Rt Hon Hazel Blears MP
Secretary of State for Communities and Local Government
c/o Department for Communities and Local Government
Eland House
Bressenden Place
LONDON
SW1E 5DU

25 July 2008

Dear Ms Blears

Planning Bill – Infrastructure Planning Commission Proposals

The UK Environmental Law Association (UKELA) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

Planning has a fundamental impact on the environment. UKELA's members include many of the UK's leading practitioners in both planning and environment law who are uniquely well placed to assess the likely impact of the proposed legislation.

UKELA's concerns expressed in this representation are born of a desire to see a streamlined, efficient, effective, fair and lawful planning process. Our members are as likely to act for government, private sector developers, public sector regulators and public sector planning authorities as they are for local community groups or NGOs who will seek to challenge major development proposals.

This representation has been put together and is sent on behalf of its Planning and Sustainable Development Working Party. Our members view the Planning Bill as the golden opportunity for a regime to be put in place for the efficient delivery of much needed Nationally Significant Infrastructure Projects. We therefore hope that you, your colleagues and your Department will take this representation in the constructive spirit in which it is intended.

Principal concerns

The Working Group is concerned that the details for the new procedure for Nationally Significant Infrastructure Procedures (NSIPs) contained in the Planning Bill will not only deliver a regime that is unlawful in terms of compliance with the UK's European and International obligations, but that, contrary to government expectation, it will also not lead to any speeding up of the decision making process or speed up the UK's transition to a low carbon economy. We are concerned that the current proposals will simply put blockages in the system elsewhere along the way.

In summary:

1. The Bill as drafted fails to implement the European Environmental Impact Assessment Directive. The new development consent procedure takes the place of the various regimes and the 1999 Town & Country Planning (Environmental Impact Assessment) Regulations 1999 apply to planning applications and will not therefore apply to procedures under the Bill unless either directly incorporated into the Bill (best option) or an amendment is made to the EIA Regulations (a less satisfactory alternative)

2. There is doubt as to whether the process set out in the Bill will be compliant with the UK's obligations under the Aarhus Convention

3. There is doubt as to whether the process set out in the Bill will be compliant with the European Convention on Human Rights

4. No recognition is given to the fact that the process of producing National Policy Statements (NPSs) must comply with the European Directive on the assessment of the effects of certain plans and programmes on the environment (SEA Directive) and the additional process and delay this may involve

5. No recognition is given to the fact that the processes both of producing National Policy Statements and of determining project applications must comply with the European Habitats Directive and the additional process and delay this may involve

6. The pre-application, application, examination and decision-making processes and procedures set out in the Bill will not lead to a speeding up in the time taken for much needed Nationally Significant Infrastructure Projects to be delivered on the ground, but will instead lead to blockages (ie. legal challenges) in the system in different places than at present

7. The processes and procedures set out in the Bill will not increase fairness in the system but will instead stifle the ability of communities to participate effectively in the system of planning for and delivering NSIPs. (It is difficult to see how a debate and procedure in Parliament, over what may well be detailed and location specific proposals, will seem more in touch with local communities)

8. The procedures before the IPC stipulated in the Bill do not allow for the calling of evidence or even a basic right to ask questions by those most affected by the process, but merely the making of representations. If the answer to this is to leave it to the discretion of the Commission, then it should be noted that the presumption in the statute is against a favourable exercise of such a discretion. Secondly, if it is to be left to the Commission's discretion then why rule those matters out in the first place as opposed to giving clear guidance to the Commission as to confining evidence and questioning to key issues and within reasonable time limits

9. Creating a situation where there is a presumption against cross-examination, is likely to lead to lower standards in application documentation and less rigorous environmental assessment by the applicant (if any are required by the process) than would be the case where the applicant anticipates cross examination on the material submitted

10. While mundane and sometimes unnecessary detail is gone into in respect of a range of matters in this piece of primary legislation (rather than leaving procedure to secondary legislation), many of the most important elements, such as details of consultations, what makes a valid application, the extent of community involvement are variously left to be prescribed at a later date, left for the Infrastructure Planning Commission (IPC) to decide or even for the applicant to decide[1]

11. The speeding up of the procedure could be achieved without creating a wholly new and untested development consent procedure. Far too much reliance has been placed on the atypical example of Heathrow Terminal 5 rather than on the effective use of procedural controls e.g. at the Hinkley Point C inquiry, which could achieve the same reduction in delays but without the added costs, complexity and confusion which creating a wholly new system is bound to create. The example of the recent reforms to the development plan system show the problems of delay and added cost and complexity where significant changes are made to the system rather than seeking to streamline and build on the existing system

12. The concept of creating yet another consent process runs completely contrary to the themes of simplification of procedure in the environmental regulation field (see the Environmental Permitting Regulations 2007) and the similar theme in the White Paper. Local communities and authorities, already burdened with vastly more and complex planning policy than existed even 20 years ago, will find the creation of a new system, new procedure and new forms of policy more confusing

We support the principle of creating a single streamlined system of obtaining development consent for projects which currently require a variety of permissions and consents under various regimes. We do not, at the end of the day, have an opinion on who the final decision maker should be – as long the decision is based on well formulated SEA/EIA/Habitats Directive and Aarhus and Human Rights Convention-compliant policies, plans and programmes. Direct and express integration of these into the development consent procedures would create the more streamlined system sought by government; and adherence to these international obligations would in itself lead to a fairer system which will have engaged public consultation at the appropriate level and should be better resistant to challenge.

UKELA also supports any reforms to make the system more streamlined and efficient providing that this is not at the cost (as will be the case under the Bill) of inferior decision-making on what are by definition going to be the most significant development projects nationally. It seems perverse to have the normal planning procedures available, with the ability to call evidence and question others, for a housing or industrial estate, superstore or motorway service station application but to curtail those procedures as a matter of general principle for development which is much more important and potentially far more significant in its impacts on local communities and the environment.

The details of the Working Party's concerns in all of the above respects are set out in the attached Schedule.

[1] cl.46

We would be more than happy to meet with you or your officials to discuss our concerns and potential solutions to the matters raised in this letter and the Schedule below.

To arrange a meeting or for clarification on any of the points contained in this letter and the Schedule, please contact the Chair of the Working Party at the contact details below.

Yours faithfully

UK Environmental Law Association
Planning & Sustainable Development Working Group

Working Party Chair:
Anne Harrison
Associate (Barrister)
Beachcroft LLP
Portwall Place
Portwall Lane
Bristol BS99 7UD
email: aharrison@beachcroft.co.uk

cc: Caroline Flint MP
Baroness Kay Andrews OBE
Bernadette Kelly, Planning Executive Director, CLG
Neil McDonald, Planning for Major Infrastructure, CLG

UKELA
UK ENVIRONMENTAL LAW ASSOCIATION

Schedule

The Bill's objectives

1. During the Bill's Second Reading on 10 December 2007 the Minister set out the Government's intentions that :

   "The Bill will reform the planning system to make it fairer, more efficient and ready to equip Britain for the challenges of the 21st century. It will speed up decisions on major projects that are vital to our economic future. Together with the Climate Change Bill and energy Bill, it will accelerate our transition to a low-carbon economy. At every stage it will reinforce the democratic principle that everyone should have a fair say on the future of their neighbourhood."[2]

2. We are deeply concerned not only that the proposals as currently drafted are unlawful for failing to meet the requirements of the EIA Directive and the Aarhus Convention, but that they are also unlikely to meet these objectives. Furthermore, the process as set out in the Bill provides insufficient detail in important areas, such that there is uncertainty as to whether the requirements of the SEA Directive, Habitats Directive or European Convention on Human Rights will be met.

3. We are of the view that the proposals set out in the Bill are not streamlined, are at best unworkable and at times unlawful, in the following respects:

Unlawful

Environmental Impact Assessment (EIA) Directive

4. By their nature the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 will not apply to applications for development consent under the Planning Bill. Direct and express implementation of the EIA Directive requirements into the NSIP development consent procedure is therefore required. The EIA Directive leaves no room for argument and is required to be applied to projects covered by the Bill, as is shown in practice at present when such matters come forward either for planning permission or for Parliamentary approval. The Crossrail Act during its passage as a Bill was subject, for example, to extensive environmental assessment which was frequently updated as the Bill progressed and amendments to the project were introduced.

5. Clause 36 of the Planning Bill leaves the requirements and standards for application documentation up to the Commission, when as a minimum it should require the submission of an Environmental Statement in compliance with the EIA Directive. In terms of pre-application consultation, clause 41 simply requires the applicant to consult with such persons as may be prescribed, beyond those set out in clause 43 and local authorities, and it is for the Commission to issue guidance about how to comply with the duty to consult. There is no screening process (which would be useful for applications relating to smaller extensions or works relating to an existing NSIP), no scoping process (which is a requirement of the EIA Directive), and the statutory consultees of the EIA process (also a requirement of the EIA Directive) are not mentioned in the consultation arrangements at all.

[2] HC Deb 10 December 2007 c.25

6. This development consent process must, as a minimum, comply with the requirements of the EIA Directive. Failure to prescribe this in the relevant legislation is a failure properly to implement the Directive and is likely to lead to legal challenges and infraction proceedings.

Unstreamlined

SEA Directive

7. Unlike the EIA Regulations, the Environmental Assessment of Plans and Programmes Regulations 2004 will apply to the NPS process notwithstanding the Bill's failure expressly to acknowledge the requirement for "strategic environmental assessment" ("SEA"). For a streamlined system however, the Bill should deal with the fact that NPSs require SEA and incorporate it in its provisions.

8. The SEA Directive requires the formal environmental assessment of, amongst other things, town and country planning and land use plans and programmes which set the framework for future development consent of the projects listed in the EIA Directive. In other words, it provides a high level environmental assessment, before individual proposals get to detailed application stage and requires an assessment of alternatives to the proposals which are preferred.

9. In particular for those NPSs that it is proposed should be location specific, what the NPS is effectively producing is a national spatial strategy for that type of development, even though badged as a policy statement. We would support the creation of national plans or national spatial strategies for the development of NSIPs, but they should be recognised as such and promoted as such, not dressed up as a statement of policy.

10. Article 6 of the SEA Directive requires that the authorities and the public are given *"an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme…"*. Article 5(1) of the SEA Directive also provides that the environmental report must identify, describe and evaluate *"the likely significant effects on the environment of implementing the plan or programme **and reasonable alternatives**…"*.

11. It should be recognised that the formulation of NPSs will require SEA under the Environmental Assessment of Plans and Programmes Regulations 2004. **A more streamlined system would expressly integrate the consultation requirements of the SEA Directive and Regulations** with the consultation process under the Bill. As it is, the Bill fails even to acknowledge that SEA is relevant to the process of adopting NPSs.

National Policy Statements

12. The use of NPSs is the source of much concern with regard to the extent to which it curtails the ability to question the merits of decisions taken at the NPS stage, which may be quite specific in terms of the nature, quantum and location of the project considered to be nationally significant; and the ability of the IPC to reject applications in accordance with the relevant NPS. This is circumscribed since clause 101 requires the IPC to have regard to a relevant NPS, any matters prescribed in relation to it and any other matters thought to be "both important and relevant" to its decision. The more specific the NPS, the more difficult it will be for development consent to be refused if it accords with the NPS, notwithstanding such environmental or human impacts as may be likely to arise.

13. There is a "catch 22" position where a corresponding power on the decision maker in clauses 92(8) and 103 of the Bill may prevent parties raising issues going to the merits of a NPS. This could include preventing issues being raised such as the environmental impacts – even though clause 101 allows for decisions at the end of the process to be taken which do not accord with the NPS where adverse impacts outweigh the benefits.

14. Although at inquiries currently, it is not the role of the inquiry to question current national policy[3], current planning policy rarely descends to the detail or prescription possible in NPSs and there is generally scope in major projects (e.g. the Dibden Bay inquiry) to test issues of need and alternatives.

15. Community participation at the NPS stage, even where the NPS specifically designates potential sites, or areas, for major infrastructure, may be of limited effect given that the publicity requirements lead to a Parliamentary process and not to the debate of e.g. appropriateness of locations and alternatives within a planning inquiry framework. This goes to the **fairness** of the process. If the NPS establishes need for a specific type of project in a specific location or range of locations, the extent to which the balancing exercise of harm against need can be debated is likely to be much reduced if not eliminated, given the power of the IPC to exclude consideration of any representations challenging the merits of the NPS.

16. In particular the details of consultation are not determined by the legislation which only provides that consultation and publicity should be:

    (i) As may be decided by the Secretary of State as "*appropriate in relation to the proposal*"[4];

    (ii) "Appropriate steps" must be taken to publicise the proposal, if the proposed policy identifies one or more locations as suitable/potentially suitable for a specified description of development (presumably steps which are effective to publicise within the areas concerned)[5];

    (iii) Following consultation with the local authorities for the areas of any of the locations concerned[6];

    (iv) As may be prescribed[7].

17. Article 7 of the Aarhus Convention provides: *"To the extent appropriate, each party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment".* To the extent that NPSs are statements of policy rather than being plans or programmes, this requirement must be incorporated into the development of NPSs.

18. As has been referred to above the Bill should as a minimum recognize that compliance with the SEA Directive is required. **Fairness** also dictates that where a NPS may be location specific, local communities should be included in the consultation and the publicity to ensure that those local communities are aware of the proposal should be as extensive as those of an actual application for planning permission or development consent.

[3] *Bushell v. Secretary of State* [1981] AC 75
[4] Clause 7(2).
[5] Clause 7(5).
[6] Clause 8.
[7] Clause 7(4).

19. In addition, it is possible that in the case of very specific NPSs, the requirements of SEA and EIA will overlap considerably, as they also will with appropriate assessment under the Habitats Directive. **A streamlined process would recognize this and provide for it**. As it is, the Bill is silent on this and an opportunity to create a streamlined system has been missed.

Habitats Directive

20. Where a European site has the potential to be impacted by a NSIP, appropriate assessment must be carried out under the Habitats Directive requirements. As with SEA, the Conservation (Natural Habitats, &c.) Regulations 1994 will apply to the processes under the Bill without direct incorporation, at both NPS and project application stage. However, it is desirable that this is expressly recognized in the Bill and **a streamlined system would integrate the carrying out of any necessary appropriate assessment with the SEA and/or EIA**. As it is, the Bill is silent even as to the need for the process to be compliant with the Habitats Directive, and an opportunity to create a streamlined system has been missed.

Unworkable and Unfair

European Convention on Human Rights

21. It is important to be aware that the discretion given to the IPC in relation to matters of procedure must be exercised in individual cases in a manner that is ECHR compliant. The wide discretion that the IPC will enjoy regarding the procedure preliminary to and at hearings will mean that consideration of the procedural guarantees in Art 6[8] of the Convention will be relevant in most applications it hears.

22. We consider that the key question raised by the Bill is when the IPC must allow oral submissions and cross-examination in order for its procedures to be fair (a stated main objective of the Bill)[9]. As drafted, the Bill only gives defined "interested parties" a right to a hearing or to make oral representations[10]. Otherwise it lies wholly within the discretion of the IPC to decide whether a hearing about any particular issue is necessary[11]. Where an application is examined therefore on written representations only, the first point in time when a third party has an opportunity to insist on being heard is by issuing a legal challenge to the decision. Although this may not affect a target set against time taken between application and decision, it will not speed up the process of delivering NSIPs on the ground.

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[8] *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security…"*

[9] *Sengupta v Holmes* [2002] EWCA Civ 1104 [38], per Laws L.J: "…oral argument is perhaps the most powerful force there is, in our legal process to promote a change of mind by the judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it."

[10] cl.91

[11] cl.89

Legal Challenge

23. Clause 13 of the Bill provides that challenges to any decisions of the Secretary of State in relation to National Policy Statements must be brought by way of judicial review and must be brought within 6 weeks of the date of the decision or publication of the NPS. The same 6 week time limit and requirement that proceedings be brought by a claim for judicial review is applied to challenges to decisions made by the IPC. These provisions appear to seek to override the discretion of the Court to allow applications which would otherwise be disallowed due to delay, and cannot lead to increased "fairness".

24. "**Fairness**" within the system will not be increased by making it more difficult for individuals and organisations to challenge decisions.

25. The precedent for the 6 week challenge period comes from High Court challenges to planning decisions under sections 287 and 288 of the Town & Country Planning Act 1990. The Judicial Review pre-action protocol requiring exchange of correspondence prior to the issue of proceedings will apply to judicial review challenges as set out in the Bill as they apply to challenges to planning decisions under sections 287 and 288 of the Town & Country Planning Act 1990.

26. If potential Claimants are expected to comply with the Judicial Review pre-action protocol and have a longstop of having to issue proceedings within 6 weeks then this will lead to unfairness and potentially meritorious challenges not be allowed to be issued. Alternatively, as was the case when the time limit for appealing against planning decisions was reduced from 6 months to 3 months, it will see unmeritorious proceedings being issued in order to meet the time limitation, when a more considered exchange of pre-action protocol correspondence may have persuaded a potential Claimant not to pursue the challenge.

Community consultation and involvement – pre-application

27. Clause 46 requires the NSIP developer applicant to prepare and consult on what is effectively a Statement of Community Involvement. There is no "sign off" or approval process for that consultation statement. All the applicant has to do is publish it, and then carry out consultation in accordance with it.

28. Our first comment is that this is a needless extra step in the process. There is no reason why a template Statement of Community (including public authority) Involvement cannot be produced, which the applicant must then follow. This would save each applicant from having to reinvent the wheel for every NSIP proposal.

29. The process as currently proposed will do nothing to speed up the time that it takes for a NSIP to gain approval. As this is a pre-application process it may speed up the time taken between application and decision, but it is disingenuous to suggest that requiring the applicant to produce its own Consultation Statement each time will actually speed up the process as a whole.

30. Secondly, if the applicant is to prepare its own Statement, then there should be some form of quality check and approval of it, by either the IPC or joint local authorities, before they proceed to consult in accordance with it. Otherwise there are likely to be legal challenges further down the line that the consultation process was inadequate and the IPC should not have accepted the application.

31. Clause 49 ensures that the one body that the applicant cannot consult with on the merits, pre-application is the IPC/decision maker itself. This is contrary to the current ability for developers to consult with planning authorities pre-application for a view on the merits of a proposed development, and the pre-application discussions that currently take place with relevant Government departments on proposed energy and other projects.

32. Furthermore, clause 49(4) suggests that the Secretary of State has not yet decided whether it is a good thing that requests for advice and the IPC's responses should be made public. Since the IPC will be covered by the Freedom of Information Act and Environmental Information Regulations requirements in any event, it is presumed that this means proactive disclosure, rather than simply waiting for a request. In what is meant to be an open and transparent process, it is our view that this should be clarified now, in favour of complete transparency in process, save where the need for commercial confidentiality outweighs the public benefit in disclosure.

33. The point is one of community participation. We concur with what the RTPI has said in its Briefing Paper 3 on the Bill that, *"As long as communities are strongly engaged in making national policy statements and Parliament then has a role in the approval of these, it will not be necessary for decision-making on individual projects by the proposed infrastructure planning commission to be accountable to Ministers or to Parliament."* The process as currently set out in the Planning Bill will not achieve this.

CPO related powers

34. Clause 50 provides for the IPC to authorise a prospective applicant to serve notices on third parties requesting information relating to land interests. It will be a criminal offence for the recipient of such a notice to fail to provide the information requested. Similarly, clause 51 provides for the IPC to authorise any person to enter land for the purpose of surveying and taking levels. It also allows for that person to investigate the nature of the subsoil or the presence of minerals, including by boring on that third party's land. There are only limited safeguards in clause 51(2). Particularly since, by clause 49, the IPC is not allowed to give any advice on the merits of an application.

35. The situation could arise therefore where a private operator with a completely unmeritorious application is given the power not only to demand information on land ownership and tenure from third parties, but also to enter their land and carry out surveys and create boreholes. There are criminal offences for the third parties who fail to comply but no sanction against the operator who misapplies the authority granted.

36. Protection is given to statutory undertakers where they object on the ground that execution of the works would be seriously detrimental to the carrying on of their undertaking. Where this is the case, the Minister must give authority for the works. However there is no appeal or right for non statutory undertaker third parties to object where the execution of similar works would be seriously detrimental to the carrying on of their lives or business. The only way in which individuals could challenge this procedure would be by judicially reviewing the decision of the IPC to grant authority to the private operator.

37. There are considerable human rights concerns at the ability for the IPC to grant such authority to private sector operators, and particularly so where there is no indication yet of who or what type

of individual will make up the Commissioners of the IPC. Land assembly is something that many private operators have to do in order to deliver a project that may be much needed in planning terms. Unless and until a proposed NSIP has been determined to have merit, there should be no power to interfere with third parties and their land.

IPC – terms of reference

38. The terms of reference of the IPC are vague and ill defined. The Bill refers to the exercise of the IPC's "functions" in a number of places and yet nowhere are those functions set out or defined.

39. Nor are any objectives or considerations to which the IPC must have regard set out anywhere in the Bill. Furthermore, no duty is placed on the IPC in exercising its functions (whatever they may be) to further or contribute to the achievement of sustainable development, or contribute to the mitigation or avoidance of climate change. A duty to ensure that development plan documents contribute to the mitigation of and adaptation to climate change is placed on all planning authorities under clause 173 of the Bill. A duty to contribute to the achievement of sustainable development (which will include climate change factors) is placed on all other parties concerned with decision making in the town and country planning field. For example, clause 10 of the Bill places a duty on the SoS herself in exercising her functions under clauses 5 and 6 *"to do so with the objective of contributing to the achievement of sustainable development"*. A similar duty should be placed on the IPC.

Lack of detail

40. While the Bill goes to the Nth degree in detailing certain aspects, such as how the Commissioners must constitute and organise themselves as a panel and transfer of process from a single Commissioner to a panel, appointment and resignation of members of a panel and chair (clauses 59 to 80), the powers of Commissioners to conduct the hearing process[12], the important detail, such as the form and content of a valid application[13], who is to be consulted on an application[14], and how the Commission is to conduct the examination of a proposed project[15], including any hearings[16] are left to be prescribed at a later date or the standards to be set by the IPC itself.

41. Clause 53(3) sets out the criteria for the IPC's acceptance of an application. Clause 53(4) requires the IPC to have regard to *"any adequacy-of-consultation representation received by it from a local-authority consultee"*. Although the term *adequacy-of-consultation representation* is defined in clause 53(5) it is not clear when the opportunity for local authorities to make such a representation arises. The only requirements on the would-be applicant to consult local authorities up to that point in the process is under clauses 41(1)(b) and 46(2) (on what is to be in the consultation statement). Neither of these is a consultation on the adequacy of the applicant's consultation process and there would appear to be no opportunity either for local authorities to comment on the adequacy of the consultation statement once it has been drafted (the only requirement is on the applicant to publicise it), or to comment on the extent to which

[12] For example, clause 89 – no similar powers for Planning Inspectors conducting hearing or inquiries are contained in primary legislation
[13] cl.36
[14] cl.54
[15] *"It is for the Examining authority to decide how to examine the application."* (cl. 85(1))
[16] Subject to any procedure rules that the Lord Chancellor may make under clause 95, *"[i]t is for the Examining authority to decide how the hearing is to be conducted."* (cl. 92(3))

they believe the applicant has then followed what was set out in the consultation statement (since it is assumed consultation with the local authority will be in parallel with the local community consultation, not subsequent to it).

Community consultation and involvement – post-application

Examination process

42. We are concerned that representations from interested parties are only to be accepted as "relevant" if they contain "material of a prescribed description"[17]. It is unclear what happens if an interested party wishes to make representations about a matter which is not of a prescribed description.

43. When it comes to the examination process, even at open-floor hearings there is no right to cross-examine, or even to call witnesses, merely to make oral representations. Clauses 89-92 (and especially the detailed prescribing of procedure in clause 92) makes it clear that "oral questioning" of any person other than by the Examining authority should only be undertaken "exceptionally" where it is "necessary". There is no good reason for this fettering of the ability of parties to question others in order to test what is being purported by another party. Questioning of witnesses can be properly controlled by the examining tribunal. Wider rights of representation and presentation of evidence can be allowed without it adding to the length of time taken by the process, it simply needs good management of proceedings by the Examining authority.

44. Creating a situation where there is a presumption against cross-examination, is likely to lead to lower standards in application documentation and lower standards in site investigations and environmental information provided by the applicant in its Environmental Statement (if any are required by the process) than would be the case where the applicant anticipates cross examination on the material submitted.

45. There is undoubtedly a sense of grievance felt by parties who are restrained from presenting their case in the manner which they consider will best assist their case, even if it is appropriately controlled in a proportionate manner. This is particularly likely to be the case where CPOs are proposed or projects are likely to have a serious impact on individuals' interests. The Bill proceeds on the basis that the IPC will control the evidence (and is able to do so). It is difficult to understand why it is regarded as undesirable *in principle* at least to recognise rights in connection with the presentation of evidence and questioning of others. Depending on the experience and expertise of the IPC members, the combination of circumstances of curtailment of rights to debate merits issues and rights to present and question evidence could be unfortunate and is likely to lead to legal challenge by aggrieved parties further along in the process. This is likely to lead to a lengthening in time taken to reach a decision rather than help to speed up the process.

46. Moreover, it seems to us that the strict prescribing of hearings and participation by even the terms of clauses 89-92 as amended at Third Reading taken with the heavily inquisitorial nature of the procedure will be far more off-putting and intimidating to members of local communities who wish to participate than the current system. Given the powers to exclude issues under clause 103 relating to NPSs (though see below and the apparent tension between this and

[17] cl.99

clause 101(7)), local people are bound to feel disenfranchised and unable to express their views.

47. Communities will see inquiries and full participation continuing for appeals or call-ins relating, for example, to new housing and industrial estates, urban regeneration projects, superstores and the like and will be bound to notice that their ability to participate is actually reduced and constrained when it comes to the most important projects to be dealt with under the new procedure. We cannot understand how Government can rationally or fairly claim that the new proposals will engage with local communities and enable full participation. It would be interesting to know what those advising Government (who understand the system better than those in high office currently pronouncing on it) consider to be the likelihood of Government actually having any reasonable prospect of achieving its professed objectives in this Bill.

Decision making

48. The Bill creates a timetable for the IPC to follow when determining applications. It will have six months in which to carry out the examination procedure and a further three months in which to take a decision (or make recommendations, as the case may be). Where a recommendation is made to the Secretary of State, the Secretary of State must then make a decision within a further three months. It is not clear though why it is believed that putting a time limit in legislation is required and will in practice have the effect of ensuring a speedy decision – unless speed is to be given priority above quality of decision making. For example, with those decisions that will be taken by the Secretary of State on a report from the IPC, there is nothing in the proposed legislation to give confidence that the systems within the Secretary of State's department will ensure a decision within three months. The delay between the close of the T5 inquiry and the Secretary of State's decision was not the fault of the current planning system. There is nothing in the Planning Bill other than the imposition of a time limit which will ensure a more efficient and quicker decision making process. There is nothing in the current planning system to prevent the Secretary of State from making a decision within three months of a report and recommendation from a Planning Inspector, yet witness currently the delay within the Secretary of State's own department to a decision on the passenger numbers at Stansted Airport. Simply putting a time limit in legislation is not sufficient to make things happen. The reason for the delay in this particular decision is due to a request for further representations on night noise. This type of request for further information is only likely to occur more frequently in a system which stymies the ability for parties to put full information, including the ability to challenge the information put forward by others, before the IPC in the course of the application proceedings.

49. We are concerned that the speed of decision making should not be given priority above quality of decision. If the proposal is that the larger the project and the more detailed the application then the more Commissioners that should be appointed to the Panel to assist with the process and consider different elements, including hearings taking place in parallel, then that can happen now under current Inquiry Rules, but it must be understood that there is a certain amount of core information which everyone involved in a project needs to understand and hear representations on in order for everything else to make sense. Major project decision making is not akin to manufacturing, say, a car where each individual component can be manufactured separately and in isolation simultaneously with each of its other components and then they can all be assembled together at the end.

50. The ability of the IPC to reject applications which are in accordance with the relevant NPS is circumscribed since clause 101 requires it to have regard to a relevant NPS, any matters prescribed, and any other matters thought to be "both important and relevant" to its decision. The more specific the NPS, the more difficult it will be for development consent to be refused if it accords with the NPS, notwithstanding such environmental or human impacts as may be likely to arise.

51. Sub-clauses (4) to (8) prescribe the circumstances in which the requirement to decide the application in accordance with the NPS does not apply. Despite the emphasis placed on the NPS, clause 101(7) allows arguments to be run that the adverse effects of the project outweigh its benefits. If this means what it says, then it does allow in considerations which the use of the NPS might have been thought to preclude and does not sit at all easily with the power of the Commissioners to rule out representations relating to the merits of the NPS under clause 103(1)(b). The clause 101 factors which specifically allow departure from the NPS include cases where deciding the application in accordance with the NPS would put the UK in breach of its international obligations, where it would be unlawful by virtue of any enactment, and where the adverse impact of the proposed development would outweigh its benefits. The question arises though as to who advises the IPC on whether any of these exclusions apply. In particular, due to the constraints on the hearing procedure set out in the Bill, the situation may well arise where interested parties would wish to make the case that the adverse impacts would outweigh the benefits by challenging and questioning the applicant's experts but where they have not been allowed the opportunity to do so. Again, this is only likely to give rise to legal challenge by way of judicial review which will cause the process to be time consuming and protracted, simply at a different point in the process than at present.

52. We agree with the words of Robert Upton, Secretary General of the RTPI that, "*The Government must not make the mistake of thinking strength of purpose means riding roughshod over communities. Public debate is both necessary and right: you cannot avoid it, and you shouldn't try to*."

Offences and Enforcement

53. Unusually in the planning system, the Bill will make carrying out development that requires development consent without an Order an immediate offence (clause 153). It does the same for carrying out such development in breach of the terms of an Order (clause 154). It is not clear what these "terms" are likely to relate to. Clause 116 provides for "requirements" to be imposed on Orders, in the same way as conditions are attached to planning permission. If clause 154 is meant to refer to these "requirements" then it should use the same terminology.

54. It is not clear who the prosecuting authority is, although from the subsequent clauses it is assumed to be the local planning authority. What is clear though is that there is no system allowing for service of an enforcement notice or breach of condition notice (or equivalent) to give the operator an opportunity to take remedial action before a criminal process is started. Instead, notices requiring remedial steps to be taken can only be served once a criminal prosecution has succeeded (clause 162). This seems particularly harsh, and does nothing to increase **fairness** in the system, in respect of a clause 154 breach, which may have been unintentional and which could be rectified through the equivalent of a breach of condition notice.

55. Also unusual, and we can find no published justification as to why this is the case, by clause 155, both operational development in breach of clause 153 and a breach of condition/

requirement/term under clause 154 are immune from prosecution after a period of four years. Under the rest of the planning system, a breach of condition is immune from enforcement action after ten years. There appears to be no rationale for complicating the system through this anomaly in time limits.

56. In the same way as it is not clear who the prosecuting authority is, the Bill is equally unclear as to who will be responsible for monitoring compliance with "requirements" or "terms" of the Order and agreeing that the requirements/terms of the Order have been complied with.

The Need for Change

57. **Holding up T5 again and again as the example of what "must not be allowed to happen again"** does the current planning system no justice. T5 was exceptional and there were a number of reasons for its length, including the fact that there was a void in relevant government policy (which took nearly a year of inquiry time to debate); there were lengthy adjournments during the inquiry when, for example, the Highways Agency withdrew the proposed Highways Orders and started the process of promoting new ones, just as the Surface Access topic was about to commence; and that the principal application for the new terminal was for an outline permission and was one of the first major projects to be required to conduct an environmental impact assessment. The decision was also delayed because the promoters changed their design for the diversion of what had come to be known as the "Twin Rivers" after the inquiry had closed, added to which 9/11 occurred while the matter was awaiting the Secretary of State's decision.

58. The pre-application consultations on T5 commenced in 1989, when the Environmental Impact Assessment Regulations had only just been implemented and the art of EIA was in its infancy. Many were of the opinion that the Environmental Statement submitted with the T5 application was inadequate. This therefore took up months of cross examination – but with the result that the promoters amended their design to take account of the environmental impact then demonstrated. In that respect T5 should be seen as a success, rather than a failure. EIA is a much better understood process now and the inadequacies of the T5 ES should not be repeated. The fact that the ES was able to be challenged in open inquiry however, led to a raising of the environmental standards of T5 and its sustainability as a project. Amongst other things, BAA's initial ES denied that it was technically feasible to divert the Twin Rivers in open channel around the terminal. It was not until the final year of the inquiry that BAA not only conceded that it was technically feasible but submitted a planning application to do so.

59. Although the total inquiry lasted 525 sitting days, by being divided into subject topics, this enabled individuals and individual organisations to participate in those subject areas that they wished to and in which they had an interest and they did not have to attend the entire inquiry. Simply because it is difficult for individuals to attend a lengthy inquiry though, does not mean that that opportunity should be completely withdrawn from them.

60. The T5 Inspector made it clear that he thought the case was not typical:

> *"1.2.15 I have already referred to the length and complexity of the inquiry for which I make no apology. It involved issues of national importance, which touch upon the lives of many thousands of people particularly those living under the flight paths. I welcome the Government's intention to take steps to streamline the arrangements for and conduct of inquiries into major projects. Much can be done. Inquiries such as this, however, will always*

be exceptional and must inevitably take time if all those concerned are to be given a fair hearing. Certainly my visits to other European airports did not suggest that the procedures elsewhere had led to quicker decisions on airport development."

61. This can be contrasted with the inquiry held by Michael Barnes QC who was the inspector at the Hinkley C nuclear plant inquiry in the late 1980s managed to complete his inquiry on time by firmly controlling the evidence and questioning of witnesses. The inquiry was conducted efficiently and in good time, without depriving interested parties of the right to call evidence and ask questions. Why this experience has not been built upon and used by government is difficult to understand.

62. Similar constraints in the length of cross-examination and oral evidence were recently applied to the Select Committee hearings in both Houses into the Crossrail Bill which, although a much bigger project than T5, resulted in less than a fifth of the hearing days of T5 (many of which were not full hearing days).

63. It therefore seems clear that the time savings could be achieved without a wholly new system, if the Government gave serious thought to a set of inquiry procedure rules within the existing system for major infrastructure which gave Inspectors much greater control over the process, and trained and appointed senior, experienced inspectors to those cases, who would be expected to take firm control over questioning and oral evidence to keep the issues focussed and the inquiry on time. Since the Commissioners are plainly expected to exert control over public hearings under the Bill proposals, it seems self-evident that experienced inspectors under the current system could do the same but within the existing system, which still preserves the ability to call evidence and to question and which is far fairer and more likely to involve the public than the inquisitorial procedure planned in the Bill.