



# RTPI

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Our ref: Policy P2007/01/02

Dear Ms Hilton

## **ENERGY REVIEW: ELECTRICITY ACT INQUIRIES PROCEDURES RULES CONSULTATION**

I refer to your consultation paper in respect of a proposed replacement for the Electricity Generating Stations and Overhead Lines (Inquiries Procedure) Rules 1990.

The Royal Town Planning Institute broadly supports the following principles in respect of the proposed changes.

- The number of sets of inquiries procedures rules applicable to planning and major infrastructure projects approvals processes should be reduced. As a long term goal, it would seem desirable to have a single set of rules for all inquiries, noting that this would imply providing Inspectors with a much broader discretion to regulate the conduct of their own proceedings, subject of course to the provision of fair hearings consistent with the rules of natural justice.
- To the extent that separate inquiries procedures rules need to be retained, there is virtue in close harmonisation between them, so that participants in different types of inquiry do not have to familiarise themselves with many different types of procedures, unless there is a sound reason for difference.
- However, the RTPI acknowledges that this consultation is in respect of an incremental step towards such an end. We note that the Energy Review together with government responses to the Eddington and Barker review processes and the forthcoming Planning White Paper are likely to address this issue further.
- In the interim, we accept that new Electricity Act Inquiries Procedure Rules are necessary and consider that those set out in the consultation are broadly appropriate.
- Principles of inquiry administration under development in this process should be considered for inclusion in future revisions to other sets of inquiries procedure rules as part of a broader harmonisation process.

Our detailed comments are as follows.

**Q1 As planning authorities may not always wish to participate in public inquiries, should the Government introduce a new concept of qualifying planning authority?**

The RTPI can appreciate why this proposal is being brought forward. However, it should be noted that not all local planning authorities are fully familiar with or regularly participate in inquiries under these rules and that mistakes may be made that could have the unintended effect of a local planning authority losing its right of standing. Local planning authorities are the primary representative and balancing body for community interests in areas affected by energy proposals: they should not be excluded from an inquiry lightly. Discretion for the Inspector to admit a planning authority that has failed to respond in time should be retained and practice hitherto suggests that it would be most rare for a planning authority to be refused standing under such a rule. If such an approach was to be taken, the benefit in the concept of the 'qualifying planning authority' has to be questioned. Might it not be simpler for all local planning authorities to automatically be qualified, but for other incentives to be considered to limit unreasonable behaviours such as seeking unduly late admission to a hearing?

**Q2 Would it be more effective for an Inspector to have the power to direct that evidence on certain issues is given in writing only, followed by limited oral submissions?**

This can be a potentially valuable power of direction for an Inspector to have, particularly where it is clear that written evidence is either not fully relevant and/or not fully germane or weighty in respect of the outcome. However, the RTPI considers that a reserve capacity for the Inspector to return to an oral process, for example on request where a party considers that significant issues would otherwise not be heard or cross examined, should be retained.

**Q3 Would it be more effective for a 1,500 word limit on summaries of written evidence in the new rules, or for this be left to guidance to the Inspector?**

The word limit could be a valuable approach, although the RTPI considers that Inspectors should desirably retain discretion to vary this limit and direct accordingly, if justified by relevant but unavoidably complex material.

**Q4 Should it be open for all parties (as opposed to only the applicant and relevant planning authority) to participate in the preparation of any statements of common ground sought by the Inspector? What are the practical implications of extending this provision?**

It should be open for the Inspector to direct that any relevant party participate in a 'common ground' exercise. However, third parties should not have automatic rights of participation without reference to the Inspector, as such rights could extend to many hundreds or even thousands of parties and make the administration of such exercises difficult. There are also a limited number of cases in which it could be expected that third parties would not use such an exercise in good faith: for example, insisting on full participation in meetings and service of documentation as a means of prolonging an inquiry or raising costs to other parties, but having no intent to participate substantively in reducing the number of contentious issues to be heard.

**Q5 Are there any inconsistencies or unintended consequences in the rules as drafted?**

Relevant issues are drawn out in the responses to individual questions.

**Q6 What technical advisors or assessors would be acceptable to assist the Inspector consider the relevant issues. To what extent would independent regulators, for example, the Health and Safety Executive, be suitable?**

The RTPI supports the principle that technical advisors or assessors should be appointed to assist inquiries. There are a number of benefits to be derived from such appointments, namely:

- capacity and expedition – enabling a greater volume of detailed technical evidence to be assimilated more quickly than at present;
- public and technical credibility – ensuring that the inquiry is seen to have the benefit of high level expertise; and
- diversity of working cultures – exposing the Inspectorate to regular infusions of expertise from other sectors.

As a long term position, it would be interesting for government to consider moves towards a greater use of Panels for inquiries, with chairs drawn from persons with strong generic skills in inquiry management and members drawn from expert lists. Such an approach has the added benefit of making the inquiry into a collegiate entity and reducing the risks and costs of loss of proceedings due to the illness or death of a single Inspector. It also enables further expedition of inquiry processes than the current advisor or assessor model.<sup>1</sup>

A person seeking appointment as an advisor, assessor or indeed as an expert Panel member should be selected from a list of pre-qualified persons. This should be assembled using methods that ensure the list contains:

- members offering a balance of high-level qualifications and experience across the technical disciplines broadly relevant to foreseeable inquiry proceedings;
- members who appreciate their duty to propriety of conduct in a public process and who will not by way of conduct give rise to avoidable perceptions of bias; and
- members who understand the nature of potential conflicts of interest and their obligation to avoid these where possible and to declare these where they arise.

This latter point suggests that a person should not be appointed in common circumstances which might include:

- where they have acted as a decision maker or adviser to the project or to a party to the process; and
- where they have any related statutory role that could bear on the project, the process or the eventual decision.

This in turn suggests that an independent regulator may not be a suitable person, if that regulator has been called on or might conceivably be called on to adjudicate or regulate any aspects of the merits or performance of the project or proposal under consideration at the inquiry.

On a related issue, the RTPI does have some concerns about the proposal that advisors or assessors' reports should be disclosed before an inquiry and be cross-examinable. This is likely to lead to substantial delay and complication in hearings, with advocacy tactics oriented towards the discrediting of an advisor or assessor who has reported in a manner that might be counter to the interests of the advocate's client. It is also of dubious value to the parties who have, when all is said and done, been accorded a reasonable opportunity to be heard and to present their own evidence, without having recourse to the advisor or assessors' reports.

Perhaps one answer lies in conceiving of the advisor or assessor as a co-partner in the making of findings and recommendations with the Inspector – ie as a Panel member. If the advisor or assessor has such a role, they would be empanelled with the Inspector and would assist her or him in their deliberations on relevant technical material at all stages of the inquiry, before, during and after the hearing. Their reporting would be in the body of the Inspector's report, to which they would be attached as a co-author and signatory.

**Q7 The draft rules do not make any explicit provision about inquiries into applications under section 36 to construct offshore generating stations. What sort of role should local planning authorities, who are likely to be interested in an application to construct an offshore generating station, have in an inquiry into such an application?**

The answer to this question will depend at least in part on progress in DEFRA's Marine Bill/Marine Spatial Planning proposal. If there is a Marine Management Organisation (MMO) in place, with duties to prepare plans

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<sup>1</sup> Additional material documenting the comparative performance of UK and Australian hearing methods can be obtained from the RTPI should this be of value to the review.

and consider proposals for a marine sector, then it should logically be regarded as the planning authority for the purposes of the rules.

An adjacent local planning authority will nevertheless retain an interest, depending on the degree to which the proposal is:

- adjacent to or visible from land or shoreline in the LPA;
- affects the interests in the marine environment of current or future residents and businesses in the LPA area; and/or
- affects the marine environment or marine resources relevant to activities conducted within or by or future residents and businesses in the LPA area.

These points imply a quite possibly substantial LPA interest in projects that may otherwise be beyond the horizon, for example in communities traditionally associated with long range fisheries, oil or marine mineral resource recovery, land/sea transportation or where persons currently or prospectively involved in the project might be resident or might use services.

These considerations suggest that it remains safest to assume that all adjacent LPAs will maintain an interest in marine matters. Whilst a 'proximity of interest' test to limit standing more closely could possibly be devised, on balance, the RTPI thinks that such a test would be likely to be overcomplicated, and that the balance should be struck in favour of enabling local planning authorities to remain parties as of right in marine matters.

**Q8 Should the new rules apply to inquiries under schedule 16 Energy Act 2004 into applications for, or proposals by the Secretary of State, to issue a safety zone notice?**

Yes, and there would be great value in inquiries into say offshore wind farm proposals and into any consequential safety zone or extinguishment of rights of navigation to be held concurrently under the same Inspector.

**Q9 Government considers that the new rules will continue to allow the full scrutiny of issues in planning inquiries. Do respondents agree that there is still reasonable opportunity for all interested parties to make relevant contributions?**

In general, the proposed rules appear to accord a reasonable opportunity to be heard. However, some care will be required with respect to paragraph 2-27 of the consultation paper. If elements of the evidence are not to be heard orally, there may well still be a degree to which these need to be tested by other parties (or an opportunity for them to be tested needs to be accorded to other parties). The RTPI suggests that a party should be entitled to apply to an Inspector for leave to cross examine on evidence that is not led orally, on the basis that the evidence may bear on a proposition to be put in submissions by that party. The absence of such a capacity could possibly lead to allegations that a party unable to either hear or question a body of evidence that it considers to be relevant and weighty to its own case has not been accorded a reasonable opportunity to be heard.

**Q10 We invite comments on the attached RIA and suggestions on quantifying the scale of the costs and benefits.**

In the RTPI's view, the attached RIA broadly correctly identifies the relevant options, costs and benefits. The RTPI is not in a position to directly quantify a range of associated costs and benefits. We note that whilst the costs to business are often reasonably capable of quantification, those for community stakeholders/third parties and for the environment are harder to identify with certainty. We caution against too direct an attempt to formally quantify and balance costs and benefits.

**Q11 What further action, if any, should Government take to facilitate the effective running of public inquiries?**

As the RTPI has outlined above, there would be value in the government undertaking a concerted and medium term push to reduce the number of inquiries procedure rules overall and to harmonise those which remain. Inspectors' discretion to manage inquiries should where possible be increased, with the Inspector being seen as

the owner of and accountable person for the inquiry process. Inquiries should be regulated by carefully drafted terms of reference, which should make clear the broadly relevant policy that is not open for contest in the process. Procedures should encourage participation by local planning authorities as the balanced representative of local communities. The registration of participants and their assignment to a mode of hearing (oral or written) should be encouraged and incentive structures including appropriate costs and hearing penalties should be provided to Inspectors to reinforce reasonable behaviour at inquiries. Written participation should be encouraged, but opportunities for oral participation and cross examination of evidence should be retained where a party can show a need to take these steps with reasonable justification. Finally, measures to ensure the expeditious delivery of reports should be taken, which could include contributions to report writing by empanelled advisors and assessors, pre-set timetables for report delivery and pre-set timetables for decision making. However, much of this constitutes the anticipated major projects agenda to follow digestion of the Barker and Eddington reports by government.

Please note that this response is intended to be a public document and a copy has been lodged on the RTPi website at <http://www.rtpi.org.uk/item/222/23/5/3/>.

I trust that the above is clear. Please contact me on 020 7929 9490 if you require any further information.

Yours sincerely,

A digital signature in blue ink, appearing as a stylized scribble. Overlaid on the signature is the text: "DIGITALLY SIGNED BY RYND SMITH" and "not for unauthorised use".

DIGITALLY SIGNED BY RYND SMITH  
not for unauthorised use

Rynd Smith  
**Head of Policy & Practice**