IPC Process, Procedures

And Potential Challenges

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1.1 A Landmark Seminar, see accompanying PowerPoint slides.

2.1 This Paper accompanies the Landmark Seminar 'Working Successfully with the IPC'. It attempts to provide a practical introduction to how the IPC is currently envisaged to operate. It does not seek to argue again the merits or demerits of the IPC itself, or the merits or demerits of the Government's apparently intended method of procedure – these arguments having been extensively rehearsed during the passage of the Bill and since.

2.2 It must come with three important 'health warnings':

2.3 First, we remain in uncharted territory here. The IPC has 'opened its doors' as of last October for 'initial advice' and will shortly receive applications. It has not, of course, considered any yet. CLG has recently published:

Infrastructure Planning (Examination Procedures) Rules 2010
Infrastructure Planning (Interested Parties) Regulations 2010
Infrastructure Planning (Decisions) Regulations 2010
Infrastructure Planning (Compulsory Acquisition) Regulations 2010
Infrastructure Planning (Fees) Regulations 2010
Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010
Guidance on Examination Procedures
Guidance on Procedures for Compulsory Acquisition

2.4 We are in uncharted territory, also, in that the process of examination envisaged by the Government for IPC matters is not very like anything we have seen before in the 'planning world'. It is not an inquiry process as we have come to understand it. It is not an EIP process as known from Structure Plan/RSSs. Nor yet is it the LDF DPD process as it has developed. It is, perhaps, more akin to the sorts of 'public inquiries' that have been used to examine alleged government failings[1]. It is also a process, as we shall see, where there has been a degree of 'see-sawing' as to intentions.

[1] Most topically the Chilcot inquiry – whose rigor with witnesses has been justly questioned; but there are others - examples of processes famously short, effective or fair, such as Bloody Sunday, Hutton and Macpherson – but I am slipping into commentary contrary to paragraph 2.1 above.

2.5 The third health warning is that no one knows what the future will hold for the IPC under a Tory Government. This uncertainty seems to extend to the Tory Party itself, with a number of apparently conflicting statements made as to what such a Government would do.

2.6 Three things can be observed, however:

2.7 The first is that the idea of National Policy Statements appears to be agreed generally to be a good one. The length of the Terminal 5 and Dibden Bay inquiries was due in large part to the absence of a clear statement of government policy.

2.8 Secondly, the principle behind the IPC decision-making (not actually devolved power, but rather the 'devolution of blame') is one which is no doubt attractive to governments whatever their political hew.

2.9 Thirdly, the IPC and CLG civil servants are running flat out to have a fully appointed, fully staffed and fully functioning IPC before the next election; by the time of a new government, the IPC will be more difficult and more expensive to remove than to leave alone.

3.1 Section 55 of the Act provides for the acceptance of by the IPC an application for development consent and s. 56 for the notification, by the applicant, of various parties that the application has been accepted. This notification is in a prescribed form and, in a sense, it starts the examination ball rolling, as it is from here on in that parties emerge so as to be 'interested parties', a term explained shortly.

3.2 The notification under s. 56 is to include a date by which any party must have submitted their 'relevant representation'[2]. The period for submitting such representations being not less than 28 days from receipt of the notification[3]. These matters are also to be publicised as prescribed[4]. Section 58 provides for certification that s. 56 has been complied with. Separate provision is made for the applicant to inform the IPC of who is affected by any powers of

[2] S. 56(4); as to the form of the representations themselves, see s 102(4), IP(Applications and Procedures) Regs 2009, Regs 7 and 8 and IP(Interested Parties) Regs, Reg 4;

[3] s.56(5)

[4] s. 56(7)-(9).

compulsory acquisition sought[5] (who thereby become 'affected persons', a category of interested party[6]).

3.3 At section 60, following acceptance of the application by the IPC and certification of the applicant having fulfilled the notice obligations, there is a requirement then for the IPC to invite each 'relevant local authority'[7] to submit, within a stated deadline, a 'Local Impact Report' – ' a report in writing giving details of the likely impact of the proposed development on the authority's area (or any part of that area)'.

3.4 The 'LIR' is an interesting notion[8]. The placing of s. 60 in the scheme of the Act would imply that it is to be early in the process – ahead, for example, it would seem of the decision as to whether the matter is for a single commissioner or a panel. The IP (Examination Procedures) Rules, however, cover LIRs within the Timetable in Rule 8, after providing for Written Representations from the parties, comments and counter comments thereon, and Statements of Common Ground. The Guidance[9] states that LIRs should normally be within 6 weeks of the preliminary meeting with comments thereon not less than 21 days thereafter. It is, however, completely silent on the content, role or value of LIRs.

3.5 This latter point may be deliberate. While provided for in the Act, one thing that may have become apparent to those given the task of implementing the Act is that local authorities cannot be expected to be impartial observers in respect of Nationally Important Infrastructure Projects in their area. Where the impetus is from the private sector, they may be opposed, but very often the infrastructure is 'public' in some way and they will be strongly in favour. They may, indeed, be the applicant.

3.6 In these circumstances, the LIR is unlikely to be uncontroversial. It may, indeed, be largely worthless. Where it opposes development, the authority's LIR will be said, by the applicant, to over-egg the pudding; where it opposes it, its LIR will no doubt be accused by objectors of under-egging any impact.

[5] S.59

[6] IP(Interested Party) Regs, Reg. 3

[7] S. 102(5) ie the local authority where the development is proposed, and any local adjacent authority

[8] and unfortunate acronym

[9] Guidance para. 61

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3.7 Early in the process, the IPC[10] will decide whether the application is fit for a single commissioner or needs to go before a panel. Where there is an NPS, the panel has the ability to make the decision[11]. Where there is no NPS, it reports to the Secretary of State[12]. A single commissioner, however, is always a reporter. If there is an NPS, he reports to a the IPC; if not to the Secretary of State[13]. Where he reports to the IPC, the decision is actually taken by the Council of the IPC[14].

3.8 Once appointed, the panel or commissioner, as the case may, be becomes the 'Examining authority' for the examination[15]. The division between single commissioner and panel cases is explained in the draft Guidance[16], which must, when published, be taken into account when coming to the decision[17]. The division is determined having regard to:

> (A) the complexity of the case and the number of issues raised including anything novel, legal or technical or stretching over more than one NPS;
> (B) the level of public interest in the outcome, including the likelihood of needing hearings; and
> (C) whether or not the project is one for Aviation or Nuclear Power, in which case it is almost certain that a panel will be required[18].

3.9 It should be noted, however, that examinations by both single commissioners and panels are to be conducted in accordance with Chapter 4 of the Act, and both may seek the assistance of appointed assessors and advocates[19]. The principle difference lies in the

[10] ie the Chairman, in consultation with others: s. 61
[11] s.74(1)
[12] s.74(2)
[13] s.83(1)
[14] s. 84 – for the Council of the IPC, see Sch. 1
[15] s.84(2) and (3)
[16] paragraphs 11-25
[17] s.61(3)
[18] there is also provision to switch to a panel where it becomes apparent that it should not be handled by a commissioner alone: s. 62
[19] appointed by the Chair of the IPC under ss. 100 and 101

reporting/determining role and the fact that panels can, in theory, conduct concurrent hearings.

4.1 The definition of the parties is important as rights or otherwise to engage in the process are dependent on what sort of party one is. Getting oneself correctly defined as a party is, therefore, significant.

4.2 For the applicant, it is easy. He is recognised as one of the 'interested parties' within s. 102(1).

4.3 There then follows the concept of a 'statutory party'. These are defined in the IP (Interested Parties) Regulations, to include a range of statutory bodies embracing government, local government and executive bodies, as appropriate[20], together with 'affected persons'. Being a statutory party brings with it entitlements to consultation and notification, as already seen.

4.4 'Affected persons' are 'those whose name has been given to the IPC in a notice under section 59 (notice of persons interested in land to which compulsory acquisition request relates)'[21]. That in turn is limited to those persons whom the applicant 'after making diligent inquiry, knows … [are] interested in the land to which the compulsory acquisition request relates or any part of that land'[22].

4.5 I cannot immediately find any provision to allow someone to become an 'affected party' if (after diligent inquiry) they have been left off the s. 59 list. This might become important as, as we shall see, entitlement to require and appear at a 'compulsory acquisition hearing' is limited to 'affected persons'[23]

[20] the Schedule to the IP(Interested Parties) Regs sets out the bodies and the circumstances applicable, including such charmers as The Equality and Human Rights Commission and the 'relevant local resilience forum'; both 'all cases'.

[21] IP(Interested Persons) Regs, Reg 2

[22] s. 59(4)

[23] s.92

4.6 Relevant local authority and, if the land is within Greater London, the GLA are interested parties[24].

4.7 Then comes the important category of persons who have 'made a relevant representation'[25]. This is the method by which a party not being the applicant, government body, quango, or affected landowner becomes involved.

4.8 A 'Relevant Representation' is one which[26]:

- Is about the application[27];
- Is made to the Commission in accordance with the IP (Interested Parties) Regulations ;
- Is *received* by the Commission no later than the deadlines contained in the s. 56 notice or publicity;
- Contains the material prescribed in the IP (Interested Parties) Regulations;
- Does not contain material about compensation;
- Does not contain material about the merits of an NPS;
- Does not contain material that is 'vexatious or frivolous'.

4.9 The last three prohibitions would not, we assume, render an otherwise 'Relevant Representation' not so, but would render those parts of it containing those proscribed matters irrelevant.

4.10 The first and third of the prohibitions raise no problems; the central one sits oddly, however, with the IPC's decision-making power at s. 104(4)-(8). These provide exceptions for the general rule [s. 104(3)] that where a relevant NPS is in force, the decision of the IPC must be in accordance with that NPS. They embrace questions of international obligation, legal duties or other unlawfulness or 'the adverse impact of the proposed development would

[24] s.102(1); NB 'relevant' here applies to the authority for the area within which the land lies, and the adjacent local authorities: s. 102(6)-(8)

[25] s.102(1)

[26] see s. 102(4)

[27] I need not quote Homer Simpson on the subject.

outweigh its benefits'. We are reminded[28] that these exceptions apply even where the NPS identifies a location as suitable or potentially suitable.

4.11 Given s. 104, it seems that challenging the merits of an NPS may frequently form part of an objector's case, particularly, but not limited to, the balancing exercise required under s. 104(7). It seems that, given the terms of s. 102(4)(e)(ii), an objector seeking to mount such a case would be well advised to point out and rely on s. 104 when making such observations in his 'Relevant Representations'.

4.12 As to the nitty gritty, Relevant Representations are to be on a registration form[29], and must contain[30]:

- name, address and telephone number of party, agent and contact;
- any interest in land affected;
- 'an outline of the principle submissions which the person proposes to make in respect of the application'; and
- a statement as to whether or not the person intends to make oral representations at a hearing

4.13 The 'Relevant Representation' therefore is not the representations of a party per se. It is more akin to a Statement of Case, telling the IPC what the party's case is. This is made plain in the Guidance[31], but also in the scheme of the IP (Examination Procedure) Rules, which provide for the exposition and evidencing of the case at a later stage.

4.14 It is none-the-less a critical stage. Not only does it put the party on the footing of an 'interested party', with the privileges that brings, but it acts, like a Statement of Case, to define and hence limit the scope of the case to be presented.

4.15 The Guidance is not very forthcoming as to the content of the Relevant Representation. Although there is provision for the IPC to issue its own guidance, the IPC Legal Director,

[28] S.104(9)

[29] see IP (Applications and Procedure) Regulations 2009

[30] IP (Interested Parties) Regulations, Reg 4

[31] at paragraphs 31-36

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Douglas Evans has suggested[32] that it would resist the temptation to be too prescriptive, recognising that one size does not fit all.

4.16 Section 56(4) provides for the fixing of a deadline for those who have been notified under s. 56(1) – not less than 28 days from receipt of the notice. Section 56(8) provides that the publicising of the application prescribed under s. 56(7) should also provide for a deadline for making Relevant Representations.

4.17 It is important, understandably, that these deadlines are met. Rule 3(2) of the IP (Examination Procedure) Rules allows late reps to be disregarded. Further, although there is discretion at Rule 15 to permit to appear persons not otherwise entitled to appear at a hearing, it places the control fairly with the examining authority, and the party has lost the 'interested party' status that allows it, for example, to require an open floor hearing under s. 94, and appear as of right.

4.18 There is provision for a round of comments on Relevant Representations. The Relevant Representations are, themselves, to be made available by the IPC 'as soon as practicable'[33] and comments on them, by interested parties, are to be with the IPC by the time of the 'Preliminary Meeting' held under Rule 7, or the date specified in the 'Timetable' issued under Rule 8, whichever is the latter. It has to be said that as the Timetable is issued after (and consequent upon) the Preliminary Meeting, the deadline will always be that in the Timetable[34].

5.1 It is for the examining authority to decide how to examine the application[35], although this is subject, of course, to the other parts of the Act [eg s. 90 – see below], prescribed Rules and Regulations, and the duty under s. 87(2)(b) to 'have regard to any guidance issued by the Secretary of State'. It must, we assume also be subject to the principles of natural justice, and subject to the overseeing jurisdiction of the Courts [see s. 118].

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[32] IPC meeting with PEBA; October 2009

[33] Rule 3(5); Rule 21 provides for the manner of 'making available' [rather dangerously, given the mandatory terms of Rule 3(5), Rule 21 provides that they are 'made available' where *all* interested parties have been notified, placing a considerable burden on the IPC as well as opening the door to procedural errors where one or more have not been 'notified' – as to which term see Rule 22]

[34] see Rule 8(1)(d)

[35] s. 87(1)

5.2 As we have seen above, the IPC is permitted to disregard representations that are frivolous, question NPSs or concern compensation[36]. It is a *discretion* to ignore such matters – importantly so in respect of NPSs.

5.3 The IPC must make an 'initial assessment' of the issues[37] within 21 days of the deadline for receipt of the Relevant Representations[38] (although the Guidance does say 'normally'[39] - as with all deadlines set in the Rules, it should be noted that the IPC can extend them under Rule 23!).

5.4 At this stage, the IPC will have the application and the Relevant Representations. From these, it will assess the necessary structure and programme, and start to arrange the necessary expert assistance[40].

5.5 By s. 88, a Preliminary Meeting must then be held, to which the applicant and interested parties are to be invited, with at least 21 days notice accompanied by an agenda for the meeting[41]. The Guidance indicates that this meeting should be within 6 weeks of the deadline for Relevant Representations[42].

5.6 Under s. 88(4), the principal purpose of the Preliminary Meeting is to take soundings on the Rule 8 Timetable which must then be issued (along with a note of the meeting) 'as soon as practicable' thereafter.

5.7 This important document sets out the deadlines (able to be amended under Rule 8(3), for:

- written representations;
- questions on written reps from the IPC

[36] s.87(3)
[37] s. 88(1)
[38] Rule 5
[39] Guidance, para. 48
[40] Guidance, para. 33
[41] Rule 6(1) and (2)
[42] Guidance, para. 49

- comments by applicants on relevant and written reps of others
- comments by applicants on responses to questions from others[43]
- comments by interested parties on relevant and written reps
- comments by interested parties on responses to questions from others[44]
- statements of common ground
- interested persons to notify their 'wish' [sic[45]] for an open-floor hearing
- affected persons to notify their 'wish' [sic[46]] for a compulsory acquisition hearing
- summaries of written representations
- the Local Impact Report(s) and comments thereupon
- anything else the IPC considers necessary

It also to sets out the date of any 'issue-specific hearing' under s. 91.

5.8 Although these dates can be varied, it is important to note that the **right** under ss.92 and 93 to have a hearing can only be exercised if notification is given within the deadline period (see also Rule 13(2)). Further, by Rule 10(8), a written representation, response to a question, or further information may all be disregarded if received after the deadline appointed.

5.9 The Rule 8 Timetable is not, therefore, a timetable for the examination itself. It is not a 'programme' as such. Although the IP(Interested Parties) Regs at Reg 4(2)(f) do require that the Relevant Representations contain a statement as to whether the party intends to make oral representations at a hearing, at the stage the Rule 8 Timetable is drawn up, necessarily, no formal notifications have been received for such hearings.

5.10 PEBA did suggest[47] that, once the notices requiring hearings are all in, there should then be a programming meeting (or meetings) held to establish the programme for them. The draft Rules were not amended, but there is the scope for these meetings, perhaps in s. 88(5), s. 89(3), Rule 8(1)(k) and (3). Any such programming meeting should, no doubt, be done after the notification of such hearings under Rule 13.

[43] Rule 8(1)(c)(ii) is rather ambiguous drafting – it may be intended to mean the deadline for the applicant to respond to the questions from others rather than, as written, to comment on the responses to the questions from others

[44] same point applies to Rule 8(1)(d)(ii)

[45] it is of course their **right** under s.93(2)

[46] it is similarly their **right** under s.92(3)

[47] PEBA Response to Consultation on IPC Examination Procdeures; October 2009

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5.11 It is also worth noting here that, as currently drafted, Rule 14(6) – the ability to refuse to permit cross-examination if the timetable in Rule 8 could not be met – is a bit of a nonsense as the deadlines in the Rule 8 are all for events long antecedent to the hearings themselves. Again PEBA had suggested[48] that Rule 14(6) be applied to the programme established at or following its suggested programming meeting, but, again, our humble suggestion was not taken up[49] and the nonsense is, therefore, carefully preserved.

6.1 Section 90(1) boldly states:

'The Examining authority's examination of the application is to take the form of consideration of written representations about the application.'

The force of that headline statement is lessened to a mild degree, however, by s. 90(2)(a), which provides:

'Subsection (1) has effect subject to (a) any requirement under section 91, 92 or 93 to cause a hearing to be held'

Section 91 is **where the IPC considers** an 'issue specific hearing' necessary;
Section 92 provides for the **right of an 'affected party'** to require a 'compulsory acquisition hearing';
Section 93 provides for the **right of an 'interested party'** [NB this includes the applicant] to require an 'open-floor hearing'.

6.2 These significant exceptions are accompanied by the slightly odd sounding s. 90(2)(b), which provides:

'Subsection (1) has effect subject to (b) any decision by the Examining authority that any part of the examination is to take the form of neither

(i) consideration of written representations, nor

[48] ibid

[49] beware – Boyle begins on a theme here.

(ii) consideration of oral representations made at a hearing.'

6.3 The Guidance remains completely silent as to this Delphic provision[50]. What is clear, however, is that, quite contrary to the spin-able headline of s. 90(1) that the IPC will conduct its examination on paper, a great deal of its work will actually (and wisely) be conducted at hearings, as the *right* to require them is given to every party.

7.1 The starting point, as always, will be the written material.

7.2 What is a 'representation' is defined in s. 102(2) to include evidence and the giving of evidence.

7.3 A representation is not, therefore, or is not limited to a submission. The important distinction between a submission and evidence is something which will need to be borne well in mind by the IPC and the parties. The interesting ramifications of the recent *Ely v. SSCLG* [2009] EWHC 660 need to be borne in mind when considering the limited duties in respect of written representations.

7.4 A representation may well, however, be a submission, and although no guidance is given, it is likely that for most parties the pattern that will develop will be:

- the 'case' for a party, being the first or 'cover' document and amounting to a submission, encapsulating and analysing the issues, settled[51] by a lawyer, and followed by
- a series of evidential 'reports', written by experts in the relevant topic[52] and accompanied by appropriate technical appendices [which the cynic might think jolly like proofs of evidence – as to which see below].

Without a clear distinction between submission and evidence, the IPC (and other parties) do not know how, or on what to rely.

[50] A séance perhaps. Or trial by combat? heads or tails? yard of ale? Who knows, it may even open the way to some form of mediation.

[51] naturally

[52] settled, naturally, by a lawyer

7.5 If nothing else, it is plain from Rules 10(4) and 14(3) that 'Written Representations' are intended to be part submission and part evidence.

7.6 By Rule 10(4), they must contain a statement as to which of the application or 'specified matters' the party agrees with, which they do not agree with and the reasons. This is quite an exercise[53], but it is not an evidential one – it is no doubt to assist the process of identifying the matters in dispute.

7.7 By Rule 14(3), at a hearing, any oral representations 'should be based on' either the Relevant Representations or the Written Representations. Oral representations are subject to the same definition (ie embracing both submissions and evidence – see Rule 2(1)) and so, when submissions are being made orally, these must be based on the written submissions made; where evidence is being given orally, this must be based on the written evidence submitted. The Guidance is explicit that written representations should include 'the data, methodology, and assumptions used to support the submissions'[54].

7.8 Just to underscore the similarity with proofs of evidence, these evidential written submissions, when relied on in hearings, must be accompanied by a summary if greater than 1,500 words[55].

7.9 This all amounts to a very British revolution. The basic need to provide evidence to the points being made in the submissions, and the basic need to be able to test that evidence – including, therefore, the need clearly to identify it, brings about the requirement that proofs of evidence be produced (with summaries) and be spoken to. It is simply that, for the IPC we are to call them 'written representations', not 'proofs'.

7.10 Interestingly, Rule 14(4) provides that a person making oral representations may depart from their written representations in order to cover matters 'which they consider relevant to the

[53] 'the application' is, presumably, all and any part of it; 'specified matters' are those provided pursuant to s. 113(3)(a) where the Secretary of State has intervened in the application [ie a 'call in'] and specifies matters for the examination to consider

[54] Guidance, para. 84

[55] Rule 14(3)

examination'. While no doubt this is valuable flexibility so as not to exclude relevant considerations, it is surely, not a practice to be encouraged. I note it is 'subject to the Examining authority's powers of control over the conduct of the hearing'. No doubt, costs sanctions would apply[56].

7.11 The greatest care, should therefore, be taken in the framing of the initial written representations. In short[57], it should amount to the preparation, as if at inquiry, of all the written proofs and appendices, bound, tabbed and arranged in the customary way, and topped off with a submission document, relying on (and referencing) the evidential material accompanying it.

7.12 The evidential documents should be in a form that would be suitable to be spoken to by live witnesses at any subsequent hearing. I would also strongly suggest an 'executive summary' at the front of each 'report' to ease the IPC into it. A 'digest' may also be considered helpful – provided it was fully referenced to the full text and appendices.

7.13 As indicated already, there is a requirement under Rule 10(4) that the written representations set out which parts of the application the party agrees with, disagrees with and reasons therefore. This is a formidable task. It might, in appropriate circumstances be best done in the form of a schedule, again referencing the parts of the application and the relevant parts of the evidence being produced by the party. This 'Rule 10(4) Report' will often be a sizeable and tedious document, but it is a statutory requirement and failure to compile it properly could lead to arguments further down the line about what points may properly be taken - and what points may not - at the hearings or otherwise[58].

7.14 Also new is the provision for the round of written questions and answers on the written representations. The Guidance indicates that *'in most cases there will be at least two rounds of written representations.'*[59]

[56] see Guidance at paragraph 84

[57] and don't tell Ministers

[58] though NB Rule 14(4) as mentioned

[59] Guidance at paragprah 79

7.15 The importance of this innovation cannot be overstated. These are thre opening heavy guns that pound the opposition positions before any fooy soldiers are sent in. Properly deployed, they are a critical weapon in the arsenal of any party. Poorly deployed, this statutory requirement to respond to 'further and better particulars/interrogatories' could fatally damage a party's case.

7.16 Depending on the timetable imposed under Rule 8, the weeks following receipt of the party's representations could be feverish indeed. This is particularly so for the applicant, who will have to analyse the representations from all other parties, frame its own interrogatories, respond to the IPC and provide further information, and also respond to the interrogatories directed to it (as well as comment on any responses received).

7.17 It would be best to assume, for the purposes of a large and controversial application that the entire team will be entirely occupied for the entirety of this part of the process. The team may not be at 'inquiry', but it should be considered, effectively, to be fully engaged none-the-less.

7.18 Again, the importance of this round of written questioning an answering cannot be over emphasised. If s. 90(1) is to mean anything at all, it is in these exchanges (including with the IPC itself) that the focus of the examining process is to be found. Similarly, given the quite explicit desire of Government to limit the opportunities for effective cross-examination[60], a very significant part of any opportunity for unpicking the case of other parties will be found in these written stages rather than (solely) relying, as traditional, on the advocate's questions.

7.19 As I say, properly handled, the round of written questions and answers can be made to suit a party's case very well. Whatever was the intention of the framer of the procedural scheme, however, no one should be under any illusion that the written rounds can be conducted without the expenditure of very considerable funds and time.

[60] wherefrom stems this seemly inveterate hatred of the Bar among our politcal masters? Is it simply that there are so many failed barristers in politics? Or is it independence that politicians don't like?

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7.20 Pan-technicon drivers should be very pleased with the Government for introducing this emphasis on the written word; tree-lovers, on the other hand, should be very concerned. Consultancy firms, Solicitors and the Bar should all sleep reassured. As always, it is the parties who will have to pay - and spare a thought for the poor IPC commissioner who has to read it all!

8.1 Hearings are provided for in one of three circumstances:

(1) Under s. 91, where, of its own motion, the IPC considers that it is necessary to have oral representations about a particular issue ('issue-specific hearing') in order adequately to examine the issue or enable an interested party to have a fair chance to put its case;
(2) Under s. 92, where an affected party (ie one subject to compulsory acquisition) requires one (a compulsory acquisition hearing); and
(3) Under s. 93, where an interested party requires one (an opn-floor hearing).

8.2 In the cases of ss. 92 and 93, as noted above, the request must be made in accordance with the Rule 8 Timetable, or may be disregarded.

8.3 Under Rule13, notice of hearings must be given at least 21 days in advance of them, with local notices, website and newspaper advertisement.

8.4 For issue-specific and open-floor hearings, once triggered, *all* interested parties are entitled to make oral representations[61]. Although this is caveated with 'subject to the Examining authority's powers of control over the conduct of the hearing', it is an open door to the hearing for everyone who has signed up as an interested party. In addition, there remains, of course, the discretion to permit oral representations persons not entitled (ie not interested persons) to make them[62].

[61] S. 91(3) and 93(3)

[62] Rule 14(10)

8.5 In the case of a compulsory acquisition hearing, it is only the applicant and the affected person who is entitled to appear[63], although they may be joined with other compulsory acquisition hearings (in which case there will be a number of affected parties attending)[64], coupled with the above mentioned discretion to allow those not entitled to make oral representations to do so.

8.6 There is a curious, and I believe erroneous comment in the Guidance in respect of *who* exactly might turn up at these hearings. The 'interested person' is the party. They have the entitlement. At para. 110, the Guidance suggests that they must appear 'in person', but with the discretion of the IPC to permit them to be represented by another and states that parties 'do not have an automatic right to call witnesses to corroborate their evidence'[65].

8.7 This appears both to be nonsense as a matter of approach and contrary to the Rules as they remain drafted. Again PEBA gently pointed this out[66] but, again, no alterations were made and the nonsense has been permitted to remain.

8.8 Plainly, it will be rare indeed if the interests of the interested person and the IPC are best served by hearing from the interested person him or herself. A body corporate could not, in any event, appear 'in person', and one doubts very much if dragging the CEO, Company Chairman or equivalent of BAA, Peel Holdings or Natural England would assist the process meaningfully. Further, where *evidence* is being heard – which, one imagines, is the real imperative for these hearings – the IPC needs to hear from the author of the written material before it. Recitation by A N Other is of no material value, even if A N Other is the person entitled to appear.

8.9 Moreover, the Rules, as I read them, are explicit in permitting both persons entitled to appear and those permitted to appear to appear through the medium of anyone they choose. This can be found in black and white in Rule 14(9).

[63] S.92(4)

[64] Rule 15(2)

[65] see similar point made at Guidance paragraph 41

[66] PEBA Reps *supra*

8.10 The net effect is that a party entitled or permitted to appear at one of these hearings can do so through an advocate, and present its evidence through the relevant expert. Inevitably, where controversial, questions will need to be asked and, of course, they need to be asked of someone whose answers can be given weight (ie the author of the evidence).

8.11 That begs… 'questions from whom?' and the clumsiness of the systems starts, really, to come into the fore.

9.1 By section 94(3) the conduct of the hearing is for the IPC.

9.2 As with other bold statements, this must also be caveated. The hearing must be in public, for example[67]. Moreover, it is subject to the Rules[68], and, not least, the provisions of the balance of s. 94.

9.3 It is for the IPC to identify the matters to be considered and any matters on which the IPC 'requires further explanation' from persons entitled or permitted to make oral representations[69].

9.4 This is, perhaps, a trifle odd as in two of the three types of hearings, they are convened as a consequence of the exercise of a right by one or more party. For this reason, no doubt, it is provided that the parties themselves are not precluded 'from referring to issues which they consider relevant…but which are not issues identified by [the IPC] … or [perhaps surprisingly] included in their relevant or written representations'[70].

9.5 As already covered, each party appearing can expect to be represented by an advocate and appropriate witnesses for the matters under discussion. Contrary to the Guidance (see SLIDE 8), this is actually an entitlement for anyone able to make oral representations (as opposed to merely observing). No doubt sensible programming of the sort with which we are used will prevent these events resembling a football crowd.

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[67] Although separate provision is made in the IP (National Security and Appointed Representatives) Rules

[68] s.94(5)(b)

[69] Rule 14(2) – (note, by the way, the care with which secondary legislation has been formulated; rule 14(2) refers to 'rule 15(3)'; there is no rule 15(3); what was rule 15(3) in the draft is now at rule 14(10)).

[70] Rule 14(4)

9.6 The IPC will be there, of course, in the guise of a single commissioner, or a panel, led by one commissioner, as may be the case.

9.7 In addition, there may be one or more assessors, depending on the issues. These are appointed under s. 100 and notified under Rule 11.

9.8 The Guidance dedicates (an unusually full) eight paragraphs to the subject of assessors[71]. The concluding warning is that they must be subject to the same rigorous approach to impartiality and the appearance of impartiality as the commissioners themselves. No doubt the established practice of PINS will be adopted in respect of IPC assessors.

9.9 Of a more novel nature is the suggestion in the draft Guidance at paragraphs 43 and 111 that the IPC might instruct and call its own expert witnesses. This caused some raised eyebrows to say the least. To quote PEBA's Consultation response:

> *"The references to the IPC calling its own expert witnesses … need considerable thought and reflection. Which power enables this? Who instructs these witnesses? On what brief? Who gets to question them? How are they to remain impartially and transparently separate from the decision-maker and process? How are they to be separated from the briefing received by the examining authority on other evidence within the topic… PEBA considers these matters likely to lead to a minefield of legal challenges."*

9.10 It appears that part of the thought behind the idea of the IPC's own witnesses stems from the imperative that the IPC should, as a starting point, be conducting the questioning and the recognition that in order to do that, the commissioner or IPC Counsel (as to which see below) would need their own expert instruction in order to frame the line of questioning. It may also be that the idea grew from a misunderstanding of the meaning of the discretion in Rule 14(10) to permit persons to address the hearings other than those entitled to make oral representations (certainly the passages at paragraph 43 and 111 are linked to the erroneous passages at 42 and 110).

[71] 69-76

9.11 The PEBA meeting with Douglas Evans[72] strongly indicated that (just as 42 and 110 of the Guidance is wrong so) paragraphs 43 and 111 were to be subject to very considerable review, internally. However[73], these paragraphs were not, in the event, removed at all.

9.12 The idea of the IPC having its own witnesses is indeed a minefield for all the reasons set out in the PEBA response. It will also be very expensive – quite beyond the fees currently identified. It would also a singular waste of resources given that the applicant and the objector(s) who were at loggerheads on the issue would already have instructed their own experts. In most cases, the commissioner or panel would be expected to adjudicate between the two rival positions. Where the matter really is too technical, the role of the assessor comes into play.

9.13 The other person for who the scheme makes provision to attend an IPC hearing is the IPC advocate.

9.14 This is a Barrister, Solicitor, or 'advocate' appointed under s. 101 by the chair of the IPC at the request of the examining authority to 'provide legal advice and assistance' including 'carrying out on behalf of the Examining authority any oral questioning of a person making representations at a hearing'. Their appointment must be notified to interested parties under Rule 12.

9.15 The provision for the IPC to instruct its own Counsel appears to have come in both as a consequence of concerns about the provision to which we are about to turn, and the provision itself. It was felt by Government that one way to take the sting out of the observations that parties would want to cross examine, and to practically ensure the IPC could do the job designed to be given to it was to provide for the IPC to have its own professional advocate.

9.16 That brings us neatly to the elephant in the room: section 94(7) and

[72] October 2009

[73] and following a pattern just observed

'the principle that any oral questioning of a person making representations at a hearing should be undertaken by the Examining authority'.

10.1 I promised not to indulge in debating the wisdom of the IPC or any of its powers. Her Majesty has been pleased to give her Assent to the Planning Act 2008, and we must live with it. But, oh, what a foolish exercise is s. 94(7)!

10.2 I had thought (or hoped) that we were now witnessing a moving away from the high watermark of the Bill, where it was proposed that cross-examination by parties should be 'in exceptionally circumstances'. Now I am not so sure.

10.3 PEBA was not alone in finding the draft Bill an extraordinary position, but it did go and see Baroness Andrews on the matter - to be faced with the noble minister and three senior civil servants. At that stage, Baroness Andrews appeared, quite genuinely, not to understand the point of cross-examination – by anyone.

10.4 It hardly needs to be rehearsed in this forum, but the ability to test evidence by questioning the giver of that evidence orally and in public is of signal importance both to parties putting their case, and being seen to have/feeling that they have put their case. It should (always) be of advantage to the decision-maker, wherever matters of fact or expert judgement are in issue, to have those matters exposed to cross-examination.

10.5 The beneficial effects can be described (shortly) as threefold:

- on the right occasion, the evidence as eventually arrived at will materially differ through the questioning from that originally given in writing;
- more often, perhaps, it facilitates the choice for the decision-maker between two rival contentions, by showing one to be more reliably based than the other; and
- thirdly, in every case, the mere fact of its existence prevents the adoption of a position that it is known could not be defended under questioning.

10.6 This last effect is, if anything, the most potent benefit. It does not depend on the efficacy of any particular cross-examination. It is a means of 'quality control' imposed by the author of

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the evidence himself, that ensures that documents presented to the IPC purporting to be evidence are not, in fact, promotional submissions of no (or dubious) evidential weight.

10.7 Questioning was always to be allowed, but by the IPC not the parties. The Bill therefore provided that (in exceptional circumstances) questions could be put where it was necessary in order to ensure adequate testing of any representations, or that a party has a fair chance to put its case, but always subject to the 'principle' that questioning should be done by the IPC.

10.8 Under pressure[74], the Government dropped the 'exceptional circumstances' clause, but the principle and the exceptions are as now enacted in s. 94(7).

10.9 It may be that doleful experience of the LDF process, and the generally poor standard of testing by inspectors in the 'roundtable' sessions, led first to a reassurance of the very high calibre of commissioners and their training, followed by a recognition that, even then, the commissioner might need some assistance if the task were indeed to fall to him. Hence s. 101, mentioned above, and the appointment of an IPC advocate to, in the words of the Guidance 'ensure that the evidence is tested in the most effective and revealing way'[75].

10.10 This, though, is when the whole thing begins to unravel. An advocate, after all is like a sniper[76] without bullets, unless properly instructed. He (or the commissioner attempting to do the job is no one is appointed under s. 101) has to have his own experts to tell him what points to explore, how and to where. Critically, he needs to know where to go in a line of questioning after the initial – still plausible – response to the opening question.

10.11 Further, the IPC, through the commissioner or its Counsel asking questions, must remain and appear to remain impartial. It must ask questions of all sides. It must therefore be prepared to ask questions on every topic in issue. The cost of the expert instruction would be in the order of that of a promoter of a scheme.

[74] from rather weightier bodies than PEBA, we imagine

[75] Guidance, paragraph 78

[76] or occasionally artillery man with howitzer

10.12 Quite apart from the wisdom of having yet another team instructed, it is quite apparent from the partial regulatory impact assessment accompanying the draft regs and the fees suggested then and now that this aspect had by no means been thought through. The Rules provide for (effectively) the same as the Act, in Rule 14(5), and so we look to the Guidance.

10.13 But what has happened? This is the case of 'The Mystery of The Missing Paragraph.'

10.14 In the draft Guidance, at least, common sense and experience seemed to have won out over Government dogma. Paragraph 100 recorded that the Act provides that the IPC (or 'legal assistance') to 'probe, test and assess the evidence through direct questioning', but after rehearsing the Act and Rules at 102 and 103, it recognised at 104:

> *"For the questioning of witnesses to be properly carried out requires* ***considerable preparation****. … If the examining authority is not properly prepared …* ***or it does not consider that it has sufficient understanding*** *of the issue to be tested, then it may consider that questioning by another party of a person making the oral representation is necessary,* ***since that other party may have greater knowledge and by better placed to probe it."*** [emphasis added]

10.15 A lesson for future consultation responses: beware what you praise! As if it is not galling enough to have ones criticisms ignored, imagine the chagrin of stating a welcome to some provision only to have that welcome taken ill – and the provision deftly removed!

10.16 The PEBA Consultation Response, in reference to the then Guidance, including para. 104 chirped:

> *'PEBA welcomes this Guidance as striking the right balance and recognising the practicalities of properly examining the cases for and against these important schemes.'*
>
> and
>
> *'PEBA is pleased to note…the express recognition within the guidance that there will be times when it is most efficacious for a party to the hearing to undertake the questioning on a particular matter'*.

10.17 Would that PEBA had held its tongue! What happened ? Not a warm glow of mutual satisfaction – CLG simply deleted draft para. 104.

10.18 Now, naturally, it cannot be that draft para. 104 was removed because PEBA welcomed it. I would love, however, to read the consultation replies that urged that para. 104 be deleted[77]. Has someone suggested that questioning of witnesses does not require considerable preparation? Has someone suggested that the IPC will always 'have greater knowledge' on every subject, and that no one will be 'better placed to probe' the evidence? Has someone reassured Mr. Evans that the IPC and/or its Counsel will have the funds to instruct a full panoply of experts to assist the formulation of questions ? It will be interesting to find out.

10.19 It will also be interesting to see how this works out in practice. After all, in almost every case, the party raising the point will 'have greater knowledge and be better placed to probe it' than the commissioner or (even) his Counsel. It seems, though, that that may not be enough.

10.20 In truth, the 'principle' in s. 94(7) and Rule 14(5) is caught on Morton's Fork: if the IPC/IPC Counsel is to be able to undertake the questioning, the cost implications are orders of magnitude above those so far budgeted; but if the IPC/IPC Counsel is bereft of the necessary expert instruction, he might as well recognise with good grace that the probing of the evidence is better done at someone else's expense[78].

10.21 The IPC is anxious always to promote was that the it will be a pragmatic body, not a dogmatic body and it will conduct itself and its hearings in the most appropriate manner. Depending on who you speak to, this includes proper recognition of the need and desirability of parties being able to question each other. But the tale of the missing paragraph is worrying, particularly if it is the result of CLG rewriting the guidance of its own motion.

10.22 I have put the 'Courts' on the Slide just to keep them in the picture. For my own part I am not too convinced about the willingness of Admin Court judges to preserve our hereditary

[77] I have asked, but have not yet received any.

[78] it the parties to the contention

freedoms, including the ability to cross-examine one's opponents, but I don't like to let CLG know that.

11.1 By s. 98 the IPC is under a duty to complete the examination by the end of 6 months from the start day.

11.2 If it is to report to the Secretary of State it is to do so within another 3 months.

11.3 The chair of the IPC can, of course, extend these deadlines[79].

11.4 By section 107, the decision itself must be made within 3 months of:

- for IPC decisions, the deadline for the end of the examination;
- for the Secretary if State, the receipt of the report (or end of examination if he himself conducted it under 'call-in')

11.5 Chapter 5 of the Act provides for the making of decisions.

11.6 As already recorded, where the examination was under taken by a panel, it is the decision maker if there is an NPS, and it reports to the Secretary of State if there is not; if the examination was undertaken by a single commissioner he reports to a Council of the IPC if there is an NPS, or to the Secretary of State if there is not.

11.7 By section 108, the Secretary of State may suspend an application when an NPS is being reviewed.

11.8 There are then extensive powers of intervention (call-in) in Chapter 7, where:

- under s. 109, it is considered that there have been significant changes in circumstances since the publication of the NPS either in whole or in part;
- under s. 110, there are matters of National Security in play;
- under s. 111, where circumstances 'specified by Order' apply.

[79] s.98(4); more than once, and after the deadline has passed ! – s. 98(5)

11.9 It is perhaps under s. 111 that the Tories might most easily gather the decision-making back to Ministers.

11.10 Chapter 8 provides for the grant itself, including reasons at s. 116, and formalities at s. 117.

11.11 Chapter 10 (ie Sch 4) provides for the correction of 'correctable errors', which is one which does not go to the reasons. This is done if a request is made to the IPC or Secretary of State (depending on who is the decision-maker), within 6 weeks of the publication of the order.

11.12 Legal challenge is limited by s. 118 to applications for Judicial Review made within 6 weeks of the date of the decision.

11.13 This extends to procedural challenges (by s. 118(7)) – except where it is a challenge to a decision not to accept the application at all[80] - meaning that the whole process must be gone through to the end no matter when or how heinous the procedural error was.

11.14 The wisdom of this is beyond this Paper; I merely record that is removes the anxiety afforded by the *Berkeley* case of when to mount ones' procedural challenge.

11.15 For those challenges, however, ripe opportunity exists. Among the most obvious are:

1. procedural niceties such as notices;
2. exclusion of representations re NPSs;
3. consideration of 'compelling case';
4. unrealistic or unfair timetables and inflexibility in applying them;
5. attempts to exclude evidence or witnesses;
6. the conduct of the examination itself (including 'the friendly inspector' and 'the hostile inspector'; now to be joined by 'the feckless inspector' and the 'ineffective appointed Counsel');

[80] s. 118(3)

7. refusal to allow cross-examination;
8. the decision itself (usual public law challenges).

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