TIF'S PLANNING WORKING GROUP

NATIONAL INFRASTRUCTURE PLANNING REFORM

CONSULTATION RESPONSE

DECEMBER 2021

1. The Infrastructure Forum's (TIF) network brings together investors, operators, constructors, lenders and professional advisors involved in the development of Britain's critical national infrastructure.

2. The Infrastructure Forum's Planning Working Group, which has consulted on this response, comprises members from across the infrastructure sector – within both the public and private sectors – and is chaired by James Good, Partner, in the Planning and Zoning Department at Bryan Cave Leighton Paisner LLP.

3. Part One of this response contains The Infrastructure Forum Planning Working Group's overarching observations on the National Infrastructure Planning Reform Programme. Part Two moves onto responses to individual questions. For ease of reference, key points are in bold.

PART 1 – OVERARCHING OBSERVATIONS ON THE PLANNING ACT 2008 REGIME

Overall performance of the Planning Act 2008 regime

4. The Planning Act 2008 (PA 2008) was introduced to streamline consenting on NSIPs. Generally, the system has worked well and has significantly improved the process of consenting NSIPs, with less delay and better certainty of outcome for promoters in the delivery of NSIPs. However, since the NSIP regime was introduced there has been some erosion in achieving the overriding purpose of the system and improvements can be made to address this and to improve the regime more generally.

National Policy Statements

5. It is critically important that NPS documents must be kept up to date and reviewed on a regular and timely basis to improve confidence, reliability and predictability in the system and to ease concerns over funding. Up to date and well drafted NPS documents also help to improve the quality of the DCO applications and the examination of those applications. They help avoid debates over the need for projects that can arise in respect of NPS documents that are not up to date and

the precise requirements of the policy in respect of matters under consideration at examination.

6. If the Government feels that regularly updating the existing suite of individual sector specific suite of NPS documents is not reasonably possible in practice then consideration should be given to developing an overriding NPS that sets out policy that applies to all sectors with Appendices or Annexes that deal with policy that applies on a sector specific basis.

The operation of the NSIP regime

7. There needs to a greater and wider recognition that the NSIP regime was never meant to mirror the grant of planning permission for other forms of development under the Town and Country Planning Act 1990 (TCPA). The NSIP regime has a wider purpose to develop a streamlined approach to the consenting of NSIPs. A number of problems have arisen in that respect.

8. First, Examining Authorities (ExAs) and objectors to projects are constantly looking for ever greater levels of detail in respect of DCO applications, as if they are applications for detailed planning permission. What is often sought from promoters are levels of detail that either cannot be known at the time it is sought or that is unnecessary in order to give consent to the project. This problem is exacerbated by ExAs not dealing with immaterial issues raised by objectors firmly and swiftly for fear of not giving a fair hearing to objectors and the perceived risk of Judicial Review to a DCO that arises from this. An effective and efficient DCO process is fundamental for all organisations involved in infrastructure delivery achieving their respective ESG obligations and the current approach is hindering progress in this regard.

9. The tendency to mirror the approach to a grant of detailed planning permissions is causing frustration with the system, is unnecessary and leads to Issue Specific Hearings being dominated by immaterial or peripheral issues as opposed to focussing on what is material to the determination of the application. That was not the intended purpose of the regime which was to establish the principle of the project in question proceeding and to establish a framework within which the project could be implemented and delivered.

10. In that context ExAs and objectors require a better understanding of why promoters need flexibility in the projects they bring forward to allow for detailed design development post application (e.g. to allow for technological change and improvements) and how they practically implement the project once it has been agreed in principle. Large NSIPs are promoted off the back of an outline engineering design, with full engineering design being completed post the grant of the DCO. DCOs which are unduly inflexible in their drafting limit the scope for beneficial ongoing project development at the detailed design stage (post the grant of the DCO) and make it much harder to incorporate and implement good ideas, generated in the delivery phase by contractors, about how particular elements of the construction process might be made quicker, cheaper and less harmful. A proportionate level of flexibility within a consented DCO can help to protect local

communities from the adverse effects of implementing a project as it allows for promoters to improve methods of construction and mitigation which if too tightly defined in the DCO cannot be amended to improve the protection it provides for the communities. This can be achieved through proportionate and appropriate DCO drafting and there are numerous examples of where this has been achieved successfully. However, the process of achieving that outcome is frequently far more difficult than it needs to be as a consequence of the lack of understanding as to why promoters need the flexibility they seek in the DCOs they bring forward.

11. Inflexible DCOs can (and in our experience do) achieve outcomes that are sub-optimal to those that could be achieved by allowing for a proportionate level of flexibility within the DCO. It is a frustrating irony that by pushing for ever greater levels of detail, and limiting flexibility to what is less than proportionate or necessary for the project in question, objectors and ExAs may actually be making the position of the local communities in question worse not better.

12. Secondly, the regime was intended, in so far as it reasonably could, to be a one stop shop approach to consenting for NSIPs with all the main consents needed for a project to be included in the approved DCO. In the early years of the regime this worked better than is now the case. Increasingly consenting bodies are not agreeing to the consents they would otherwise have to issue for a project being included in the DCO. There is no rationale or justifiable basis for that approach given the objectives of the regime and it causes difficulties in Examination and for the ExA in reporting on the application because of the consequential uncertainty and it frustrates efficient and effective implementation and delivery.

13. The current relatively short list of other consents that can be included within a DCO further to section 150 of the PA 2008 needs a fundamental review and the Government needs to issue an updated longer list of consents that can be included in a DCO. That longer list needs to be backed up with clear Government Guidance that where these other consents are necessary for project delivery the starting assumption is that the consents will be contained in the DCO unless there is a clear and strong justification not to do so.

14. Thirdly, and linked to the second issue raised above, some statutory consultees either will not or cannot effectively engage with the DCO process. This may be due to the relevant organisations and officers within it lacking the knowledge and experience of the regime in which case there needs to be investment in training and developing the necessary skills, knowledge and familiarity with the system. That simple fix would undoubtedly improve the DCOs that are granted and the implementation and deliverability of projects. Additionally, Local Authorities (LA) often do not engage for local political reasons, which is understood, but this stance is not without implications for the LA and the communities they represent who should be represented by the LA in the process. Guidance should be issued that even if a LA has an objection to a proposed DCO they should nevertheless engage with the promoters in a constructive manner.

15. Difficulties with engagement may also be due to resourcing issues in which case resourcing needs to be improved whether by Central Government or by the giving of clear guidance as to what resourcing promoters should make available to statutory consultees such as LPAs, EA, National Highways, MMO, etc. in terms of e.g. skills training and financial or other resources in the form of Performance Agreements and related arrangements. With adequate resourcing in place (which is not the case at present and which is a matter within the gift of central Government) statutory consultees should be put under a policy duty constructively to engage with the regime and the projects that are promoted and in respect of which they have roles and responsibilities e.g. in respect of consultation and engagement or issuing the necessary approvals and consents to allow for delivery with a view to delivering consented projects in the national interest. Compliance with that duty should be enforced through the discipline of an enforceable costs regime being applied to those statutory consultees who fail to meet that duty in a reasonable manner.

Delays in decision making

16. There is a worrying and growing pattern of delays in SoS decision making on DCO applications. There are a range of causes. Some appear to arise from the complex issues that arise in respect of issues such as Habitats Regulations Assessment, air quality and emissions and carbon and net zero. In the case of some of these issues, habitats being a good example, the way statutory consultees engage with the regime and the policy and other objectives they look to secure (whether in line with the relevant law or policy) are a major complicating factor in Examinations and it is not assisting the ExAs in making their recommendations to the SoS.

17. In other instances, delays arise from ExA reports leaving issues unresolved as a result of issues not being fully aired or resolved at Examination (this is partly a reflection of the issue referred to immediately above). Those issues are then passed on to the SoS at the point of decision in circumstances where the SoS is in a far more difficult position in terms of understanding and determining the issue in question giving rise to the SoS having to ask for further written submissions (in some instances several rounds of further submissions) in order to understand and resolve the issue. That is an impossible task in the three months allocated to the SoS for their decision.

18. The solution appears to be that ExAs must take a more proactive approach to problem solving and dispute resolution at Examination. There are at least two main issues here. First, there is a tendency to use Issue Specific Hearings as process and programme updates and for the ExA to get bogged down in unnecessary details and immaterial issues at its own behest or the behest of objectors either exacerbates their unwillingness to do this or it prevents the proper airing of the key issues and resolution of them with the proactive assistance of the ExA. Second, there is a tendency for ExAs to put pressure on applicants to reach common ground with Interested Parties (IPs) (i.e. to yield to their demands for additional mitigation and/or funding) rather than properly and thoroughly interrogating and testing whether the demands of the IPs are justified both in

principle and scale. Once common ground is reached, ExAs tend to regard the issue as satisfactorily addressed and take little or no further interest in it. The inquisitorial nature of the regime as originally intended with ExAs probing and understanding applications and objections equally rigorously in order to make clear recommendations to the SoS has been replaced by a focus on process and procedure, and pressure to negotiate to reach common ground, with the ExA acting as referee rather than inquisitor. The focus on process and procedure can lead to a consequent side lining and lack of focus on the consideration of the major issues to which Issue Specific Hearings should be directed. The focus on pushing for common ground undermines the inquisitorial function, and inevitably leads to NSIPs costing more to implement and taking longer to build as a result of 'gold-plating' of mitigation and compensation.

19. An ability for promoters and interested parties (IPs) to proactively update the SoS on matters unresolved at the end of Examination but resolved at the time the SoS comes to make his decision would also help for example an agreement that overcomes an issue that was contentious and unresolved at Examination and in respect of which the ExA could consequently reach no clear conclusion for the SoS.

Amending DCOs

20. The process for making amendments, material or otherwise, to consented DCOs is not fit for purpose and needs to be thoroughly revisited and changed. It is too complicated, it is too uncertain in its outcomes and it takes too long given the urgent need to deliver these projects in the national interest. The consequence of these problems is that when faced with the opportunity to amend the DCO to improve a project the time and risk associated with seeking an amendment, particularly a material one, leads promoters to seek alternative "work around solutions" that avoid amending the DCO and that in some instances lead to suboptimal outcomes. It is an irony that it is easier and quicker to amend an application during examination, when the principle of a project has not been approved, than it is to amend a scheme the principle of which is agreed.

21. The difficulties with amending DCOs also causes promoters to seek greater levels of flexibility in the application stage than they would otherwise do if there was a simpler and better way to amend a project once the principle of it has been established through the grant of a DCO. This exacerbates the problems of ExAs and objectors seeking greater level of detail than are necessary at Examination.

PART 2 – RESPONSES TO INDIVIDUAL QUESTIONS

Question 3. What could government, its arms-length bodies and other statutory bodies do to accelerate the speed at which NSIP applications can be prepared and more generally to enhance the quality of submissions?

Strategic issues

NPS policy

22. The PA 2008 is designed to operate most effectively alongside a suite of up to date National Policy Statements (NPS). Where these exist, and have effect for a particular proposal, they play a significant role in determining what needs to be done in order to prepare an application so that it is ready for examination.

23. **Each NPS should clearly tell applicants what they do and do not have to demonstrate in order to obtain development consent, what evidence and assessments they will need to submit with their applications for that purpose, and the approach that will be adopted when examining and determining their proposals.**

24. Some NPS are better than others in this respect, both in terms of their content and the clarity with which policy is expressed. Any lack of clarity creates delay and generates additional expense because applicants have to undertake additional pre-application work on a defensive basis, aware as they are of the front-loaded nature of the system, the difficulty of materially amending an application once submitted and the risk of legal challenge to an approved DCO on the basis of an alleged misinterpretation of policy.

25. A lack of clarity in policy also generates a great deal of additional work for all parties (Applicant, ExA, IPs) during examinations, because of the time spent either responding to questions from the ExA or considering the responses received to the questions and other oral and written submissions from Applicants and IPs (IPs) on the meaning of relevant passages of policy. Please see also paragraph 61 to 63 below.

26. By way of example, guidance in the draft Energy NPSs EN-1 is very useful in terms of the correct approach to the consideration of alternatives to a promoted DCO project. Other statements however do not have such helpful guidance. It is important that this is addressed. **All NPSs should include clear and robust policy on the approach that applicants and ExAs must take to the consideration of alternatives when applying for and making recommendations to the SoS on NSIP applications. The absence of this advice in most of the current suite NPSs leads to unnecessary consideration of options that are not realistic or genuine alternatives to the project in question by the applicant and the ExA. This increases**

cost for the applicant and waste valuable time in the Examination process including ISHs.

27. **TIF invite the government to undertake a cross-departmental review of the current suite of NPS to assess what has worked well and what has led to difficulties in practice, in order to inform revisions and updates where appropriate. Government should place greater focus on implementation in National Policy Statements, recognising the public interest benefits associated with efficient and rapid implementation of approved projects so that these are properly factored into examinations and decision-making, and setting out per NPS particular implementation issues which arise in the particular sector. The review might be conducted by the Infrastructure & Projects Authority.**

28. The process of revising and updating NPS is a substantive one which generates litigation risk. However, the benefits could be substantial. The success of the current set of Energy NPSs in delivering renewable energy generation capacity illustrates exactly the difference that a strong NPS can make.

29. If the Government feels that regularly updating the existing suite of individual sector specific suite of NPS documents (e.g. every 5-7 years) is not possible in practice then consideration should be given to developing an overriding NPS that sets out policy that applies to all sectors with Appendices or Annexes that deal with policy that applies on a sector specific basis.

Process and procedure

30. On many occasions, examinations are too focused on process and procedure and too little on achieving high quality outcomes by resolving issues and disputes at examination.

31. TIF's Working Group believes that ExAs spend too much time focussing on immaterial and less or barely relevant issues raised by objectors, meaning there is less time available to be spent on identifying and resolving the key issues in respect of the project in question which hinders the objective of achieving high quality DCOs that deliver on NPS policy requirements.

Design detail and flexibility in DCOs

32. There is significant variation in the quality and timeliness of the input that is received into DCO applications from statutory consultees and other IPs including objectors both before and after submission of an application. This in turn reflects significant variation in the extent to which those parties are familiar with infrastructure planning, and the practical issues that face promoters planning and delivering new nationally significant infrastructure projects. There are examples of local planning authorities with significant experience of NSIPs (e.g. East Suffolk Coastal District Council), and there may be merit in finding a means by

which the benefit of its resultant experience and expertise can be captured and passed to others.

33. It is the experience of the Planning Working Groups members that ExAs, Statutory Consultees and other IPs including objectors have generally unrealistic expectations as to the level of detail to which such projects can properly be expected to have been developed at the DCO application / examination stage.

34. Further there is a general lack of awareness and understanding of why flexibility is so important in DCOs and the benefit it can bring when it comes to implementing a project. Some ExAs can be instinctively wary of attempts by applicants to maintain flexibility, and very receptive to suggestions by statutory consultees and objectors that flexibility be reduced to an absolute minimum. On the Thames Tideway Tunnel examination, there were 48 issue specific hearings. Throughout that process there was a feeling that the ExA saw success as limiting flexibility in terms of what was being proposed.

35. Flexibility in DCOs is important in achieving the best possible projects that can be efficiently implemented and delivered in good time and without unnecessary expense. DCOs which are unduly inflexible in their drafting, limit the scope for beneficial ongoing project development at the detailed design stage and make it harder to incorporate good ideas generated in the delivery phase by contractors about how particular elements of the construction process might be made quicker, cheaper and less harmful. Not allowing proportionate flexibility in DCOs can be to the detriment of the promoter and the communities that it is thought are being protected as it prevents projects being adapted and mitigated to take account of how implementation is ultimately undertaken. Flexibility can also allow for the taking into account of technological development between application and implementation which is important in a number of sectors.

36. That said it should also be noted that some local authorities and other organisations are calling for flexibility, as are local communities. They recognise this is in their interest and would allow them to influence design to a greater extent at the implementation phase to the benefit of local communities and the project.

37. Applicants commonly have to work extremely hard to explain practical issues about the process of project development which are common to many nationally significant infrastructure projects (NSIPs) and which is part of the need to incorporate proportionate flexibility. Those difficulties increase the time that it takes applicants to prepare their applications, not least because of the degree of friction experienced in working with statutory consultees.

38. However, it should also be acknowledged that some promoters do not give sufficient attention to how projects will be implemented when preparing their DCO application and promoters should recognise the need to have this information available as part of their application. In the absence of such

information promoters should expect the flexibility they might want in the implementation phase to be curtailed in the DCO and for detailed information to sought from them in Examination in order to make up the deficiency in the application information in that respect. Clear national policy guidance on the issues associated with implementation and the public interest issues that need to be balanced in decision-making would assist in resolving this issue.

39. **However, in overall terms more knowledge is needed from examiners of what it takes to project manage, design and deliver a major infrastructure project.** It would therefore be helpful for PINS teams to recruit more staff with experience of implementing major projects. TIF suspect that if more panels included people with direct experience of the Planning Act in practice (particularly in implementing nationally significant infrastructure projects), there would be a marked difference in the approach taken to these issues. The objective should be to achieve a more balanced approach in decision-making, recognising that the public interest issues are more nuanced that simply ensuring that sufficient mitigation and control is secured.

40. **Government should release guidance to promote a greater understanding of the need for DCOs to retain flexibility within their terms, and the public interest objectives underlying this need. It would be helpful if the Guidance could confirm that where a promoter consults on the flexibility it requires in the DCO in the pre-application phase and justifies that flexibility through the Examination process to the satisfaction of the ExA then the DCO will be granted by the SoS with the flexibility that is sought by the applicant. This should be backed up by extra training for ExAs.**

41. TIF's Planning Working Group recognise that PINS Advice on the Rochdale Envelope is helpful, but **there is a need for non-statutory government guidance to more clearly acknowledge and explain the need for and public interest benefits of incorporating flexibility at the DCO stage. This should include more positive guidance on ways in which such flexibility can appropriately be incorporated into DCO drafting.**

<u>A single consenting process</u>

42. The objective of the PA 2008 system was the creation of a single consenting process.

43. It is however being eroded by the approach taken by some examining authorities and other statutory consultees and consenting bodies, which has been a clear weakness of the system in recent times. See further paragraphs 104-105 below in respect of our response to question 5.

Co-ordination amongst the public-sector bodies

44. There is a need for far greater management of cross cutting and conflicting issues and problems within the public-sector organisations and bodies involved in DCO applications (please see paragraph 27 above in addition to the comments below).

45. **A central co-ordinating role within Government would be of great assistance in helping public sector bodies align their comments and competing issues and requirements to assist promoters in producing high quality projects.** The inconsistency that currently exists between public sector bodies in respect of a single project frustrates the delivery of high quality projects. Such a role might be fulfilled by the Infrastructure & Projects Authority.

46. **There should also be stronger guidance to require regulators to become more engaged in this DCO process upfront**, which would avoid the issues faced on the Hinkley Point C connection, whereby after the application had been examined and the DCO made there was much debate between National Grid and Ofgem concerning the design and funding of a particular style of pylon that had been included at certain carefully chosen parts of the route so as to reduce the visual effect of that project but that was more expensive than a traditional pylon design. The appropriateness of the choice of pylon design and its targeted use in order to make the project acceptable were carefully examined and tested via the Planning Act process and the results reflected in the DCO as made. Ofgem's objections only arose after that process had been completed.

47. **Government should also reconsider the relationship between the planning process and the regulatory regime and provide clear guidance of what is required of both promoters and regulators in the DCO process in terms of ensuring issues of promotion, delivery, and funding of projects are dealt with at the appropriate stage.** That will enable promotion of projects that balance the need to deliver the project in an environmentally acceptable and proportionate and funded cost. This work could be included in the review of economic regulation now underway led by BEIS.

48. In the water sector for example, a whole swathe of water resource DCOs are expected to be coming through the system in the next 5 years. An approach has been set up by Regulators' Alliance for Progressing Infrastructure Development (RAPID) with its gated process but it is not clear that the interface between RAPID and the DCO process has been thought through fully. **A government review should make sure that this interface was appropriate on a sector by sector basis.**

Detailed issues

DCO drafting

49. There is too much variability in the approach to (and quality of) DCO drafting.

50. There have been model provisions for many years in the Transport & Works Act regime which worked very well. Additionally, the former model provisions set out in the Infrastructure Planning Order 2009 were very helpful, but section 38 of the PA 2008, and with it the obligation on the decision-maker to have regard to the model provisions, was repealed by the Localism Act 2011.

51. There is some advice on DCO Drafting from PINS in Advice Note 13, but it is very limited and basic in its content and no substitute for the model provisions.

52. **TIF recommend an amendment to PA 2008 to reinstate a version of the former section 38 and thereby give statutory weight to a refreshed set of model provisions and associated guidance.**

53. As an alternative, non-statutory guidance could be issued. The latter would carry less weight than the former, but would still represent a considerable improvement on the current position.

54. A set of model provisions would help to provide promoters with a firm starting point and would thoroughly improve the efficiency of the process, in both pre-application and examination and would assisted discussion and engagement with stakeholders.

55. In the absence of model provisions and/or detailed guidance, a lot of time and expense has to be incurred by promoters in preparing and subsequently justifying the drafting of what are common provisions in draft DCOs. Over time, a situation has emerged in which there are now multiple versions of such provisions in made DCOs. These differing versions reflect the views and preferences of the particular individual legal advisers and ExAs involved in each case, and the value and assistance to be gleaned from precedent is significantly reduced as a result. Applicants are therefore unable to predict with any certainty which version is likely to appeal to the preferences of the particular ExAs that will consider its application, and IPs with conflicting interests and priorities can each identify precedents supporting their position.

56. This difficulty includes, for example, provisions which are important in catering for the inevitable uncertainties that exist at the early stage of planning as to exactly what will need to be done during implementation.

57. The situation that exists at present also enables objectors to challenge the drafting that has been used by a particular promoter on a particular issue or DCO article on the basis that it differs from a previous precedent. This is frequently

used in an attempt to frustrate DCO applications. It wastes huge amounts of time at DCO examinations.

58. **Good detailed guidance on commonly occurring provisions would have the potential to reduce uncertainty for applicants, limit the scope of debate in examinations, and improve the standard of drafting in DCOs.**

Environmental Impact Assessment (EIA)

59. EIA has also lost its focus on improving developments and is now very procedural. **TIF's Planning Working Group will look forward to responding to EIA reform once we see the revised proposals for the regime.**

<u>The precision and clarity of NPS policy</u>

60. NPS policy is frequently unclear or uncertain as to the policy requirements for assessment in terms of the type and extent of assessment required. This inhibits pre-application engagement and application preparation. **PINS must give section 51 advice in this respect in the pre-application phase**. That will assist application preparation and save costs and will significantly assist the examination of DCO applications

61. **PINS could also make the situation better by dealing with scoping reports in a more critical way in terms of identifying the assessment information (including methodology) that they require to have available in order to assess an application against relevant NPS policy**. TIF recognises however that 1 month is not a long turnaround time in that respect.

62. On the Silvertown Tunnel project, which went through the DCO process due to a section 35 direction, it was not entirely clear through the wording of the National Networks NPS how much should apply to a section 35 case. If following the decision in *EFW Group Limited v Secretary of State for Business, Energy and Industrial Strategy (2021 EWHC 2697 Admin.)* the Government now considers that it cannot utilise section 35ZA(5) to apply the relevant NPS to a section 35 case then the Government will need to specify the extent to which they will apply the NPS to a section 35 case within the remit of the relevant NPS when they review the NPS in question. This would remove the evident policy gap that appears to exist at present in respect of section 35 cases.

<u>Statements of common ground</u>

63. **There must be greater clarity in Policy and Guidance on the need for statements of common ground (SoCGs), their role and purpose, the required parties to an SoCG and how SoCGs will be used and when in**

the DCO application / examination process they are required to be provided.

64. Too often SoCGs are simply lists of issues that fail to distinguish the really key issues from the remainder. Applicants and other IPs need to be directed to work on them earlier in the application process and with more commitment.

65. At the moment, SoCGs are seen by promoters and others as a burden not a benefit to the process and this lessens their enthusiasm to pursue them, particularly opposite statutory consultees that are not engaging in the application process (for whatever reason). There is also a tendency for ExAs to require applicants to agree SoCG with vast numbers of parties in circumstances where the exercise is likely to yield little if any practical benefit but will require significant time and expense. This includes requirements to agree SoCG with local action groups dedicated to in-principle objection to the project, where it is clear there is no meaningful common ground that will be agreed. Team members have to be directed to preparing these documents, engaging with the relevant IPs, reviewing drafts etc. at a time when the applicant's resources are inevitably already under great strain. All too often the end product is of no utility to any party least of all the ExA, simply repeating what could already be gleaned from the parties' written documents.

66. The Working Group also feel that promoters are very wary of the way in which ExAs can use SoCG and the emphasis on reaching agreement with IPs to pressurise promoters to deliver unnecessary mitigation in an attempt to appease objectors to the scheme in question and reduce the number of disputed issues the report needs to address. As explained above, this tendency is incompatible with a truly inquisitorial process that was originally intended for the PA 2008 regime and leads ultimately to nationally significant infrastructure taking longer to implement and being more expensive to build and operate, than would be justified on a proper rigorous application of existing policy on the imposition of requirements and requests for obligations. TIF recognise that ExAs have a limited amount of time in which to examine and report on the issues, and that in those circumstances the establishment of common ground can make that burden easier to bear. The current approach, however, does not reflect the original intention of an inquisitorial approach, and yields results inconsistent with established policy which is intended to ensure no unnecessary or disproportionate restrictions or obligations are imposed. It also risks a slide into a 'transactional' approach to negotiations with IPs, undermining public confidence in the system.

<u>Consultation and engagement</u>

67. **The difference between consultation and engagement, and their respective purpose, needs to be clarified in Policy or Guidance.**

68. **Clearer guidance on the purpose and role of consultation, what represents adequate and inadequate consultation and when it is**

necessary to re-consult on project design changes arising from consultation responses is also much needed. The complementary role of engagement also needs to be explained and emphasised in updated Government Guidance. Interested parties need much firmer guidance on the need to respond constructively to consultation even if they retain in principle objections to the project in question. We would expect that updated Guidance could be well informed by a huge amount of learning that has developed through the projects that have been promoted and consented already.

69. DCO applications are expensive to draft due to the onerous documentation requirements and the front end loaded consultation process. Consequently, promoters are and have to be very cautious in this area for fear of applications not being accepted for Examination on the basis of allegations of inadequate consultation with consequential financial and programme implications of non-acceptance.

70. **PINS need to make better use of section 51 advice around adequacy of consultation in the pre-application phase to assist and reassure applicants around the application acceptance risk that consultation represents**. Where there is multi-phase pre-application consultation PINS should adopt a stage by stage style of approach to assessing adequacy of consultation that should be signed off as the pre-application process continues. PINS should not leave the issue of adequacy of consultation on a project that has used multi-phase consultation to the 28-day acceptance period.

Question 4. Following submission, are there any aspects of the examination and decision process which might be enhanced, and how might these be improved?

Strategic issues

Section 51 advice

71. **TIF believe that PINS need to make better use and be bolder when giving section 51 advice in the pre-application phase**.

72. Too many issues that could be resolved in the pre-application phase are left to the Examination phase which complicates that phase and adds programme pressure to the Examination. The effect of PINS reluctance to give clear section 51 advice in the pre-application phase is that applicants have to be more cautious and defensive in their approach, adding time and expense at the pre-application stage. This tends to complicate the Examination phase more than it would need to be if clear section 51 advice was provided at the appropriate time in the pre-applications phase.

Approach to DCO examinations

73. It is felt that in many cases the approach to the examination of DCO applications has become too focussed on process, procedure and reporting of progress in negotiations and is not inquisitorial enough. The ExA were originally charged with inquisitorial examination of applications but that approach is no longer followed with sufficient discipline by ExAs.

74. **The ExAs need to be more proactive in assisting in resolving disputes between parties by giving a far clearer indication of their opinion in respect of the dispute in question and what they feel needs to be done to resolve the situation.**

75. This would assist promoters deciding to commit to mitigation they may not believe is necessary but are prepared to provide if it is deemed to be and it would stop statutory consultees and objectors holding out for such mitigation in circumstances where the ExA is not persuaded of the need for it. This would assist efficiency of time in Examinations immensely.

76. At present promoters are concerned that the approach of the ExA to not expressing a view allows objectors to continually push for unnecessary mitigation and promoters feel pressure to agree to such mitigation just to reduce the risk to the approval of the project even if it drives up costs (which an economic regulator may not approve). There is a perceived risk and concern on the part of promoters that ExAs can on occasion use this approach as a way of appeasing objectors to a project that they expect they will ultimately recommend for approval. The perception that may exist that this reduces JR risk is not borne out by evidence.

77. A further issue is that the lack of proactive inquisitorial examination can result in issues not being fully resolved at the end of the examination meaning the ExA cannot or will not report fully on the applications to the Secretary of State (SoS). This has the consequence of leaving issues to be resolved by the SoS at the decision-making stage when in practice there is insufficient time to do so. That leads to delays in issuing consents whilst issues are resolved. This has become a familiar issue in the off-shore wind and highways sectors in particular (please see our overarching comments at paragraph 16 above).

78. **The efficiency and effectiveness of Issue Specific Hearings (ISH) must also be addressed.**

79. Agendas for these hearings are rarely sufficiently detailed to allow for adequate and focussed preparation by promoters and IPs and their teams. The agenda items are commonly so broadly expressed as to offer little real guidance as to exactly what the ExA wishes to probe and why. In addition, it can be difficult to identify which technical specialists should attend a hearing as the precise subject matter and issues to be considered are not clear from the agenda.

80. Furthermore, the oral questions that ExAs do ask are too often directed at very specific detailed issues which could not reasonably be predicted from the agenda. Where these issues are complex, calling for input from and co-ordination between different experts, it is unreasonable to expect a proper reasoned response to be provided on the spot. This significantly reduces the effectiveness of the ISH process and could be avoided by giving adequate advanced notice of specific questions in agendas.

81. The end result is that very substantial amounts of time, effort and expense are wasted by applicants and IPs preparing to respond to issues that ultimately are never discussed or which are different to that which the ExA want to hear about so matters that are of concern to the ExA are not fully aired and discussed. It can also lead to unnecessary attendance by experts for issues that are not relevant to them and hence they need not have attended. In short inadequate agendas result in inefficient and expensive hearings.

82. An example of good (early) practice were some of the Hinkley Point C ISHs. In one such hearing, a very detailed agenda was produced in advance with over 100 very specific points/questions that the ExA wished to probe. Whilst preparing to address such long lists of points inevitably presents applicants (and other IPs) with a challenge, it is nevertheless effective in ensuring that everyone knows exactly the issues that are to be dealt with. All of the (considerable) time and effort put into preparation is thereby focussed on the specific issues to be discussed on the day.

83. In some of the other ISHs in that case, the agendas were far less specific and detailed, sometimes just a relatively short list of broadly defined topics with no indication of what issues within that topic were of concern (let alone the specific

questions the ExA wished to ask). Unfortunately, that approach has become more commonplace over time, with even 'detailed' agendas offering little guidance as to exactly what is to be discussed. The consequence is that efficient preparation is impossible, because much time and expense is wasted preparing for issues that do not arise, and often the true concerns of the ExA are not anticipated meaning that they are not considered in preparation and considered responses cannot be given in the hearings. This is wasteful, inefficient and ineffective for all participants and undermines the usefulness of hearings for ExAs.

84. **Where there are specific points that cannot adequately be explored using written questions, making an ISH necessary, those points ought to be known about sufficiently well in advance and clearly set out in the agenda so that applicants and all others invited to attend know what will be discussed and can focus their preparation on those points.**

85. Insufficiently detailed agendas can also bring about significant well-being issues within teams of people participating in examinations, particularly promoter's teams. They place immense pressure on teams, with some having to work 16 to 18 hours day after day in a six-month process that does not relent or include any programmed breaks in activity to allow for holiday. This is a particular issue on larger and more controversial schemes such as the Thames Tideway Tunnel project. The Planning Act process is intended to be fit for purpose for all such schemes, and it must be made to work in a way that does not assume either that participants will routinely be placed under unreasonable pressure, or that they will need to assemble even larger and more expensive teams of lawyers and consultants in order properly to protect the well-being of the individuals involved. Adding such an additional burden would be contrary to the underlying public interest objective of having a rapid, proportionate and efficient means of decision-making for NSIPs. It would also tend to deter smaller developers from promoting NSIPs, leading to barriers to entry, smaller capacity schemes (to avoid triggering the PA 2008) and more expensive NSIPs.

86. The lack of detail given to applicants prior to ISHs can also mean that decisions by applicants on how to respond to issues are rushed and measures are agreed to that would not have been if more time was available to digest the question. This often leads to remedial or mitigation measures being included that would not be justified if the relevant policy tests were properly and rigorously addressed.

87. **TIF recommend that there should be an independent assessment of the management and effectiveness of ISHs, with the intention that it be used to generate good practice guidance for PINS and for all other participants.**

88. Additionally, non-attendance by invited IPs, particularly statutory bodies, can be a significant impediment to an effective and efficient examination. The fair and

effective operation of the PA 2008 process relies on IPs attending ISH to which they have been invited, and playing a full and active part in discussions.

89. The difficulties this gives rise to are exacerbated in circumstances where the IP in question has a specific statutory role in advising the decision-maker, especially where that party is in dispute with the applicant over important issues in the examination.

SoS decision making

90. **Government have to prevent determination periods being extended as much as possible**. TIF understand that extensions will never be avoided completely as events can occur after close of the examination meaning it is not possible for the relevant SoS to make a determination within three months. However, too often the extensions occur because issues had not been explored sufficiently during the 6-month examination period and were left over (see further paragraphs 17 and 77 above).

91. Extensions are very damaging, reducing the confidence amongst investors and promoters that they will get a DCO with a reasonable degree of confidence within 12 months of the preliminary meeting, which has always held out as a hallmark of the regime and something that is important to preserve.

92. A key challenge appears to be the issues arising out of the Habitats Regulation Assessment (HRA) process which is often unresolved at the end of the Examination. Progress can be made post the close of the Examination but there is no established mechanism for this or methodology for updating the SoS as part of the post examination decision-making process.

Detailed issues

93. **The Infrastructure Planning (Examination Procedure) Rules 2010**The Examination Procedure rules were written when the IPC was in existence and Examinations would be held by them not PINS.

94. **The Rules need to be reviewed to provide greater flexibility in how PINS hold and manage Examinations and hearings.** Relaxing these rules would help improve efficiency, reduce cost and make it easier to bring forward changes to DCO's during an examination. A more thoroughly inquisitorial approach to examinations should be encouraged – see paragraphs 74 to 90 above.

Relevant and written representations to become Statements of Case

95. **To assist the ExA in conducting hearings IPs should not be allowed to deviate from the case set out in their relevant and written**

representations and if they do there should be a cost penalty for doing so.

96. Currently, some IPs perceive each stage of the examination as a chance to expand the scope of their case or to change their position to their own objective by raising fresh points. This produces inefficient examinations and prevents the full consideration and resolution of material points and issues.

97. **TIF recommend changing the name of the written representation to 'a Statement of Case'. This would make its purpose clearer. Adherence to the 'Statement of Case' (save where there are material changes of circumstance) should be rigorously enforced.** Third parties must not be able to avoid sticking to the rules and their Statement of Case and ExAs must be firmer in this regard.

Question 5. Where a development consent order has been made, what impediments are there to physically implementing a project which could be removed?

Strategic issues

Amending DCOs

98. **The process for amending DCOs is not fit for purpose.** It is frustrating innovation and design development and leading to suboptimal outcomes. If the system could be made simpler and quicker and with greater certainty of time frame then promoters might be prepared to seek less flexibility in their applications from the outset that would go some way to alleviating the issues identified at paragraphs 8 to 11 and 32 to 41 above.

99. In particular, the time taken to process and determine applications for non-material amendments is excessive. The process is extremely lengthy when compared to the TCPA regime, where a non-material change could be pushed through in just 28 days.

100. It is understood that the process will never be as simple as the TCPA regime because it involves changing an instrument of legislation, but the point remains that it could be vastly improved.

101. Whilst applications for material amendments are rare, TIF believes this is because of a lack of appetite on the part of promoters to engage with the current system for material amendments unless they absolutely have to due to the problems that exist with it. It is not as a result of a lack of appetite on the part of promoters to make changes to approved schemes. There is a greater likelihood that they would make use of the statutory process if it was consistent with the timetables they have to work to if a project to get the project implemented. The current process for seeking and obtaining such an amendment, is not dissimilar to what is needed to obtain the DCO in the first instance even though the principle of a project has already been agreed. It is an irony that it is easier to amend an application during examination, when the principle of a project has not been approved, than it is to amend a scheme the principle of which is agreed.

102. **The creation of a shorter, streamlined process would make applying for a material amendment a more realistic option for more applicants where appropriate and is therefore recommended by TIF.**

Section 150 consents

103. At present to few section 150 consents are included in DCOs and the position of certain regulators in that respect is not reasonable or justified.

104. **The list of section 150 consents that can only be included in a DCO with the consent of the 'normal' consenting body needs to be**

fundamentally reviewed and far greater use of section 150 needs to be adopted with Guidance on when it and it is not appropriate to withhold consent for the consent being included in the DCO being issued to the normal consenting bodies and promoters by the Government. There should be a policy presumption that a section 150 consent will be included within a DCO unless there is a clear and strong justification not to do so.

Detailed issues

Draft DCOs, correction orders and certified documents

105. DCOs that are to be approved should be issued in draft for confirmation / comment by promoter and other parties after the decision to approve the DCO has been made by the SoS and before it is formally made. This would allow errors to be corrected before the DCO is formally made.

106. The current process for corrections is not up to scratch. It takes too long, causes uncertainty on implementation and takes up unnecessary resources.

107. It is a worrying trend that errors are seemingly being introduced into a DCO at the decision stage, when they were not present in the final draft submitted for examination.

108. In addition, there is a lack of clarity regarding what amounts to a correctable error and what does not.

109. **The certification of documents must become an electronic process**. Some promoters view this as very important particularly for communities to have access to all certified documents.

110. On more than one occasion, delays in certification have caused problems, as statutory undertakers will not engage under a protective provision until they have seen evidence that a document has been certified.

Readiness reviews

111. **Readiness reviews should be undertaken at key milestones in the planning process.**

112. These should be short interventions, allowing independent experts independently to assess the project.

113. **Independent readiness review teams should be assembled**, who have the ability to interact with all parties and decide whether a project is ready or not to proceed to the next stage in the regime e.g. to pre-application

consultation or application submission or examination, whilst highlighting specific gaps.

114. The team should interact with both PINS and the promoter, performing a 360-degree assessment. **Independent reviews should be seen as best practice and applicants should be encouraged to build these into their timescales.**

Discharge of DCO requirements

115. **The process for discharging requirements should be improved and standardised. Clearer guidance from the Government on the process should be designed and work would be very useful.** This should extend to approvals required by certified documents, such as codes of construction practice.

116. Furthermore, **where an EIA is undertaken using the Rochdale envelope / parameters basis, there is a need to have regard to the actual effects that will occur when the project is implemented and there must be a requirement to design the development implemented within the assessed parameters in an environmentally sustainable way.**

Question 6. How might digitalisation support the wider improvements to the regime, for example are there any specific aspects that you feel could benefit from digital enhancements?

Strategic issues

117. **Overall TIF believe that digitalisation will not be the panacea that many perceive**. The volumes of data and information in for example an EIA of a project render full digitalisation very difficult to achieve in the time frames the projects have to be promoted and delivered.

118. Where digitisation will help is in communicating key information on the design and effects of a project, for example in the Non-Technical Summary of EIA information, and in ensuring use of common data sets at the application, detailed design and implementation stages of a NSIP and building up long term data sets that can be used to monitor trends e.g. development and growth of species populations as a result of mitigation for the ecological effects of a particular project.

119. Government have to carefully think about the burdens that might result of anything too over ambitious in terms of digitalisation. Promoters of smaller infrastructure projects which are on the margins of NSIP thresholds may be tempted to steer away from the 2008 Act regime if the burden of digitalisation is deemed to be too great and make their developments smaller than they might have otherwise been which may not be in the public interest. TIF understands that there already examples from various sectors of projects being scaled just below the NSIP threshold and the suspicion is that this is an entirely deliberate move on the part of the promoters of those projects in order to avoid engaging the PA 2008 regime.

120. Over digitalisation could be a disincentive of the regime and a barrier to entry for smaller promoters coming into the infrastructure provision market if the requirements of digitalisation were seen to be onerous and with no obvious benefit. Many smaller projects will be needed in the coming decade and it is vital that small developers are not put off.

121. Whatever level of digitalisation is introduced appropriate public resources will need to be made available to assist PINS and Statutory Consultees meet the digitalisation requirements in the regime.

122. A key benefit that has been realised due to the Covid-19 pandemic was that hybrid meetings could work exceptionally well. It was important for promoters to be present in rooms, but **TIF are keen for the ability to remain for people to be dialled in to answer questions.** This helped to reduce the need to take too many people into meetings when they might not be needed.

123. Consistency of data is also important. It did not make sense that data which is used for EIA is not reused in the future e.g. if when it came to implementation, a whole extra raft of baseline surveys had to be completed when much of the data already existed. So, **data has to be consistently carried through a project from promotion to implementation.**

Detailed issues

PINS website

124. **The PINS website needs to be improved, particularly if there is a move towards greater digitalisation.** At current, it is very difficult to find documents, which discourages people from becoming engaged.

125. The current website set-up also makes difficult to work out which is the most up to date version of a certified DCO document.

126. **PINS must be given the funding to enhance its website as it is absolutely critical to the examination process. There should be a search engine function added to the site to make it easier to navigate for all stakeholders.**

Question 7. What issues are affecting current NSIPs that would benefit from enhanced cross-government co-ordination including government departments and arms-length bodies?

Strategic issues

Dispute escalation

127. It is often problematic gaining senior level intervention from certain statutory consultees to resolve key issues. Furthermore, the direction from senior levels within an organisation can be unhelpful, where for example it insists on huge levels of unreasonable detail being provided at application stage. It can also problematic when local level officers do not accept the strategic direction set by Senior Executives.

128. Additionally, costs too often escalate as a result of demands from IPs for money. There is always a temptation when promoting a project to pay certain parties in order to make issues disappear, and this 'transactional' approach is inimical to the proper functioning of the system as intended in the public interest. In an inquisitorial system, it is for ExAs to ensure that development consent is not seen to be 'bought and sold' in this way. That requires robust and rigorous testing the necessity and proportionality of all requests for additional funding, and not assuming that to be the case simply because agreement has been reached (please see in addition paragraph 73 to 76 above)

129. **TIF recommend that it is put into national policy that adding unnecessarily to the cost of providing nationally important infrastructure, for example by seeking to require unjustified mitigation, is contrary to the public interest and should not be allowed.** The ExA have a role to play here in probing and interrogating requests for more funding or additional mitigation that may be unnecessary.

Governance and leadership in the public sector

130. Lessons need to be learned from projects that have gone through the system regarding what does and does not amount to good governance and project management that enables key issues to be elevated and resolved effectively.

131. The Thames Tideway Tunnel project set-up the Tideway Forum, which periodically brought together public-sector bodies including central and local government and Arm's Length Bodies (ALB), along with PINS when appropriate. That provided a helpful channel in the sense of visibility and led to helpful interventions by public-sector colleagues when they were needed.

132. **There should be non-statutory guidance encouraging these structures to be set up where appropriate and on how they should**

operate in terms of their engagement as a multilateral forum with the process.

133. On Heathrow Expansion, the Heathrow Strategic Planning Group was set up to engage on a multilateral basis, which again was very useful. However, the main local authority, Hillingdon, simply refused to engage in the Forum or even on a bilateral basis directly with Heathrow.

134. **Public sector bodies such as LPAs, EA, MMO, National Highways and Historic England should be under a policy duty to facilitate NSIPs as they were they were by definition 'nationally significant'.**

135. **Direct Government Guidance must be issued to organisations that makes clear that whilst they may object to the principle of a development, they must engage constructively with the promoter and promotion.** When these organisations do not engage, they are not properly representing the interests of their communities and the businesses located there.

136. In addition, national policy must require LPA's to be problem solving and proactive, in the same way that the NPPF already does. This would give teeth to any guidance.

137. **Guidance should also be released on the interactions between financial regulation and the NSIP regime, particularly on the tensions between delivering economic and cost efficiency and delivery development with appropriate mitigation. Economic Regulators also need to be issued with the Guidance that they must engage with promoters of NSIPs.**

138. On the Hinkley Point C project, a consent was granted for its grid connection, but the economic regulator, Ofgem, then refused to approve the funding for certain parts of the project after it had been consented on the basis that they do not believe the additional cost of a type of pylon design aimed at mitigating the visual effect of the overhead line was justified (see paragraph 46 above). It was wrong that parties could go through the NSIP process only for the economic regulator to disapprove it at the last moment.

139. A further issue is that a lot of time is spent on funding and procurement issues and less time is spent on the key issue of planning and consenting a project.

140. **Within the IPA and Government Projects Academy, a programme of work should be introduced to give greater profile to planning and consenting issues, in terms of training, best practice and education.**

NPS review and common approaches to policy

141. **TIF recommend that the entire NPS regime is improved as it has become unsustainable.** The level of effort involved in reviewing each NPS and keeping them up to date is phenomenal.

142. **It is an attractive prospect to change the model to one with a core NPS looking across all infrastructure sectors, which could set out the core government planning policy for those sectors. Sector and sub sector specific annexes would deal with the more specific needs.** This would iron out many of the inconsistencies and unclear policies in the system. (See also paragraphs 5, 6, 28 and 29 above)

143. Under the PA 2008 as it is currently formulated NPSs are at almost constant threat of Judicial Review, either on initial designation or in respect of requests that the relevant SoS review the relevant NPS. This represents a significant risk to investor confidence in the effectiveness of the PA 2008 regime and consequently their appetite for investment, particularly for the biggest and most controversial projects.

144. In this respect TIF would encourage the Government to review sections 5, 6, 9 and 13 of the PA 2008 that govern NPS designation and review of a NPS and the circumstances under which a decision on the part of the relevant SoS to designate, review or, in particular, not to review an NPS may be challenged by way of JR. It is clear that within certain sectors, notably energy, aviation and highways, that objectors are using the Judicial Review of decisions to designate an NPS (aviation) or not to review a NPA (energy and highways) as a tactic to frustrate the bringing forward of NSIPs and as a parallel (or satellite) means of resisting individual applications for development consent. TIF would like to see the Government robustly address this issue as it represents a significant risk to investment in the future NSIPs. If Parliament is satisfied that a NPS should be designated and has resolved accordingly, then there may well be a strong case in favour of the right to judicially review that decision or any subsequent designation being constrained to greater degree than is currently the case under the PA 2008. TIF recognises that placing any additional constraints on the right to seek judicial review is likely to be controversial, and would require considerable care in order to strike an appropriate balance between competing public interest considerations. Nevertheless, the current system appears to us to be unduly vulnerable to persistent legal challenge, and neither does it recognise Parliament's role in approving proposed NPSs prior to their designation, and hence we suggest it is appropriate for it to be reviewed.

Detailed issues

Mitigation

145. Disputes between Government departments and even within the same departments has become an issue, particularly around the adoption of certain measures. For example, where the NPS calls for sustainable highway drainage but the Highway Authority refuses to adopt it.

146. It can also be difficult to get senior level intervention at organisations such as Natural England. They sometimes appear reluctant to give a strategic steer to their local offices.

147. These organisations must give strategic direction, and there should be a clear national policy obligation on such bodies to adopt a constructive approach to engagement, and to focus on problem solving (even if they wish to maintain objections on some points that cannot be resolved).

148. **There should be better co-ordination between national and local officers in organisations with a specific statutory role in advising the Secretaries of State on important issues (e.g. Natural England and Historic England).**

149. **Guidance must go further than simply setting out the well-established tests for the imposition of requirements and taking account of obligations, because these tests are not being properly applied in practice. It should therefore go on to explain why mitigation should only be provided if it is genuinely necessary to make the effects of a project acceptable, and is no more than is needed for that purpose, and that requiring mitigation that does not satisfy those tests is contrary to the public interest as it builds unnecessary costs and delay into the promotion and implementation of NSIPs.** Please see paragraph 128 to 130 above.

Question 8. Does the NSIP regime successfully interact with other consenting and regulatory processes and the wider context within which infrastructure projects operate?

Strategic issues

Section 150 consents and the link between DCO Regime and other consenting Regimes

150. **There needs to be much clearer guidance on the link between the DCO regime and other consenting regimes.** The guidance must explain clearly that there is a policy presumption that section 150 will be used and 'normal' consenting authorities will consent to the relevant consent being included in the DCO unless there are clear and good reasons for that not to happen

151. **There should be a root and branch review of the list of consents that can be dealt with under section 150. The current list is inadequate and should be extended in order to move the system closer to the one stop shop consenting regime that was intended.**

152. A particular example relates to the interaction between the airspace change regime and the DCO regime. This caused problems at Heathrow in respect of the proposed third runway and at Manston Airport. Because detailed airspace change design comes after DCO, it is not possible to accurately define air noise effects at the DCO stage. This leads to those people that will be affected not understanding the impact on them until years down the line when a detailed airspace design has evolved.

153. From the promoter's perspective, the issue is that consent is granted for the infrastructure on the ground before consent is granted to change the airspace to allow the new infrastructure to operate as it was designed to do. Promoters (investors) would therefore not know whether to begin building the infrastructure as they might not necessarily be able to operate it efficiently and effectively and as it was designed to operate as that was dependant on the outcome of the significantly later airspace change process. **On major infrastructure projects, important aspects such as this (e.g. airspace change) should be wrapped into the DCO process. Those charged with managing these parallel processes, such as airspace change, need to be far more proactive in interacting with the DCO processes in a positive and constructive manner to achieve deliverable and implementable projects.**

NPSs and regional planning

154. **The Relationship between PA 2008 and regional spatial planning needs to be clarified.** Where there are major sub regional initiatives like the Oxford-Cambridge arc, Government should consider using a NPS to set out the

infrastructure requirements for that area. This would help projects coming down the line on an individual basis.

Enforcement in the PA 2008 Regime

155. **The enforcement regime for breaches of DCOs or building NSIPs without a DCO in place needs to be reviewed.** There is a strong feeling that criminal sanction is not the most effective form of enforcement and that a move towards mirroring relevant aspects of the TCPA enforcement regime would produce a better, more practical framework.

156. If the TCPA was mirrored for DCO breaches, building an NSIP without a DCO in place would make you subject to an enforcement notice procedure. TIF recognise the public interest importance of discouraging developers from commencing nationally significant infrastructure projects without approval. However, a difficulty with the current approach is that developers of small schemes whose allocation between one regime and the other (i.e. PA 2008 or TCPA) is less clear face the risk prosecution even if they have (in good faith) obtained planning permission for their development in advance and complied with its terms. Such developers may (and generally do) take legal advice before proceeding, but unless the answer is clear they can be dissuaded from implementing beneficial schemes or can end up reducing their scale to mitigate the risk of prosecution. Neither is in the public interest, and criminal sanction seems wholly inappropriate as a response to such a situation.

157. Similarly, if you breached the terms of a DCO which is in place, you would face something similar to the breach of condition notice regime.

158. In both cases if the issued notice was not complied with a criminal sanction could then be enforced (as is the case under the TVCPA regime) but for the initial breach in either scenario an enforcement / breach of condition notice would be a more practical way of proceeding, not least as it would bring in the possibility of breaches being stopped by High Court injunction (which seems a better disciplinary measure than a criminal sanction).

159. Under the current regime criminal enforcement is likely to be through the Magistrates Court. In many cases the existence or otherwise of a breach may be unclear as a matter of fact, and could turn (for example) on the legal interpretation of bespoke DCO drafting. Magistrates may not be best qualified to identify and pass judgement on the legal breach of the DCO terms (given they would be interpreting a bespoke statutory instrument with which they would have no familiarity) and to apply the facts of the situation to establish whether in fact there had been a breach. Experienced local planning officers are likely to find use of an enforcement notice / breach of condition notice approach a more practical way of bringing a timely end to breaches of a DCO or construction of an NSIP without an authoring DCO in place.

DCO and environmental and other permitting processes

160. There is scope for better co-ordination with regard to the overlap between the DCO process and wider environmental and other permitting processes, for example in relation to Habitats Regulation Assessment, protected species licensing, loss of public open space, (as noted at paragraph 152 and 153) airspace change processes or under local byelaws (the disapplication of which may be possible or appropriate under the relevant DCO).

161. On a point of detail in that respect whilst the Habitat Regulations allow for one decision-maker effectively to defer to another where they are better placed to judge the potential impacts of a regulated process on protected sites, **there would be merit in clearer guidance as to when and how decisions relating to this allocation of responsibility should be made.**

Question 9. Are there areas where limits in the capacity or capability of NSIP applicants, IPs and other participants are resulting in either delays or adversely affecting outcomes?

Strategic issues

Public sector training and expertise

162. At the start of the PA 2008 regime PINS ran training sessions for LPAs involved in DCO applications. However, this effort appears to have ceased as PINS resources came under pressure and now the burden falls on applicants. Greater public resources need to be made available to statutory bodies involved in the DCO process in order to enable then to carry out their statutory functions in that respect. Resources are not limited to purely financial resources, access to high quality training on the regime would be a significant benefit to statutory bodies involved in the PA 2008 regime.

163. It should be recognised that the extent to which LPAs need the training depends on how many DCO projects they have to engage with, for example Suffolk County Council have engaged with DCO projects as LA and promoted its own NSIPs and will have far greater expertise than for example Surrey County Council. The Government should explore how that knowledge gleaned by one LA can be passed on to the benefit of other LAs, for example could the Local Government Association have a role in such an initiative or could the LA with knowledge and experience work with PINS on combined training for LAs "lacking" the relevant knowledge and experience.

164. **Guidance on how Performance Agreement between promoters and statutory bodies should be used to secure LAs and other statutory bodies funding for work outside their statutory responsibilities would help as would strengthening the advice in PINS Advice Notes 2 (The role of local authorities in the development consent process) and 11 (Working with public bodies in the infrastructure planning process). Developing some structured templates that Las and other bodies can utilise as starting point would also assist**

Section 150 consents and policy on adjusting other regimes

165. **There should be guidance released on the extent to which the DCO regime can adjust other statutory regimes**, for example the London Permitting Scheme (LOPS).

166. On the Northern line extension project, the LOPS was a struggle and when it was tried to be disapplied, Southwark Council objected. The same was true opposite TfL and the affected London Boroughs on Thames Tideway Tunnel. **On all regimes that a project interacts with, there should be consideration given to the policy stance as to which can be disapplied if the applicant wants to do so.**

167. In some cases, applicants do not have the detail to justify disapplying a regime, so it should be the applicant's choice in terms of how they frame the draft DCO, but if the applicant has detail available to them, there should be, given the philosophy in the 2007 White Paper, the ability to disapply, including in relation to LoPS.

168. Please also consider paragraphs 150 to 153 in response on question eight.

Other participants in DCO examinations

169. **ExAs should be much more robust in dealing with immaterial objections raised by objectors at hearings.** A lot of time at hearings is wasted dealing with immaterial points. A failure to do this places an unreasonable burden on promoters who have to respond to these immaterial points that uses up additional unjustified time and financial resources. It is also not fair to promoters to take up time on immaterial points as that reduces the time available for dealing with genuine issues etc.

170. ExAs need to manage hearings both to stop time being wasted on immaterial points raised by objectors, to stop objectors constantly changing and evolving their case against the application (see paragraphs 95-97 above), and to curb repetition of the same point by different individuals.

171. Allowing air time to objectors irrespective of materiality of the points they are raising does not reduce Judicial Review risk which appears to be a widely held perception, it may in fact increase the Judicial Review risk.

172. Applicants promoting a controversial NSIP face a big task in terms of the scale of investment needed to prepare an application to a standard capable of acceptance and to promote that application through an intense six-month examination.

173. The six-month examination period involves successive rounds of written questions and submissions to which the applicant must respond, interspersed with ISH, Compulsory Acquisition Hearings and Open Floor Hearings. The workload is immense, and involves responding to large volumes of material at every deadline.

174. The volume of written questions is increasing, and it is not apparent that this is reflects projects becoming more complex. In a number of recent examinations many questions seem to do little more than identify points made by IPs (including points which are patently ill-founded, e.g. because they question the merits of national policy) and ask the applicant for a response. Applicants already have an opportunity to respond in writing to points advanced by IPs if they think they are not already covered adequately in the material that has been submitted. Such points should only be the subject of written questions where

the ExA has first considered the existing material and any such further response, and decided that the issue raised is important and relevant and has not yet been adequately addressed. The question should make clear why that conclusion has been reached. Simply passing on points directly from IP representations to written questions involves unnecessary duplication of work, placing undue pressure on applicants and reflects a 'refereeing' rather than inquisitorial approach.

175. There seems to be a bit of nervousness amongst inspectors in giving clear direction as to what is and is not relevant. Lots of airtime is therefore wasted at hearings.

176. **More should be done to make people stick to the points that really ought to be dealt with.** The current approach unnecessarily burdens applicants, both in terms of resources, effort, time and cost. (Please see generally paragraph 73 to 89 above)

177. It is often suggested that the ExA conduct matters in this way to reduce Judicial Review risk. However, the process should not be driven by the need to reduce Judicial Review risk, but rather by the need to make the process work as effectively as possible. The Planning Court is developing a sophisticated understanding of the Planning Act system, and is well-placed to 'sort out the wheat from the chaff' in terms of any concerns and complaints about procedural fairness.

<u>IPs and fair hearings</u>

178. Difficulties are arising as a result of the sub-optimal level and quality of engagement by statutory bodies. This is causing delay, including during the post-examination period where additional work has to be undertaken by applicants in order to address outstanding issues which ought to have been capable of resolution during the examination itself.

179. **Suitable guidance and training has a role to play in improving this position, but it would be worth considering other means of seeking to arrest and if possible reverse this apparent trend.**

180. There is also a problem with Open Floor hearings and Issue Specific hearings going over the same ground. Interested parties such as individual local residents and organised local opposition groups often make points at the Open Floor hearings (an appropriate forum), but are then being given equal airtime as e.g. bodies with a defined statutory role in advising the Secretaries of State at Issue Specific hearings, where they repeat the same points.

181. There are only a limited number of hours available for oral representations to be made at any hearing. If time is taken up in this way, it is inevitably at the expense of affording the ExA time to explore issues with the

applicant and statutory stakeholders. For applicants, this risks undermining the fairness of the process because they and statutory stakeholders do not get the necessary 'airtime' and/or the valuable opportunity that hearings provide to understand what the ExA and statutory stakeholders are concerned about (and for the latter's concerns to be probed, tested and clarified) is curtailed.

Question 10. Is there anything else you think we should be investigating or considering as part of our end-to-end operational review of the NSIP process?

Fees

182. **Application fees and Examination fees are too low and should be increased and charging for pre-application meetings advice should be brought in.** This would create more funding and resources for PINS which would assist them in examining applications

183. If fees for applications are to be increased promoters are entitled to expect a better level of service out of the PA 2008 regime. The prospect of increased funding for PINS should be linked to their achievement of an agreed set of performance KPIs, which must be transparently reported and monitored. These KPIs could reflect a number of the recommendations made by TIF, for example improvements to the PINS website generally and in context of emerging process of digitalisation.

The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (APFP Regulations)

184. **There is a need to review the application documents that are required by APFP regulations**. Some of the required documents are not rarely used in Examinations. Others are not required by the APFP Regulations but are routinely provided by applicants because they are a good idea e.g. a Mitigation Route Map detailing how committed mitigation is secured in a legally binding manner or a table showing the status of negotiations for land that is subject to CPO powers in the DCO.

185. **There is also a need to review the list of consultees in the regulations.** Applicants should be allowed to apply to PINS for a bespoke reduced list of consultees to reduce the consultation burden in respect of projects that will not concern otherwise prescribed consultees. The way in which LA s to be consulted under section 42 and 43 of the PA 2008 are identified should also be reviewed as frequently LAs a very significant distance for the DCO application site are consulted for no real purpose as they will be entirely unaffected by the project in question

Timescales

186. **There should be an option for shorter examination processes for less controversial projects.** Projects that did not involve a CPO or a HRA seem to be obvious candidates. Sensible criteria based judgements allowing flexibility and a three or four-month examination would be a good way of attracting in more projects that are close to the NSIP threshold.

187. Too much time is taken up throughout the six-month examination educating the ExA about the basic architecture of a scheme, how it is laid out on

the ground, how the application plans work in connection to the relevant DCO articles and requirements etc.

188. **In the lead up to Preliminary Meetings there should be a short period – including a hearing or hearings - to deal with matters like building knowledge and understanding of the proposed project and preliminary assessment of issues or agreeing scope of areas of agreement and disagreement re SoCGs etc.** The PA 2008 regime does not currently provide an obvious opportunity for applicants to set out the project other than in writing. A formal hearing in which the applicant could explain the 'architecture' of the application (DCO, works plans, other plans, transport strategy etc.) would be likely to assist ExAs and others to understand the subject matter before the examination starts. This should reduce the need for questions directed at this issue, and ensure that where there are questions they are more rapidly focussed on substantive issues rather than simply information gathering.

Proposed section 35A of the PA 2008

189. **A new section should be added to the PA 2008 that allowed for an application to take a project out of the NSIP regime if certain criteria are met.**

190. Criteria could include where a project is on a site allocated for the proposed use in the relevant local plan, the project has LPA and other regulators support, the size of the scheme is not significantly above the relevant NSIP threshold or there is no requirement for CA.

191. An alternative option is for a fast stream DCO process as a potential means of accelerating projects.

192. These two options would mean there is either a complete opt out and or an accelerated process for simpler projects.

Competing DCO applications

193. **Guidance is needed on how competing DCO applications should be dealt with and determined.**

194. This can occur when there hasn't been a nominated undertaker designated to carry out a project and did arise on Heathrow expansion, in part for exactly that reason. It was also an issue in respect of competing rail freight terminal applications, namely Rail Central (application ultimately withdrawn) and Northampton Gateway Rail Freight Interchange (DCO confirmed).

195. The process for handling such applications is unclear (it is not defined as far as TIF is aware) and unsatisfactory and the situation is not in the public interest. Interested parties, statutory bodies, landowners or otherwise have to

engage with two separates pre-application processes. There is also the possibility of examinations running in parallel or being conjoined which carries a huge amount of complexity

196. This is nationally significant infrastructure where a national need has been established at policy level. So, this situation is clearly not in the public interest.

The role of the Planning Court

197. The development of a specialist Planning Court within the wider remit of the Administrate Court has been a positive benefit to high quality and responsible infrastructure planning in England and Wales.

198. The specialist judges within the Planning Court have developed an approach of delivering practical and measured judgements that balance the competing merits of those bringing and defending the cases that the Court determines. A particular feature has been a greater willingness not to interfere with the exercise of judgement by decision makers around such matters as the interpretation of national policy, provided of course that the decision maker stays within the remit of the relevant legal procedures and maintains rational and reasonable decision making.

199. These decisions have done much to improve the planning system in England and Wales. However, members of the TIF Working Group with experience of these cases are concerned that legal boundaries these cases establish are not being adequately communicated to ExAs (as well as other stakeholders) who adopt an approach to such matters that is far more cautious than it needs to be in light of the case law when considering legal issues before them during the pre-application and Examination phase of the DCO process.

200. **TIF would like to see, and more positively recommend, greater training for ExAs in this respect and are confident that the successful role out of such training would be a considerable benefit to all those involved in the DCO process.**

The Infrastructure Forum Planning Working Group

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