all analysis shows that lengthy inquiries are only a small factor in delaying project implementation which often pales into insignificance when compared, for example, with ministerial delay in determining applications following receipt of inspectors’ reports.

Parliament is incapable of assuming the role

Modern parliamentarians are professional politicians beholden to the party machinery who neither have the time nor the qualifications nor the inclination to engage in analysis and adjudication upon individual projects. In practice, the majority of members would be whipped.⁴ At a detailed level, the suggestion of adopting Regulatory Reform Order procedure⁵ was quite inappropriate for development proposals which have wide-ranging implications and which proceed, so far as those most directly affected are concerned, on a non-consensual basis.

There is a democratic deficit

Parliament is too remote and inaccessible and its procedures too arcane for effective public participation. Parliamentary scrutiny cannot provide an effective substitute for detailed consideration of all issues at a local inquiry so far as individual interests are concerned. The problem of public alienation and the potential for public dissent and civil disorder must not be under-estimated.

⁴ Lord Falconer did go on to indicate in debate in the House of Lords that he accepted that it would be inappropriate for MPs to be whipped: HL Hansard, April 17, 2002, col.1025.

⁵ The “super-affirmative” parliamentary procedure adopted for the new form of deregulation order under the Regulatory Reform Act 2001 which will be found described in detail in the Explanatory Notes to the Act.

Practical difficulties

Despite the desire to streamline and expedite the process being a prime objective of the proposals, no real time savings could possibly be obtained under the proposed new procedures which might even have delayed a determination in some cases. It would also have been impossible in practice to draw a practical distinction between matters for Parliament and matters for the subsequent local inquiry and then impossible to deal with late changes to a project which, under existing procedures, are commonplace.

Legal conundrums

The split between a parliamentary and an inquiry process cannot be reconciled with the requirements for environmental impact assessment,⁶ the Habitats Directive⁷ or the Aarhus Convention.⁸ The parliamentary process was also liable to offend the spirit if not the letter of the Human Rights Act.

The proposals were certainly greeted with less than enthusiasm by MPs generally. Both the Transport, Local Government and the Regions Select Committee (TLR) and the Procedure Committee in the House of Commons undertook inquiries into the proposals and their initial reports were not encouraging. In the case of the TLR committee, the initial view expressed was that the proposals were fundamentally flawed and that all that should be contemplated is a Transport and Works Act style parliamentary endorsement of individual projects, leaving all matters still for the public inquiry.⁹ In the case of the Procedure Committee, having taken evidence from Lord Falconer, Sir Iain Glidewell and Roy Vandermeer QC (who presided over the inquiries at the Heathrow Terminal 4 and 5 inquiries respectively) and then the CPRE, together with the National Trust, Friends of the Earth and Transport 2000,¹⁰ the Committee unsurprisingly concluded in its initial report that the Government's proposals were so important, and complex, as to deserve extended and rigorous scrutiny by the Committee, which was unlikely to be completed before the autumn and that it would therefore be unfortunate for the Government to proceed in the coming session with any legislation that assumed a new parliamentary procedure.¹¹

All in all, it was clear that many in Parliament and elsewhere had difficulty with the concept of finding new ways to involve Parliament in major development decisions. From a historical perspective, it could certainly be seen as odd that Parliament should once again be seen as a proper vehicle for endorsing major projects. For over a century, the trend had generally been in the other direction, with the development of provisional order procedure, light railway,¹² water,¹³ harbour¹⁴ and transport and works orders to replace Private Bills. New non-parliamentary procedures had also been introduced when occasion demanded as, for example, in the case of pipelines,¹⁵ off-shore oil rigs,¹⁶ electricity generating stations and power lines.¹⁷

⁶ See in particular Council Directive 85/337/EC as amended by Council Directive 97/11/EC and, now, also the new directive on strategic EIA: 2001/42/EC.

⁷ 92/43/EEC, implemented in the UK by the Conservation (Natural Habitats, &c.) Regulations 1994, No.2716.

⁸ Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, June 25, 1998, Aarhus in Denmark.

⁹ Thirteenth Report, 2001–2002, July 1, 2002, HC 476–1.

¹⁰ See HC 823–i, ii and iii, Session 2001–02.

¹¹ First Special Report, 2001–02, July 3, 2002, HC 1031.

¹² See the Light Railways Act 1896.

¹³ See now s.167 of the Water Industry Act 1991 and s.168 of the Water Resources Act 1991 in particular.

¹⁴ See procedure for Harbour Revision Orders and Harbour Empowerment Orders under the Harbours Act 1964.

¹⁵ See the Pipelines Act 1964.

¹⁶ See in particular the Petroleum (Production) Act 1934 and the Petroleum Act 1967.

¹⁷ See now ss.10, 36 and 37 of the Electricity Act 1987 in particular.

Nevertheless, there was a wide-ranging acceptance that the present system for authorising major projects needed to be changed. In addition to bodies such as the CBI, who had specifically championed the Government's proposals, many others including the Law Society, the RICS and the RTPI acknowledged this in their representations on the proposals as did, with certain reservations, a number of environmental interests.

Critically, however, it was clear that, at the present time at least, Parliament was likely to be hostile to any new or additional involvement on its part and that, had the Government pursued its proposals, the final form of the parliamentary process that would have been settled would have been unlikely to afford any real time savings and might even have prolonged the determination process.

It was not therefore altogether surprising that the Deputy Prime Minister should announce on July 18, 2002 that the concept of the proposed new parliamentary procedure was to be dropped. Drawing attention to the Commons TLR Select and Procedure Committee reports and the strong doubts expressed in them as to whether the proposed parliamentary procedure would lead to any speeding up of the process, the new planning reform paper, which was then issued to explain the Government's intentions for carrying forward the Planning Green Paper and related proposals, calmly states—

We recognise their concerns about the commitment on MPs time, the supporting resources needed by Parliament and the principle of Parliament being involved in the detail of a development proposal. We do not intend therefore to pursue this element of the package.¹⁸

Instead, as referred to later in this paper, clearer guidance on national policy about the need for specific investment is promised as a means to reduce decision times together with some further examination of ways to speed up and make more efficient the public inquiry process.

Current and prospective arrangements for authorising MIPs

Some MIPs will it seems continue to be subject to existing parliamentary procedures and I return to this at a later point in this paper.

Those which are not and which fall to be dealt with in England through conventional planning procedures are now liable to be subject to the new MIP Inquiry Rules which came into force on June 7, 2002.¹⁹ These build upon existing arrangements for major inquiries set out in DETR Circular 05/2000, which are currently operating in relation to the Dibden and London Gateway (Shellhaven) new port proposals. The new Rules, which apply to a fixed list of projects specified in the Schedule to them, incorporate or allow for the following features over and above those which ordinarily apply to planning inquiries—

- Establishment well in advance of the inquiry of an inquiry secretariat headed by a Programme Manager;
- Establishment of a three part register of participants, Part 1 being for major participants intending to play a full part, Part 2 for those seeking just to present oral evidence and Part 3 for those only wanting to make written representations;
- One or more mandatory Secretary of State pre-inquiry meetings;
- Establishment of an inquiry timetable, proposed by the inspector but subject to approval by the Secretary of State and with any variations to it requiring Secretary of State approval;
- Stricter preliminary timetabling arrangements including provision for the first pre-inquiry

¹⁸ See *Sustainable Communities—Delivering through planning*, July 18, 2002, ODPM.

¹⁹ The Town and Country Planning (Major Infrastructure Project Inquiries Procedure)(England) Rules 2002, No.1223.

meeting ordinarily to be within 16 weeks of the announcement of the inquiry, for statements of case to be exchanged no later than four weeks after the final pre-inquiry meeting and for the inquiry to commence no later than eight weeks after that meeting;

- Provision entitling the inspector to refuse to permit cross-examination or to order it to cease if such cross-examination would put the inquiry timetable at risk;
- Provision enabling the Inspector to convene or arrange round table sessions and Joint Data Groups, both before or during the inquiry;
- Provision for compulsory mediation through a facility for the Secretary of State at his own volition to appoint a mediator, for the mediator then to issue a report to the inspector on the mediation and for that report to be a matter upon which representations may be made at the inquiry but without the mediator being liable to cross-examination or otherwise appearing;
- Provision for mandatory statements of common ground as between the applicant and the local planning authority;
- Establishment by the Secretary of State of a deadline for delivery of the Inspector's report but without any deadline being fixed for the Secretary of State's determination.

Overall, these features of the new MIP Rules can perhaps be said to have two main aims. One of these is to try to put further emphasis on the resolution of issues prior to the inquiry. The other is to try to further regiment and constrain the pre-inquiry and inquiry programme. Notwithstanding the good intentions lying behind such objectives, each can however give rise to particular difficulties.

For example, although the new Rules might be felt to imply otherwise, the absence of agreement between parties, and what may prove to be unnecessary misunderstandings between them on matters that could perhaps have been agreed prior to the commencement of an inquiry, is to a degree an inherent feature of the system rather than being attributable to some lack of vigour or failing in the conduct of the parties which external management arrangements can help erase. Very often, parties to an inquiry struggle to produce outline statements, statements of case and proofs of evidence within the relevant deadlines. Were the preparation of these simply a matter of setting out pre-conceived, fully documented and supported views, there would perhaps be no excuse but, more often than not, the preparation of the case for the inquiry must be constructed from the ground up. Objectors in particular may well be quite clear very early on as to the stance which they wish to take but very rarely will they have to hand the case to substantiate it. The size of application documents that need to be considered and omissions from or late additions to them also compound the difficulty. If, whilst preparing their case, the parties are then compelled to engage in dispute resolution arrangements not on their own terms but at the instigation and to the direction of the Secretary of State or the inquiry team, this can therefore prove particularly difficult and may not always prove productive. Compulsory dialogue can also easily favour a well-resourced applicant against objectors who, necessarily, will need time to assess the applicant's voluminous documentation and to undertake their own research and analysis. If the outcome is that, in whole or in part, they are distracted from developing their detailed case for the inquiry or must, in practice, have their case ready prior to the time allowed for exchange of proofs, they may be unfairly disadvantaged or at least feel that this is so, particularly where the run-in to the inquiry has been expedited. Generally, it does not appear to be in contemplation that additional time should be allowed for pre-inquiry discussions and there is perhaps an inherent contradiction in introducing additional procedures during the pre-inquiry period without allowing any additional time for these. Particularly in relation to issues taken towards the beginning of an inquiry, many may well find the pressures of the timetable immense.

Until the new Rules have been applied on a number of occasions, it is of course a little early to be

confident as to what may prove to be their actual impact. However, taking the joint data group arrangements applied in the case of the on-going Dibden inquiry, from one viewpoint at least, the general absence of agreement and the number of caveats and opt-outs expressed by parties to the reports of the groups established in that case do suggest that such initiatives may well not always yield substantial advantages.

In expressing these reservations, I do not wish to belittle what can be achieved in many cases before an inquiry commences or the importance of attempting early resolution of factual issues and matters in dispute. However, it seems to me important to recognise that there are potential difficulties in the application of procedural requirements in this area and that what these can achieve in individual cases may not be very dramatic. To avoid difficulties and in order to be most effective, I would also suggest that the practical application of such requirements will need to be approached sensitively, with an eye to what is reasonably practicable within the overall timetable and with a proper emphasis on helping the parties rather than any too slavish adherence to the objective of saving inquiry time. Whilst there may well be merits in placing a greater emphasis on dispute resolution and in adopting a more inquisitorial approach to planning questions, it seems to me that it is also important to recognise that such measures do not fit very naturally into what remains, by virtue of the ultimate inquiry procedure, essentially an adversarial process. So long as conventional inquiry arrangements are retained, there is therefore on my analysis an inherent tension in mixing such different processes.

Turning to the proposals for further regimenting and constraining the inquiry programme, it also remains to be seen how these will work in practice but, should a very rigorous approach be adopted, there may well give rise to some alarm. At one extreme, initial programmes could perhaps be adopted which substantially constrain individual parties' opportunity to present their cases in the conventional way with evidence in chief and detailed cross-examination. Even where an initial programme is in fact settled which makes reasonable allowance for this, unexpected developments are liable to occur for which allowance needs to be made. Accurate programming is a notoriously difficult exercise and when, as so often happens, the unexpected occurs, most would no doubt reasonably expect a degree of flexibility to be adopted, preferably exercised on the basis of a first hand appreciation of the conduct of the parties and of the proceedings to date. The prospect then of the initial inquiry timetable and any changes to it having to be agreed not simply by the Inspector but by some representative of the Secretary of State, who may well be physically remote from the proceedings and divorced from the inquiry itself, could therefore lead to considerable disquiet. In addition, the prospect of cross-examination being further constrained in the interests of maintaining the inquiry timetable is liable to give rise to additional concern. Although, as with anything, cross-examination can be over-lengthy and capable of being condensed, it is also in the nature of the exercise that it is an exploratory process, the length of which cannot very easily be estimated in advance and which may take differing turns depending on the answers actually given. Early indications of the time needed for cross-examination can therefore often prove inadequate and, even when they prove accurate, the new Rules seem to contemplate curtailment not only when any individual allowance for cross-examination is exceeded but to make up for delays encountered elsewhere in the inquiry proceedings. Constraints upon cross-examination, if widely or rigidly imposed, could possibly undermine the whole process and herald the way, as some would no doubt welcome, for the adoption of alternative arrangements to the present adversarial inquiry system.

Some of the things which the new MIP Inquiry Rules do not cover are perhaps as of much significance as those which they do. By way of example, the Rules are generally silent on the treatment of policy and the prospective new policy statements, containing only the usual proviso excluding government representatives from any need to answer questions directed to the merits of government policy.

Possibly, however, rule 17(2) and (6), which require the Inspector to identify the matters determined by the Secretary of State to be matters to be considered at the inquiry and which allow the Inspector to refuse to permit irrelevant evidence, may prove relevant to the treatment of policy issues.

A second omission is that, despite the inclusion of a provision to impose a deadline for receipt of the Inspector's report, there is no provision imposing a deadline on the issue of the Secretary of State's ultimate determination. However, it appears from the July 2002 planning reform paper, and the Deputy Prime Minister's statement to the Commons when announcing it, that the Government does propose in due course to put in place a statutory framework limiting the period for the issue of ministerial decisions.²⁰ Pending any such change in the law, some may well still doubt whether any improvement in decision times will actually be achieved or, if achieved, will be maintained.

Then, it is to be noted that the new MIP Inquiry Rules do not apply to the various special procedures which exist for such developments as ports, power stations and railways. Additional complementary rules may, however, be promulgated in due course. In addition, necessarily, the new Rules do not apply to Wales, Scotland or Northern Ireland. Different approaches to the authorisation of MIPs in those jurisdictions may well develop which, in turn, may result in pressure for a further revision of the English arrangements.

Apart from the Major Inquiry Rules and the possibility of national planning statements, to which I will return to later in this paper, the July 2002 planning reform paper also indicates that the Government is considering further ways to make public inquiries more efficient. One particular possibility is referred to, namely allowing the consideration of issues concurrently rather than sequentially which, it is claimed could save up to a third of inquiry time based on initial findings. This would appear to mean different inspectors sitting simultaneously to consider different topics, the logistical and evidential implications of which could well be substantial. Whilst the government concedes in announcing the proposal that "we recognise the need to ensure that the changes do not erode the ability of the public to participate as appropriate" no indication is given as to how this will be secured.

Parliament's continuing involvement with major projects

Contrary to many people's understanding, Parliament's involvement in authorising development authorisation has not completely disappeared and has only relatively recently reduced to its current low ebb.

Whilst the heyday of private bills in the latter part of the nineteenth century, when several hundred railway bills might be before it at one time, has long gone, several private bills for railway and port projects were still deposited each year until ten years ago. The Transport and Works Act 1992 then introduced an order-making procedure for railways and works affecting navigation which finally did away with the need for most remaining private bills authorising infrastructure projects but Parliament still has quite a few powers to sit in judgment on infrastructure projects and does on occasion do so pursuant to a variety of different procedures as the following survey shows.²¹

Hybrid Bills

Hybrid bill procedure remains and, in advancing its now abandoned proposals for a new parliamentary procedure, the Government was careful to reserve the option of its use for further projects. Hybrid bills can be defined as bills, usually introduced by the Government, which, by virtue of having some

²⁰ See HC Hansard, July 18, 2002, col. 447.

²¹ A description of existing procedures will also be found in the article on the Future of the Major Inquiry by John Popham and Michael Purdue at [2002] J.P.L. 137.

particular effect on specific private interests (as will always be the case with powers for a works project), are subject to the Standing Orders applicable to private legislation. As such, they are subject to particular advertisement, notification and documentation requirements, objectors can petition against the bill in one or both Houses and, prior to the conventional public bill committee stage in each House, petitioners as well as the promoters can then appear in person or with Counsel and witnesses before a select committee. However, unlike a private bill, the principle of the legislation is deemed to have been determined at second reading (*i.e.* the first debate on the floor of the House) with the consequence that petitioners will ordinarily not be heard on matters of principle by the committee. Since the question of what is the principle of the bill is in effect determined by Ministers speeches at the second reading, it can therefore follow that issues such as need, mode choice and alignment can be treated as pre-determined.

The Channel Tunnel Act 1987 was perhaps the most notable example of hybrid legislation in the last 25 years although the bill for the Channel Tunnel Rail Link Act 1996 which then followed can lay claim to having involved the longest running hybrid or private bill committee ever, the Commons select committee in that case sitting for 320 (as against 220) hours in total and being followed by further select committee proceedings in the House of Lords which lasted 31 days. Both were incontestably concerned with projects of national significance. Only a small number of hybrid bills for other projects have been introduced since 1987, resulting in the Dartford Thurrock Bridge Act 1988, the Severn Bridges Act 1991 and the Cardiff Bay Barrage Act 1993.

A number of potential new candidates for hybrid bills are occasionally mentioned, chief amongst them being a re-promotion of the London Crossrail project which, in its last emanation, proceeded as a private bill only to be rejected at the committee stage in the Commons. All those who made or sympathised with the arguments put against the introduction of the now abandoned new parliamentary procedure would no doubt find the introduction of a new hybrid bill (or for that matter a private bill) equally if not more unacceptable. However, it remains to be seen what if any impact the abandonment of the proposed new procedure may have on the prospects for further hybrid bills.

Special Development Orders

Special Development Procedure by which planning permission can be granted by statutory instrument subject to the parliamentary negative resolution procedure also remains available under section 59 of the Town and Country Planning Act 1990. However, it has not been utilised in recent years, perhaps the most notable occasion of its use being in relation to Stansted airport in the late 1960s.

Private Bills

Private bills, which were the vehicle by which land enclosures, our canals and most of our railways were authorised, can still be promoted where alternative authorisation routes are not available. As indicated earlier in relation to hybrid bills, private bills are subject to particular advertisement, notification and advertisement requirements and include in each House a facility for objectors to petition and be heard along with the promoters, in person or by Counsel and with witnesses before a select committee. Unlike hybrid bills, however, the whole case for the bill has to be proven and can be challenged at the committee stage in each House. Only petitioners who are considered to be specially and directly affected are then liable to be heard and, by virtue of some fairly arcane *locus standi* rules, not all petitioners with a grievance are liable to be found to fall into this category. General amenity groups and specially-formed action groups for example have on occasion found themselves excluded as have residents in relation to a bill promoted by their own local authority.²²

²² The subject of *locus standi* is dealt with in some detail in Erskine May 22 edition, pp 882–890.

Private bills authorising works projects are now rare since, ordinarily, one condition for their promotion is that there is no alternative practicable means of authorisation. When the Transport and Works Act 1992 was enacted, not only did it create a new order-making procedure for railways and certain navigation works but it also repealed a saving²³ contained in the Harbours Act 1964 that projects capable of being authorised by harbour revision or empowerment order could still be authorised by private bill.

Only one works project has been the subject of a private bill²⁴ since the Transport and Works Order procedure was introduced in January 1993. Given the wide availability of alternative powers, there are unlikely to be many more but, where other authorisation routes do not exist, they do remain a possibility. One potential candidate often cited is the proposed Cross Border Railway project since, at present, there is no alternative Anglo-Scottish authorisation procedure.

Transport and Works Orders

The parliamentary procedure for Transport and Works Orders of national significance needs also to be cited.²⁵ This provides that applications can be designated by the relevant Secretary of State as of national significance following which they cannot be referred to a local inquiry or otherwise carried forward until a resolution approving the project has been passed by each House of Parliament. It was this process which proved fatal for the Central Railway project in 1996 but, apart from that case, the only example of its use to date has been for the CTRL (Stratford Station) Order, as required by the original CTRL Act, and this involved no real controversy.

The effect of a Transport and Works Order being declared of national significance and then securing affirmative resolutions in Parliament is not quite as decisive as might first be thought. The resolutions do not provide any form of outline approval or approval in principle that can be acted on and do not preclude issues being considered at any subsequent inquiry, which is likely to remain the first occasion when the application, including any supporting environmental statement, is subject to detailed public examination and objectors afforded a right to have their cases heard. The Secretary of State can still refuse the application following receipt of the Inspector's report notwithstanding the prior approval of the principle given by Parliament and is then only constrained not to include in the order, as made, any provision inconsistent with the parliamentary resolutions.

In the circumstances, unless the applicants for such an order are confident of unswerving governmental support, they may well see designation as involving additional risk although, if the parliamentary hurdle is successfully overcome, financiers and other backers may then feel more ready to back the project.

It is interesting to note that extension of the procedure beyond the confines of Transport and Works Orders (which the Government discounted when announcing its proposals) has been seen in a number of quarters, prior to the recent abandonment of the proposed new parliamentary procedure, as the best way forward. Support for this can be found, for example, both from the House of Lords' Select Committee on Science and Technology²⁶ and in the Commons TLR Select Committee Report on the Planning Green Paper.²⁷

²³ s. 62.

²⁴ See the Tamar Bridge Act 1995.

²⁵ See s.9 of the Transport and Works Act 1992.

²⁶ Third Report 1998–99 (Management of Nuclear Waste), para.6.35.

²⁷ Thirteenth Report 2001–02, para.165, HC 476–1.

Special Parliamentary Procedure

Not to be forgotten is the somewhat arcane process known as Special Parliamentary Procedure.²⁸ This still applies in a small number of cases, most notably to the compulsory purchase of open space where no exchange land is provided. It results in the order being referred to Parliament after the ministerial decision to confirm and with the potential, if any objectors pursue their objections, for a re-trial before a joint committee of both Houses of issues previously ventilated at the earlier public inquiry.

The referral to a joint committee of objections (which have to be lodged in the form of petitions) can be prevented by negative resolution in either House, so enabling the Government to preclude such a re-trial of the issues, should it wish. The Government also has the facility to override through the promotion of a Confirmation Bill any adverse determination by a joint committee. Such an extraordinary step might be considered no more than a theoretical possibility but this did in fact occur in 1985 in relation to the Okehampton Bypass Compulsory Purchase Orders.²⁹ In that case the Secretary of State (Nicholas Ridley) refused to accept the majority recommendation of the joint committee, which had sat for fifteen days and which, in the light of the submissions of the Dartmoor Preservation Society and others who had sought the adoption of an alternative northern route over farmland, determined to reject the southern route over Dartford Common for which the orders provided and which the inspector had commended to the Secretary of State. The confirmation bill was itself then passed by 247 to 127 votes in the Commons, voting being essentially on party lines.

Only about half a dozen cases of special parliamentary procedure have arisen since, many of which have been non-contentious, but one at least, for compulsory purchase powers in Barnsley,³⁰ was rejected by the joint committee to which it was referred and was abandoned in consequence.

Scottish Provisional Orders

Whilst now overtaken in the main by the procedure for Private Bills before the Scottish Parliament, Scottish Provisional Orders are the one remaining example of provisional order procedure, something which once was the basis of much major project authorisation and which, as a means of avoiding full parliamentary processes, involves a preliminary hearing of those objections by specially appointed commissioners. Assuming a favourable determination, enactment is then by means of a Confirmation Bill which is subject to an expedited parliamentary process.

As with public inquiries, a hearing before commissioners is not necessarily a simple matter, the hearing in the case of the Edinburgh Western Relief Road Order (chaired by the current Speaker of the Commons) lasting 54 days in 1988 and then being followed by contested joint committee proceedings on the subsequent confirmation bill. Promoters can also find themselves subject to early disappointment, the Strathclyde Tram Order of 1995 providing a notable example. In that case, the commissioners rejected (and without giving any detailed reasons) the Strathclyde Passenger Transport Executive's proposals for a new rapid transit system for Glasgow.

Eight confirmation Acts resulting from Scottish Provisional Orders for infrastructure projects have been enacted in the last ten years, one for guided busways in Edinburgh and another, the most recent, for the Eriskay Causeway, but none as contentious as those just referred to.

²⁸ See the Statutory Orders (Special Procedure) Act 1946.

²⁹ See the Okehampton Bypass (Confirmation of Orders) Act 1985.

³⁰ The Barnsley (Oakwell Regeneration Area) Compulsory Purchase Order 1997.

Private Bills in Scotland and Northern Ireland

The new Scottish Private Bill system (and its Northern Ireland equivalent) must also not be overlooked. In Scotland and Northern Ireland there is no equivalent to Transport and Works Orders and, in relation to devolved matters that in England would need to be authorised by such an order or by a Private or Hybrid Bill, a new form of Private Bill has been invented. This allows those affected a 60 day objection period and involves referral to a special committee (with provision for special advisers) who produce a preliminary stage report on general principles. The Bill is then subject to plenary approval followed by a detailed consideration stage when evidence is heard in committee. A final plenary approval stage then follows.

The procedure is as yet largely untested in practice but the first Scottish Private Bill (in relation to an off-shore wind farm project)³¹ has now been presented and has commenced its passage through the parliamentary process.

Given that responsibility for many major infrastructure projects is a devolved function, the new Private Bill procedure in Scotland presents a particularly interesting development and may, perhaps, serve as a model for the reform of hybrid and private bills in England should that be contemplated. Whilst the Scottish procedure has been developed with reference to the UK hybrid and private bill procedures, it is by no means a mirror image of them but rather takes as its basis the modern and, arguably, more inclusive and measured scrutiny process that has been developed for Scottish public legislation. Intriguingly, no reference seems to have been made to this generally in either the Government's announcements on the now abandoned new procedure for MIPs or in the majority of responses and commentary by others.

The work of Select Committees

Leaving to one side what many may view as the backwater of local legislative processes, any analysis of Parliament's involvement in the planning process and with infrastructure projects ought also to give proper recognition to the work of the departmental and other select committees in both Houses.

As is generally acknowledged, these have grown enormously in importance since 1979, when the current Commons' system of departmental committees was first established. Not only do they now provide a substantial measure of scrutiny of government and the administration generally but they also contribute significantly to the general level of expertise and know-how, both within Parliament and beyond, on important issues of the day. They can also be said to play an important role in raising the profile and reputation of Parliament in the country at large.

The inquiries of the Commons TLR and Procedure Committees in relation to the MIP proposals are an obvious example of select committee work in the planning and environmental sector but by no means the only one. The work of the Lords' Select Committee on Science and Technology on the management of nuclear waste,³² would be cited by many, I suspect, as particularly influential and can be treated as a prime reference point in relation to the Government's new consultation paper on the management of solid waste³³ issued last September and as respects the proposals for redundant power stations which are the subject of the Government's July 2002 White Paper.³⁴ The report of the Commons' Environment, Food and Rural Affairs Committee in this area is also particularly

³¹ The Robin Rigg Offshore Wind Farm (Navigation and Fishing) (Scotland) Bill, presented on June 27, 2002.

³² See in particular the Third Report 1998–99 (March 1999) and the Government's response in the First report 2001–02 (November 2001).

³³ *Managing Radioactive Waste Safely*, DEFRA, September 2001.

³⁴ *Managing the Nuclear Legacy—a Strategy for Action*, cm 5552.

noteworthy.³⁵ Other recent select committee work of particular note as respects planning and the environment includes, for example, the inquiry by the Commons' Environment, Transport and the Regions Committee on sustainable waste management³⁶ and that of the Commons' Science and Technology Committee on wave and tidal energy.³⁷

In this paper, it is impracticable to give more than a passing reference to the work of the select committees. However, it seems right to point out, as I hope these few examples help to show, that Parliament is, through its select committees, actively and influentially engaged in scrutinising planning and environmental matters. This does not of course mean that it is necessarily well suited to tackling the detailed complexities of individual major projects and their impact upon the environment (which also involves other and wider questions). However, it does I think help to illustrate the capabilities of Parliament in relation to planning and environmental matters which all the recent argument in relation to the Government's proposals for MIPs has tended to downplay. It may also give some comfort for those who are now keen to see Parliament take an active role in scrutinising new planning policy statements.

Framing national policy—a dilemma for government

Whether or not Parliament is involved directly in sanctioning individual MIPs, which it now seems is to remain a rare occurrence, the application of national policy to them, with all the political implications which that has, will remain a major factor in their determination. As earlier stated in this paper, one of the things which will primarily distinguish MIPs from ordinary development proposals is their national significance and, in consequence, the extent to which national policy dictates that they should proceed.

It is not surprising therefore that a frequent complaint levelled at our inquiry system so far as major projects are concerned is the lack of any prior government policy on critical issues which, in consequence, have to be ventilated at the inquiry. Thus, for example, the point is often put that the Heathrow T5 inquiry proceeded without any settled policy on airport capacity in the south-east and that this materially complicated and extended the process.³⁸

Before looking at proposals for greater use of policy statements, I think it is worth first just pausing to consider the manner in which they have tended to be treated in this country. As stated in the Franks' Report³⁹ and endorsed by the House of Lords in *Bushell v. Secretary of State for the Environment*⁴⁰ (Lord Edmund Davies dissenting), for many years, the general rule has been that issues of Government policy are for ministers answerable to Parliament alone and are not open to investigation at public inquiries. That report went on to state in particular that ministers should be free when issuing a statement of policy to direct in writing that the whole or certain parts of it were not open to discussion at the inquiry:—

“This power would avoid useless discussion of policy in the wrong forum, but the manner of its exercise could itself be open to criticism in the right forum of Parliament”.⁴¹

Statutory expressions of this, usually safeguarding Government witnesses from questions in relation to

³⁵ See Third Report, 2001–02, February 2002.

³⁶ See Fifth Report 2000–01, March 2001.

³⁷ See Seventh Report 2000–01 (April 2001) and the Government's response in the Third report 2001–02 (November 2001).

³⁸ The Inspector, Roy Vandermeer QC, estimated in evidence to the Commons Procedure Committee that some 6–9 months inquiry time might have been saved had there been up to date policy on air demand and the best part of one year of the 3 years 10 months duration if there had been an up to date local plan: see Q84, HC 823–ii, Session 2001–02.

³⁹ Report of the Committee on Administrative Tribunals and Inquiries (1957) (Cmd 218).

⁴⁰ [1981] A.C. 75.

⁴¹ *ibid.*, para. 288.

Government policy, are now to be found in various inquiry rules, including most recently the new MIP Inquiries Rules.⁴²

In these circumstances, some might wonder why Government is at all shy in declaring policy when, if it just got on with it, so many issues would be taken out of contention. The difficulty of course is that it is not as simple as that. On the whole, it is not realistic for Government unilaterally to declare policy without engaging in a debate upon it and, accordingly, it must be dealt with earlier. With the great advance of judicial review, it is also the case that the courts are willing to adjudicate upon the rationality of government decisions in ways that were perhaps inconceivable at the time of the Franks Report and the decision in *Bushell*. Requirements of European Law, such as in relation to environmental impact assessment and under the Habitats Directive, also mean that certain issues which can be viewed as ones which fall within a general governmental prerogative do require to be carried forward on a transparent, reasoned basis and with a degree of public participation.

Given these difficulties, it is perhaps understandable that, at present at least, we have little if anything by way of national policy statements that provides a guiding light for MIPs in any sector. Furthermore, the form of some recent policy announcements does not give grounds for too much optimism. In the ports sector, for example, there is now a new Ports Policy,⁴³ the first for 30 years, an event which perhaps surprisingly did not give rise to any debate in Parliament. Disappointingly for some, whilst the policy indicates that new port development must be commercially funded, sustainable and with a clear need, it leaves open the question of what the UK requires by way of further port capacity and where this should go. In consequence, these issues remain very much alive, for example so far as ABP's proposed new major port at Dibden in Southampton Water is concerned although, it appears, that in that case they have not required too much time at the ongoing local inquiry which is due to complete this year. Equally, they remain open in relation to P&Os proposed new London Gateway (Shellhaven) port in Thurrock which is currently the subject of a number of recent applications and which, it appears to many, must be viewed as an alternative to Dibden (rather than potentially additional to it), should the Dibden project be allowed to proceed.

Perhaps ironically, absence of clear provision for prior policy on development has not always been the case in the ports sector. The Harbours Act 1964 originally provided for a National Ports Council with a duty of formulating and keeping under review a national plan for the development of harbours in Great Britain. The National Ports Council was abolished in 1981 as one of Mrs Thatcher's first legislative actions prior to confronting the National Dock Labour Scheme but, until that time, the consent of the Ministry of Transport, given on the advice of the Council, was required for schemes of harbour development then having a value in excess of £1m. Prior political approval was thus required for major new port development which, at that time, was unlikely to be given for proposals that might compete with existing facilities. No-one appears to be suggesting any return to quite such an arrangement. However, perhaps the concept of national policy statements could, depending upon the manner in which it is advanced, bring us quite close to it.

All that the Government's 2001 MIP proposals promised when they were announced was that the parliamentary stage of a MIP "would generally be preceded by development of a national policy statement, on the content of which there would normally be prior consultation".

The July 2002 planning reform paper really went no further, simply stating that—

⁴² See rule 14(5).

⁴³ *Modern Ports, A UK Policy*, DETR, November 2000.

We will issue clear statements of national policy about the need for specific investment as this will help reduce decision times.

John Prescott's statement to the House of Commons on the issue on 18 July was also very general, simply promising that "I will speed up the planning of major infrastructure projects by setting out the Government's objectives in clear policy statements, and changing the inquiry processes to make them more efficient".⁴⁴ The announcement from his press office was equally minimalist, stating "we will speed up inquiry processes and give clearer guidance from Government on the need for investment".

The continued fixation in these announcements with the issue of decision times, the absence of any clear indication of the intended arrangements for public participation in the settlement of policy statements and the reference to "investment", which is very much a Treasury term and which many will see as only one consideration, no doubt caused a degree of concern to a number of interests.

If the planning reform paper and related announcements are a little vague on the subject of policy statements, the way that the government is moving perhaps became somewhat clearer shortly afterwards with the publication by Alistair Darling on July 23, 2002 of six regional airport consultation documents on the settlement of a 30 year strategy on the future development of air transport in the U.K.⁴⁵ These followed on from the publication of the *Future of Aviation* consultation document in December 2000 and also various *Regional Air Services Studies* and promise the publication of a White Paper next year, following a four month consultation period expiring at the end of November.

In his statement to the Commons, Alistair Darling made clear on behalf of the Government that, in publishing the White Paper, "we will set out our concluded views on how much additional airport capacity is needed and where it should be sited".⁴⁶ Accordingly, what appears to be in contemplation is that not only issues of airport capacity but also, at least to some degree, the question of location should be decided by the Government through the White Paper. In general, however, the consultation documents are a little vague as to precisely what the Government thinks can be or should be determined by the prospective White Paper and how much may still have to be left to subsequent planning processes. Intriguingly, on my reading, only the consultation paper for the South East seems directly to address the issue of the interface with the planning system but in doing so rather fudges the question in stating—

The White Paper will identify what sort of development is required in the UK and its location, and this will provide the policy framework to underpin such developments and reduce risk.

It will still be for the relevant airport developer to carry out project design, to consult with all concerned on the impacts and how to mitigate them, and to seek approval for any projects through the planning system.⁴⁷

In general, it does seem that there remains real uncertainties as to what can be achieved by policy statements. Much of course depends on how expansive an approach is taken to the question of what is "policy". Inevitably, the answer to that question and the related issue of what can usefully be included in a policy statement for the purposes of one or more MIPs is amenable to a range of answers. For some, "policy" in this context should really be about overall need and capacity. But policy can also extend to

⁴⁴ HC Hansard, July 18, 2002, col.441.

⁴⁵ See www.airconsult.gov.uk.

⁴⁶ HC Hansard, July 23 847.

⁴⁷ See paras 2.22–23.

methodologies for assessment, relevant considerations and the weighting to be given to them as well as more general guidance, for example as respects location. If it does so, then the choice of individual projects to fulfil a need and between competing alternatives can be very substantially influenced.

The question of what force is to be given to national policy statements also remains very much a live issue. Are they to be, like planning policy guidance generally, simply material considerations to be weighed and, if appropriate, discounted or are they to be in some way determinative within their purview? If the latter, as seems to be in contemplation, is this to be only after some form of Parliamentary sanction and, whether or not that is the case, how and in what manner will discussion of matters of policy and principle be precluded at any subsequent inquiry?

In relation to the now abandoned parliamentary proposals for MIPs, many bodies such as the Royal Commission on Environmental Pollution took the view that national policy must always and not just “generally” be sorted out in advance and that this should always be subject to wide public consultation. The Commons’ TLR Committee picked up on this in its Thirteenth Report in stating—

We strongly support the proposal to introduce National Policy statements. They should be the subject of public consultation on an amendable, substantive motion. If they are prepared well in advance of projects coming forward, they will be a major step forward. The policy statements could take a variety of forms:

- In some situations they would indicate a need to make provision within a region, leaving regional guidance to indicate a suitable site for the particular facility;
- In others, they would need to indicate a range of options or a precise location or route corridor.

The policy statements should relate to the national Spatial Strategy”.⁴⁸

Others went even further, the House of Lords Science and Technology Committee, for example, urging in relation to the long-term management of nuclear waste that a fully comprehensive policy is put to Parliament for debate and decision in the form of a Bill.⁴⁹

The wider question of pre-inquiry consultation and appraisal

With so much emphasis having been placed on streamlining the inquiry process, much attention has been paid to means of resolving or adjudicating upon differences following an application for authorisation and in the run-up to or during an inquiry. However, in relation to MIPs in particular, even without some new form of policy statement, a substantial degree of public consultation and appraisal will already have taken place, some of which at least already involves a degree of public participation.

In all cases, MIPs are liable to be subject to environmental impact assessment (EIA) which, as is well known, involves a degree of consultation and encompasses appraisal of more than simply environmental effects. Now, following the adoption on June 27, 2001 of the European Directive on the assessment of the effects of certain plans and programmes on the environment,⁵⁰ provision will need to be put in place by July 21, 2004 for the environmental assessment of development plans (including, if these happen, Local Development Frameworks) and other plans and programmes which set the framework for development of projects subject to EIA insofar as these are prepared for (amongst other

⁴⁸ *ibid*, para.141.

⁴⁹ Third report 1998–99, paragraph 6.6.

⁵⁰ EC Directive 2001/42/EC.

specified matters) energy, transport, waste or water management, town and country planning or land use. The precise implications of these new requirements for strategic environmental assessment (which, it seems, may themselves need to be adjusted as a result of a prospective protocol on the same subject being negotiated under the Espoo Convention) seem a little unclear and are a major topic in themselves. However, it must be reasonably safe to assume that those requirements could have a substantial influence on the development of MIPs in particular.

Quite apart from the requirements for environmental assessment, MIPs are also subject to particular information requirements set out in the DETR *Code of Practice on the Dissemination of Information during Major Infrastructure Developments* which was issued in October 1999 as part of the Government's *Modernising Planning* initiative. The UK along with the EC and its other Member States is now also a signatory to the Aarhus Convention which requires the public to be consulted about plans, programmes and policies relating to the environment and projects subject to EIA. Although not yet ratified by the UK or the EC, this can be expected in due course and a revision of European EIA requirements, together with a new European Directive on Public Access to Environmental Information are currently being progressed to prepare for this as well as, within the UK, proposals for new Environmental Information Regulations.⁵¹

It should also be noted that most MIPs, by virtue of being public sector projects or requiring public funding, are subject not only to informal or arbitrary appraisal as they proceed but also to more formal appraisal in accordance with governmental guidelines.⁵² In the transport sector in particular, what is called the *New Approach To Appraisal (NATA)*, which was first developed to assess investment decisions on trunk roads,⁵³ is now used and takes account of the five main criteria for transport⁵⁴ set out in the 1998 Transport White Paper *A New Deal for Transport*. There also now exists HM Treasury guidance, known as *The Green Book* (on which a consultation paper with proposals for a revised draft has recently been published),⁵⁵ which deals with how proposals should be appraised before significant funds are committed. As is to be expected, the *Green Book* is concerned essentially with economic appraisal and cost-benefit analysis but, as with environmental factors in environmental appraisal, economic factors do not stand in isolation. The process is therefore best viewed as having wider implications.

The practical consequence of all these arrangements is that the development by promoters of proposals for MIPs is now inevitably subject to elements of advance appraisal and public consultation which did not exist not so long ago. Promoters therefore have much less facility than was once the case simply to decide independently on a project and then announce and defend it. As a result, the details of a project are less likely to be entirely untested or to come as a complete surprise to interested parties at or about the time of the application for authorisation. Having regard to the developments which I have just referred to, even without new arrangements for policy statements, this trend would seem set to continue. In consequence, increasingly, it can be said that the public stage of the authorisation process is being brought forward to a period commencing well before applications for authorisation. Although affected interests may feel themselves to be no better off when applications go in, from an administrator's viewpoint in particular, this does perhaps to some extent downgrade the importance of

⁵¹ See *New Draft Environmental Regulations: Public Consultation*, DEFRA, July 2002 (responses due by October 4, 2002).

⁵² For a general discussion of this, see the Parliamentary Office of Science and Technology's Postnote No. 173: *Appraising Major Infrastructure Projects*.

⁵³ See *A New Deal for Trunk Roads in England* (DETR, 1998) and *Guidance on Multi-Modal Studies* (DETR, 2000); see now *Major Scheme Appraisal in Local Transport Plans* (DfT, June 2002).

⁵⁴ *i.e.* environmental impact, safety, economy, accessibility and integration.

⁵⁵ See *The Green Book Consultation Paper—Appraisal and Evaluation in Central Government*, HM Treasury, July 2002 (responses by October 18, 2002).

the post application inquiry process as well as adding to the pressure, once an application is in, to process it as quickly as possible

The role of politicians in the sanctioning of MIPs

Before seeking to conclude this paper, I would also just like to comment briefly on some issues concerning the general role of politicians and the political process which the recent proposals concerning MIPs have perhaps helped bring into focus.

Lurking beneath many of the objections raised to the Government's proposals for a new parliamentary process did seem to be a basic distrust of political involvement in the planning process. Whilst the abandonment of that particular proposal means that this issue is no longer quite so dominant, the political implications of many MIPs do mean that questions concerning the proper degree of political involvement will continue and, as consideration of the issue of public policy statements helps to highlight, the subtle distinction between what is a political or administrative and what is a judicial process leaves room for further debate.

At a local level, planning decisions are still entrusted to politicians, a policy issue which was subject to review by the Nolan Committee in its report on Standards of Conduct in Local Government in 1997.⁵⁶ That report came out clearly in favour of councillors remaining involved although (as has now been put into practice), the report also suggested that planning committee members should be subject to special training on the performance of their planning functions and as respects the issues of probity to be complied with. Paragraph 290 of the report stated the committee's general conclusion as follows—

They [local planning decisions] are administrative decisions, taken within a framework of law and practice, and this view has been upheld by the courts.⁵⁷ The effect of this is not that planning decisions are freed from legal constraint, but that the constraints are different. Decisions must still be free from bias caused by personal interest. But in our view they need not be decisions which are taken judicially, based solely on a rational and impartial assessment of evidence. On the contrary, councillors must bring to planning decisions a sense of the community's needs and interests. That is why they are there. Theirs is the sometimes difficult task of marrying their duty to represent the interests of the community with their obligation to remain within the constraints of planning law, and only to take account of relevant matters. If they do either to the exclusion of the other they are equally at fault.

Since that report, we have witnessed the passing and implementation of the Human Rights Act and the first wave of judicial interpretation in relation to it, culminating for present purposes in the decision on the *Alconbury* appeals.⁵⁸ Rather than being concerned with the role of councillors in the planning process, as will be well known, that decision addressed the issue of whether, as a matter of law, it was still possible to have a planning appeal system culminating in decisions by a Secretary of State responsible for planning policy determining applications having regard to his own policy guidance. In his most illuminating paper to this conference last year, Keith Lindblom QC came to the following conclusion—

“I think the true importance of the result of those appeals lies in its having served to confirm the existing constitutional balance rather than presaging some sort of shift. Although the supervisory role of the courts has undoubtedly increased since the advent of the modern system of town and

⁵⁶ Third Report of the Committee on Standards in Public Life, July 1997, Cm 3702.

⁵⁷ See fn. 10 to the report, referring to *R. v Amber Valley DC, ex parte Jackson* (1985) 1 W.L.R. 298 and other cases.

⁵⁸ [2001] 2 All E.R. 929.

country planning in this country half a century ago, the broad constitutional balance remains essentially unchanged today.”

In consequence, Keith Lindblom felt able still to adopt an earlier description by Professor Grant of the 1947 Act to the effect that “It places the administration of British land use planning entirely in the hands of politicians”.

As a matter of law, it therefore still seems possible with a certain degree of procedural and legal juggling to maintain a planning system with a strong political element of decision making. As a matter of policy, however, and at a political level, debate about this is bound to continue.

The now abandoned proposals for dealing with MIPs by way of a new parliamentary procedure gave the subject a particular edge, not least because it would have been very challenging to secure within a parliamentary environment the safeguards of due process which are now viewed as a necessary part of the conventional planning system. UKELA⁵⁹ were probably not alone in questioning in their representations on the MIP proposals the sense of reserving a final decision on the inspector’s report to the Secretary of State rather than simply adopting the Inspector’s report as the Secretary of State’s decision or handing over the decision-making authority to the Inspector in the first place—an argument that would seem equally applicable to non MIP appeals.

Plainly, planning is by its nature in part a political process and must remain driven by political considerations. This will continue to be the case particularly given the role of PPGs, MPGs, the new Regional Spatial Strategies and other policy guidance and directions, whether or not at some stage the Secretary of State ceases to be the final decision-maker on the larger appeals and call-ins. But, where do or should the true boundaries lie between policy and the proper exercise of political and administrative decision-making on the one hand and the constraints of an objectively justifiable and judicially reviewable process on the other? Whilst I suspect no very clear answer can be given to this question, the position is perhaps more confused than it need be or at least not as well defined as it could be and as it may now need to become with the development of new policy statements.

Some MIPs at least are liable to be viewed politically as “must haves”. In consequence, the outcome of the determination process in relation to them is liable to be viewed in some quarters at least (and perhaps it should be) as wholly or partly pre-ordained. If this can be seen as the outcome of clear and publicly evolved national policies, then maybe it will be found generally acceptable. However, that of course is not the present position. Furthermore, if a process can be established for ensuring that appropriate policy statements are promulgated first, to some degree, that simply advances the policy/political element to an earlier stage but does not necessarily provide an answer as to what its appropriate parameters should be. Whilst the final determination remains with a Secretary of State, there will also still remain a political element to be grappled with thereafter. Maybe, the concept of having a clearly worded statutory objective for the planning system would help here.

Not surprisingly, in the recent debate on the now abandoned parliamentary procedure for MIPs, the importance of there being some adequate democratic or participative process to help ensure public confidence in and acceptance of the decision-making process has been stressed by many. This is clearly an important issue for MIPs if the sort of problems experienced on projects such as the Newbury Bypass is not to become commonplace.

Politics does of course bring an additional dimension to planning determinations which can give rise to additional difficulties. The extremes of this can perhaps be no better illustrated than by reference to the

⁵⁹ The United Kingdom Environmental Law Association.

process which the United States has been engaged in this year in finally determining the site for a long term geological repository for high level radioactive waste.

After a long and complicated gestation process pursuant to procedures established under the U.S. Nuclear Waste Policy Act 1992 but only after the legislative criteria for site selection had been amended in 1998, some have alleged, to favour the site then chosen, the Energy Secretary, Spencer Abraham, finally recommended to President Bush on February 14, 2002 the Yucca Mountain Site, 100 miles north west of Las Vegas. President Bush notified Congress the next day that he considered Yucca qualified for a construction permit application but, as allowed for in the legislative procedure, this was then vetoed by Governor Kenny Guinn of Nevada and all then depended on the resolutions of Congress, many interests in the state of Nevada and beyond being absolutely opposed to it. Nevada established a \$9m dollar campaign fund, most of which it was reported was quickly exhausted on advertising and media campaigns directed at those parts of the country whose representatives and senators might most readily be swayed. By June 6, Nevada had also commenced no less than five law suits designed to stop the process. The House of Representatives, however, voted by 306 to 117 in favour of Yucca Mountain on May 8 and then, on July 9 by 60 votes to 39, the Senate gave its approval. Assuming all remaining legal challenges fail (which perhaps they may not), it will only remain for the Energy Department to submit a licence application to the Nuclear Regulatory Commission, for it to conduct lengthy hearings and investigations, for the repository to be built (estimated four years) and then for a final licence application to be made to allow waste to be shipped to the site for approximately 100 years before being entombed for the next 10,000 years.

What was a highly sensitive and extremely difficult planning decision has thus been resolved by a political process but only at enormous cost and after massive controversy which, some would say, demonstrates the limitations of such a process. In due course, with the failure in 1997 of the Nirex application for its proposed rock characterisation facility at Sellafield, it would seem that we may be embarked in the UK on some similar process. Whilst the extent of the lawsuits and lobbying in relation to Yucca Mountain are perhaps unlikely to be matched in the UK, any new repository proposal here is bound to prove hugely controversial⁶⁰ and, unlike Yucca Mountain, the potential for mass protest will not be dampened by local geography dictating that the main gate to the site is situated some 65 miles of desert away from the repository.

There are perhaps no other projects which can be conceived of which are anywhere near as emotive but, at a lesser level, there is quite a number which will still have the potential to be cause celebres and in relation to which politicians will find themselves subject to sustained campaigns. Unsurprisingly, this is unlikely to be welcomed and, from an individual politician's viewpoint, punting decisions off to some non-political process has many attractions given that involvement with such projects so easily can become something of a poisoned chalice. When viewed in this context, it is very easy to understand the reluctance of MPs to accede to any new parliamentary procedure. For many MIPs, this does not mean, however, that the eventual decision can be divorced from politics.

Conclusion—where to now?

Although I have ranged far and wide, I am conscious that I have not provided any definitive answers to the question which I posed to myself in the title to this paper on MIPs—*Where to Now?* I hope,

⁶⁰ Before winning the Irish election this year, for example, Fianna Fail re-dedicated itself to the closure of Sellafield in its election manifesto.

however, that I have helped demonstrate why, as I see it, the question is worth posing and, in doing so, have also cast some light on the nature of the landscape through which, for individual MIPs, a route must be found.

Overall, it seems to me that we enter, or perhaps I should say continue in, a period of uncertainty and transition.

The abandonment of the proposals for new parliamentary procedures has not really provided any substantial degree of clarity as to the way forward for MIPs but has rather only removed from consideration one particular possibility. It does not even mean that Parliament is going to be kept out of the decision-making process because we may yet find one or two hybrid bills being brought forward, other parliamentary procedures remain extant and the question of possible parliamentary involvement in the scrutiny and settlement of policy statements remains unanswered. Given the political element involved in many MIPs, it is also the case that public disquiet, unexpected developments and the pressure of events may very easily result in Parliament becoming involved, whether or not this has been pre-planned.

In my judgment, the abandonment of the proposed new parliamentary procedure, when taken together with other recent developments, also cannot be viewed as providing a general endorsement of the public local inquiry as a satisfactory forum for the referral and scrutiny of all issues arising on an MIP. Inquiries will still form an important part of the process but if, as now seems intended, the Government is to grasp the nettle and issue meaningful policy statements, this can only be upon the basis that such statements are to be effective in removing issues from the purview of the local inquiry, notwithstanding that the degree of public participation in the prior formulation of those statements may be limited at most to written representations on consultation papers. Ironically, perhaps, the abandonment of the proposed new parliamentary procedure may therefore, at least in some cases, result in less opportunity for interested parties to challenge and engage in scrutiny of relevant policy issues than might otherwise have been the case. Whether or not that proves to be the case, the general increase in requirements for and the modern trend towards greater prior consultation, the advance of environmental impact assessment (which post-dates the establishment of our inquiry system) and the emphasis now being put on constraining the adversarial elements of the inquiry system, all suggest that the inquiry may become less important.

So far as the new procedures for major inquiries are concerned, in my view, it is too early to say whether these will produce any greater efficiencies or result in better decision-making but, as I have sought to show, their practical application may give rise to a number of difficulties.

Overall, if you share the view which I expressed at the beginning of this paper that the design, authorisation and delivery of MIPs is a matter of vital interest, you may agree that it is somewhat disappointing that not more has been achieved to facilitate the processing of MIPs. But the planning and authorisation of MIPs is never going to be an easy thing to achieve and, in our small and crowded island, some at least may feel that this may not therefore be such a bad thing.