The Law Society

Response of the Law Society of England and Wales to the Ministry of Housing, Communities and Local Government on Planning Appeal Inquiries Review - Call for Evidence Questionnaire

September 2018

Introduction

1. The Law Society of England and Wales ('The Society') is the professional body for the solicitors' profession in England and Wales, representing around 170,000 registered legal practitioners. The Society represents the profession to Parliament and the Assembly, government departments and regulatory bodies and has a public interest in the reform of law.

Summary

2. The Society believes that inquiries are the only appropriate procedure for determining more complex appeals. In our view, the planning inquiries appeals process generally works well, although to an extent that the successful conduct of an inquiry may depend upon the skills and experience of the inspector. There is a need for much greater resourcing of the planning inspectorate; for clearer procedures, and more transparency.

3. Our response to the questionnaire is confined to questions 6 to 17.

Views on the overall planning appeal inquiries process

Q6 What do you value most about the planning appeals inquiries process compared to written representations or hearings?

4. The planning appeals inquiries process allows for a thorough and detailed consideration of the issues. A key feature of the process is the cross examination of witnesses, which is almost exclusively reserved for appeals determined by planning inquiries. In some cases, the evidence relied upon can only be adequately tested through cross examination, without which it would not be possible for the Inspector to attribute weight to often conflicting evidence. Cross examination is not only useful in itself, but the mere prospect provides a 'check and balance' to the preparation of formal evidence. The realisation that everything that is stated in written evidence could be subject to questioning in a public forum means that the evidence presented at public inquiries is more reliable, accurate and generally of a far higher standard than in hearings or written representations, leading to better quality decisions.

5. In terms of the value of other features:

- Ability for parties to meet face to face: neutral (depends on whether parties are cooperative or hostile);
- Ability to present evidence orally: quite important;
- Ability to cross examine witnesses: important;
- More time to prepare more evidence: not very important;
- Ability for detailed consideration of potential impacts of a development: quite important;
- Ability to consider complex issues: important;
- Ability of local community to be heard: important.

Q7. What aspects of the current inquiry process work well?

6. The inquiry process is highly structured (eg. time is allocated for third parties and cross examination) and there are elements that are strictly enforced (eg.

there is a formal timetable for the exchange of witness proofs). The early statement of case works well, as it makes the parties think about what is agreed. That said, there is scope for flexibility in inquiries (e.g. s106 discussions and informal roundtable discussions on conditions, which are also possible in hearings). In principle, Statements of Common Ground should be helpful, but in practice they are less successful because the parties rarely agree anything more than rudimentary, uncontroversial details. Generally, the inquiry process tends to encourage more active pre-exchange of evidence and other pre-inquiry communication behind the scenes.

7. The opportunity for observers to see the details of the case helps to make inquiries transparent.

8. As we say in our response to Q6, the availability of cross examination allows for the thorough testing of technical evidence, which is unique to the inquiry process.

Q8. What aspects of the current planning appeal inquiries process do not work well?

9. The main problems arise from the handling of the volume of material and the presentation of plans and drawings at the inquiry itself. These problems could be addressed by setting up an online 'data room' of documents and by having the ability to project plans and extracts onto a big screen in the inquiry room so that everyone can work off the same material. Such a data room could be hosted and operated by the programme officer. Some large inquiries deal with this challenge well, but practice is variable. A standardised approach to the management of core documents would assist the efficient running of all Inquiries.

10. It is important to ensure the availability of inquiry documents in an accessible format to all parties (including observers). In the absence of electronic documents, there is no responsibility for the production of Inquiry bundles: this could be considered further depending on resources.

11. More rigour in timetabling could assist in reducing the costs of unnecessary attendance, where witnesses do not wish to attend the whole inquiry (although there can be a benefit in doing when it comes to giving evidence after hearing everything which precedes it). There can be problems when key witnesses, particularly Council witnesses, are not present throughout. Stricter timetabling would also minimise indulgent or unnecessary evidence.

12. It seems unnecessary for the s106 agreement to be handed in at the inquiry when amendments may be required arising out of the proceedings, which may for practical reasons be impossible to execute on short notice. The requirement for the s106 agreement to be handed in on the last day of the inquiry means that it cannot be improved after the inquiry. This is problematic as it denies the ability for the agreement to be shaped by the discussions and progress made during the inquiry. Early scheduling of time to discuss whether any work remains to be done on legal agreements might help to avoid this.

13. As public inquiries are quasi-litigious, there are very few opportunities to engage the planning inspector before the first day of the inquiry. It would be helpful to have a consistent procedural steer from an inspector before an inquiry (especially as this could save time at the inquiry). This would have traditionally have happened at a pre-inquiry meeting, but they are less frequent

now. There is a presumption in the procedural rules that there will be a meaningful statement of common ground, but this is not always the case.

14. An advantage of the inquiry procedure ought to be that the policy in question has been seen to have been properly considered. Transparency improves public perception and confidence, which can head off judicial review and other challenges.

15. It is also important that an inquiry leaves parties feeling that they have been heard. It is particularly important for community groups that they have not only been given a platform but to feel that their views have been taken seriously.

Q9. In your experience, are the right appeals subject to an inquiry, rather than written representations or hearings?

16. No. There is often a sense that local planning authorities subject appeals to hearings instead of inquiries simply because they are not resourced to deal with the volume of work generated by inquiries, choosing the cheapest option, rather than the option best suited to the merits of the case. Many written representations appeals should be hearings and many hearings should be inquiries.

17. There is a concern that decisions on the appropriate appeal forum are taken by PINS case officers who are insufficiently experienced to assess the factors for and against convening an inquiry, with the result that cases suitable for an inquiry can be diverted to a hearing instead. Ultimately, it is open to an inspector to change the procedure for the determination of an appeal: the earlier a case is allocated, and time allowed for the inspector to give a preliminary view on the appropriateness of procedure, the better. Much depends upon the resources available within the inspectorate and timing of allocation of cases to individual inspectors.

Improving each stage in the process

Q10. Could the receipt to valid stage be improved?

18. Yes. This ought to be a lot quicker than the quoted time. It is unclear why there is a split between the validation and the start letter. Validation and start could be compressed into one phase and the running order could be concurrent, rather than sequential. For example, a debate about whether there should be an inquiry or hearing could be resolved separately to issuing confirmation for a valid application.

Q11. Valid to start date. This stage took on average of 2.7 weeks in 2017-18. Could the valid to start stage be improved?

19. Yes. As indicated above, there is no reason why discussions of the procedure could not start earlier. This could be done on the basis that it would be without prejudice to the appeal subsequently being validated.

Q12. Start to event. Could the start to event stage be improved?

20. Yes. Target dates for fixing an inquiry are fine in the absence of agreement between parties, but where the parties have all reached an agreement on an acceptable date based on (for example) the availability of key witnesses and of representatives who may have been involved for years, there is no good reason why agreement should be overridden simply because the date would be outside of performance targets.

21. The availability of suitable inspectors with the requisite experience or specialist expertise is also key. There is concern that there are gaps in the year where inspectors may be unavailable. There is also the relevance of obtaining a specialist (e.g. lawyer, engineer) for some types of case, and there seem to be too few of them available. There are also concerns as to sufficient resources within the inspectorate generally. Even where no particular specialism is needed it still seems to take too long to allocate an inspector to inquiries.

22. A related point is that the ability to agree an extension of time once a pre-inquiry programme has commenced would be useful. The parties may, for example, be confident of their ability to resolve their dispute but need a Committee authority to approve a separate application. In the past, PINS has been willing to defer the inquiry timetable to allow this to happen. There is a noticeably greater reluctance to allow it now - and the suspicion is, inevitably, that performance targets are driving this reluctance. Whilst the consultation document appears to imply that the number of appeals withdrawn shortly before an inquiry is a bad thing, this is not always be the case, especially when the parties have withdrawn because a consensus has been arrived at outside of the appeal process.

23. The ability to engage with the inspector pre-inquiry, and the inspector's willingness to accept amendments to the application or to obtain a procedural steer, would be useful pre-inquiry (and could increase the efficiency of inquiries). See also see the point we make on redetermination in response to Q17.

Q13. Event to decision/submission of report. Could the event to decision/submission of report stage be improved?

24. The biggest delay is with a Secretary of State decision: the timeframes are unacceptably long and unpredictable. Generally, the timeframe for inspector decisions is reasonable, although it would help appellants if some indication of the timetable for a decision were made available earlier.

25. Interim decision letters can be helpful, in that they allow the parties to take action on the next steps and because the agreed areas are clarified.

Wider process and other issues

Q14. Do you have any suggestions on how better use could be made of new technology, including artificial intelligence, to enable more efficient handling of inquiries at each stage?

26. Electronic documents should be available to all parties (including observers). Some simple steps could be implemented relatively easily e.g. large projector screens and live streaming of the inquiry. However, the exchange of documents can be problematic due to parties having access to different technology. There are also difficulties in producing multiple copies of documents or in uploading documents with large files (especially drawings). Third parties/members of the public who wish to engage in the proceedings may be disadvantaged as a result. As we have commented above, the responsibility for who should provide this equipment needs to be resolved and standardised.

27. Many applicants are keen to use other forms of technology, such as Skype, so there needs to be some common rules to govern fair use. This could be a benefit of convening a pre-inquiry meeting, so forms of evidence (as well as

their availability) could be agreed beforehand. Many inquiries are very paper heavy, so there are clear advantages in making all core documents available electronically, perhaps with the exception of some visuals and/or plans. This could aid navigation through documents a cross-examination and increase public access. For this to work effectively, wifi access at inquiry venues would need to be reviewed and improved where necessary.

28. A single data site could be established for each inquiry (in a similar fashion to Compulsory Purchase Order inquiries), where all statements of case, proof of evidence and core documents could easily be located by members of the public. A key risk is impaired accessibility for members of the public who may not have access to the necessary technology; platforms must be accessible at the lowest common denominator.

Q15. A substantial proportion of appeals that would be heard at an inquiry are withdrawn, typically before the inquiry starts. What are your views on this matter and what, if any, steps would you suggest to limit the number of withdrawn inquiries?

29. Sometimes this demonstrates the effectiveness of the process and the effect of the prospect of cross examination (see above), so we do not see this as evidence of any problem.

30. An idea which has been canvassed in the past is the introduction of an appeal fee. We are very wary of the unintended consequences of this. It is unlikely that the costs regime would adequately penalise the withdrawal of an appeal or that it would prevent those appeals being made in cases of particularly high value. However, the introduction of a fee could unfairly deter some appellants with genuine grounds of appeal.

Q16. Please give us any further suggestions, no matter how innovative, on how the planning appeal inquiries process may be improved.

31. In the past, mediation has been discussed in this context, but we have doubts over its effectiveness in this area of practice as primary legislation requires a fresh application to be submitted even if mediation shows that a refused scheme can be adapted to overcome planning objections.

32. Greater pragmatism if the local authority elects not to defend the appeal at any stage would be helpful. It is currently not possible to settle a planning appeal by consent (if an authority refuses, an appeal or subsequent application is needed) so primary legislation is required. A possible solution would be to make the appeal system more like civil litigation (although the risk of preventing public discussion and input must be considered and mitigated).

Q17. Please give us any additional comments on the planning appeal inquiries process which you would like the Review to consider?

- The period when planning appeals start and finish;
- When an appeal is decided by PINS, overturned in High Court, then sent back to PINS, it is unclear as to whether these are driven forward in the same way as first instance appeals; greater communication on this area is needed.
- Time scales for redetermination are needed;
- We do not support the introduction of appeal fees;
- Many of the issues stem from the resourcing of the planning inspectorates.

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