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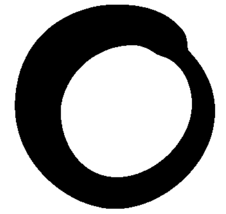

MP Briefing
Planning Bill

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Headline issues

The UK has to take long-term infrastructure decisions which secure sustainable development and in particular support the transition to a progressive low carbon economy.

The decision-making around major infrastructure such as roads, rail, waste and energy should be made more efficient but not at the expense of proper scrutiny, accountability and public engagement. The current proposals risk breaking public legitimacy and therefore causing greater delay and uncertainty. While the Planning Bill may be radical it is neither effective nor fair. It proposes a Commission with unprecedented and unaccountable powers over vital legislation and over people's opportunities to have a meaningful voice.

The Planning Bill must deliver improvements to the system by ensuring democratic accountability, a duty to reduce carbon emissions, and the retention of people's rights to be heard.

Friends of the Earth has a positive vision of development and has closely engaged in the planning reform process. However, the needs of communities and the opportunities for simpler and more cost effective means of securing development have been ignored.

Key messages

- Planning is vital to achieving sustainable development, which delivers integrated environmental, social and economic benefits.
- Planning is essential to the UK meeting the challenge of climate change. National Policy Statements (NPS) and major infrastructure developments must be tested against the UK's climate change policies and international commitments. The Planning Bill does not require policy and decisions to deliver on these commitments.
- The Government's stated intention to speed up the process of approving major infrastructure projects by introducing a single consent regime will deliver significant time savings. The rest of the reform package is deeply flawed. The draconian powers of the Commission whose decisions will not be accountable to the Secretary of State or to Parliament are simply unfair and unconstitutional.
- People must have effective rights to be heard in relation to major infrastructure projects which affect them and their communities. Those rights must be at least as strong as currently exist in relation to major infrastructure project inquiries[1]. Without such rights the legitimacy of the process will be fatally undermined.
- Public inquiries for major infrastructure projects provide an effective system of testing evidence and are trusted by the public. Delays in those public inquiries are not caused by community participation or the right to be heard but by badly planned applications and by Ministerial delay.

[1] Note. Under the 2005 Major Inquiry Rules, which apply to a range of infrastructure projects, anyone who registers as a Rule 6 party has a right to appear and cross-examine through the inquiry.

- Serious flaws are apparent in these reforms as they have been based on a very narrow economic analysis which failed to examine the needs of public participation and democratic accountability.

Long term challenges ahead

Moving to a low carbon Britain means that we need to address:

- Climate change: by ensuring that National Policy Statements are required to be drafted to achieve climate change mitigation and so that major infrastructure which minimises carbon emissions is properly planned

- Energy: by setting out a vision for a low carbon energy production by strong encouragement for renewable technology

- Environment: by ensuring that our infrastructure does not rely on the destruction or use of natural resources from overseas, and that the environment and biodiversity in the UK are protected and enhanced.

Public attitudes

Consultation to the Planning White Paper consisted of over 30,000 responses, with the majority from individual people concerned about:

- Their right to be heard in major infrastructure decisions
- Sustainable development and national policy
- The need to reduce carbon emissions
- Democratic accountability on decision makers

What is the Government doing?

The Planning Bill contains a series of detailed reforms but Friends of the Earth has three overriding concerns:

1. Public participation

The Government claims that the new Bill provides people with proper rights to be heard in the process. In fact, taken together, the proposals represent a significant reduction in public participation. From the public's perspective the process would work like this:

The Secretary of State would draw up National Policy Statements (NPS) which are the key documents in determining applications. Decision must be made in 'accordance' (Clause 94 (3)) with NPS unless there are exceptional circumstances. These documents can be site specific (Clause 7 (5)) and despite their power and influence over people's lives there is no right to be heard in the preparation process. This right does exist for local planning documents in the 2004 Planning and Compulsory Purchase Act (Clause 20 (6)).

Once an application is made there is presumption that the Commission will operate through written representations (Clause 82). This inevitably favours those with access to written professional expertise and against those less familiar with formal proofs of evidence. The Commission has discretion as to whether to hold an oral hearing. No one has a right to be heard since rights can never be discretionary. Clause 84 does allow for an 'open floor' session to be held and people do a have

right to be heard at this stage. However this is essentially an opportunity to 'say one's piece'. There are no rights to cross-examine or ask questions and no obligation for other parties to even be in attendance. It does not provide the opportunities available now to really test the evidence.

There is nothing positive in the Bill to help the public deal with the complexity of the process despite experts recommending the limited funding of third parties to help create a level playing field.

In summary:

- Under the current proposals the default position would be that applications are to be decided on the basis of written representations and no oral hearing.

- The only guaranteed oral hearing stage would be an open-mic session at the end which would allow people to 'say their bit' but would provide no opportunity to challenge evidence and ask questions.

- Even when the Commission decides to hold a hearing into a particular issue (entirely at its discretion) there is no right for people to test the evidence by asking questions of the promoter as there is currently, and the hearing is limited to the particular issue which the Commission has designated for oral consideration and not to the wider application.

- The preparation of National Policy Statements includes no right to be heard and no opportunity for proper Parliamentary scrutiny or debate in relation to NPS. There is not even a requirement to lay National Policy Statements before Parliament.

- The proposals give the Secretary of State the power to designate existing policies as National Policy Statements without any of the consultation and publicity safeguards (such as they are) that exist for new National Policy Statements. Retrospective designation of current policies would give those policies huge weight in the new planning structure without them having been properly considered either by Parliament or the public.

- The National Policy Statement consultation processes are vague and inadequate. NPS's will carry enormous weight in those decision-making contexts. In that situation it is essential that the Statements are subject to robust and guaranteed public consultation. The consultation provisions are vague and subject to a very broad discretion of the Secretary of State.

Most major infrastructure inquiries[2] allow people to take part in an oral inquiry and, importantly, to question those promoting the project. This allows the Inspector hearing the inquiry to reach a view as to the strength or weakness of the promoter's evidence. Removing those rights not only strips the process of its legitimacy but also means that the people deciding on the major applications will be deprived of a hugely significant opportunity to test the evidence. That loss will be felt particularly strongly where the Commission is required to make decisions or recommendations in such a short timescale. Other measures proposed by the Bill do not compensate for the removal of this essential right. Experience also shows that detailed public scrutiny

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[2] Infrastructure applications are dealt with under a number of consent regimes. It is important to acknowledge that the process for determining major road schemes does not contain statutory rights for the public to appear.

leads to both the avoidance of projects that are unsound and the improvement of those that go ahead. The Nirex Inquiry which refused an application for deep level nuclear waste disposal partly on the grounds of safety is an example of how public scrutiny can be vital.

2. Climate Change

The Bill creates no new obligations on the Secretary of State or Commission to consider climate change in decision making. The draft Bill requires Local Authorities to ensure that their local planning policies are designed to secure that the Authority contributes to mitigation of and adaptation to climate change. That is a very welcome development. However, there is no equivalent in the Bill requiring National Policy Statements to contribute to the mitigation of or adaptation to climate change.

This is both illogical and wrong, particularly as the National Policy Statements are likely to have a major impact on developments that are of greatest concern in climate change terms. If the Government is serious about the challenge of climate change then it must ensure that National Policy Statements are designed in line with climate change policies. A legal duty should be built to ensure national policies are designed so as to reduce emissions in line with the Government's established targets.

The draft Bill does not contain any requirement for major infrastructure projects to be determined by reference to the need to address climate change. The types of projects that are to be determined under the new procedures will often have significant climate change implications and should be measured against the forthcoming climate change strategy.

3 The unprecedented powers of an unaccountable Commission

The Bill provides an unelected body (the Infrastructure Planning Commission) with extraordinary and unprecedented powers to apply, modify or exclude provisions in primary legislation and to amend, repeal or revoke local Acts (also primary legislation) where 'expedient' (Clause 105). In each case, such actions can be taken without any Parliamentary scrutiny. The Secretary of State's only power is to give a direction in very narrow circumstances where the revocation would be contrary to European Law or the European Convention of Human Rights.

The proposed Commission would not be directly accountable to Parliament or even a Minister for individual decisions.

The Planning Inspectorate has widespread public support, particularly for its perceived fairness and objectivity, and should be considered as the administrator of these inquiries.

<u>What changes are required to the Bill?</u>

<u>Improved public participation</u>

- Ensure a meaningful right to be heard in person throughout infrastructure inquiries
- Ensure the development of National Policy Statements is done with Parliamentary scrutiny and a right to be heard or at least an examination in public

- Ensure that an independent, accountable Commission runs the pre-application consultation to ensure a fair and unbiased presentation of facts

Sustainable development and climate change

- A duty to make a strategic environmental assessment of **all** National Policy Statements
- A requirement for National Policy Statements to seek to reduce carbon emissions and adapt to climate change in line with the forthcoming climate change strategy
- A binding duty on decision makers to ensure infrastructure decisions serve to contribute to reducing carbon emissions
- A clear definition, on the face the Bill, of sustainable development

Accountability

- To ensure democratic accountability the Commission must only have powers to make recommendations to the Secretary of State and to Parliament
- The Commission must not have unconstitutional powers over legislation

Efficiency

- Promoters to benefit from an independently-run pre-application consultation process
- Promoting mediation and agreed areas of fact between parties **prior** to the inquiry
- Building on the existing expertise of the Planning Inspectorate rather than creating a wholly new body.

Question and Answer

Q. What is the most common cause of delay in decision-making?
A. The Government has produced no comprehensive research about sources of delay in the process nor ever made clear what they mean by 'delay' as opposed to the time it takes to properly examine a proposal. In terms of the delay of Heathrow Terminal 5, the applicant's lack of preparation and subsequent changes to the application, along with Ministerial thinking time, were key causes. It is significant that the Terminal 5 promoter used more than half the total inquiry time. The public inquiry is only one aspect of the overall development process. Land assembly and financial uncertainty represent a much greater source of delay than public participation which is always governed by the strict rule of inquires. In fact the public's involvement is one of the most prescriptive aspects of the process.

Q. Is it lawful to restrict cross examination?
A. Legal advice supplied to Friends of the Earth suggests that not allowing cross-examination is legally dubious. The advice concluded:
'It is very difficult for members of a tribunal to properly examine a witness's evidence without the assistance of other parties. If evidence contains defects these will usually not be readily apparent. We have often had experience of apparently sound technical evidence being exposed as fundamentally flawed by cross examination.'
(A full version of this advice on the Planning White Paper is attached as Annex A)

Q. Is this about building nuclear power stations?
A. The Government has already stated a commitment to nuclear power, before it decided to consult on whether nuclear power is a safe, efficient, and cost-effective option. The refusal of the Government to devolve power generating stations to Wales over 50MW is a possible indicator that the Government wants to impose the nuclear option on Wales.

Q. How can we really put climate change first?
A. The Government is about to launch a new Planning Policy Statement on climate which is a sound starting point for dealing with climate in local and regional planning. Unfortunately this document does not apply to major projects, which again is both wrong and illogical. (The new Planning Policy Statement will be a supplement to Planning Policy Statement 1).

Q. Wind energy and planning – what's the problem?
A. There is a perception that planning is a barrier to renewable energy. This may have been true in the past but recent developments have changed this picture. Most onshore wind is under 50 megawatts and so not touched by the Planning Bill. The Planning Policy Statement on climate due in December 2007 will transform the way planners think on climate and renewables and will effectively create a much more positive environment for all kinds of renewables. Large scale renewables are vital but they do need to be tested and imposing them on communities will create a counter productive backlash.

Q. Will these proposals make it harder for people to engage in inquiries?
A. Yes. They will limit involvement in National Policy Statements to a difficult-to-understand consultation process. They will limit involvement in inquiries to written representations, cutting out disadvantaged and 'hard to reach' communities. The open floor proposals will not allow any meaningful participation in the examination of the application because it will occur in a vacuum at the end of the Inquiry, rather than when the real issues are being debated.

Q. Is there any justification for giving an unelected body unprecedented power in our constitutional history?
A. There is no justification for the remarkable powers proposed to be given to the Commission. The suggestion that an unelected body should be given powers to amend, revoke, modify or disapply legislation without any Parliamentary oversight is wholly unconstitutional.