

Planning Appeal Inquiries Review – call for evidence questionnaire

Thank you for responding to the call for evidence. All comments are welcome. It would particularly help us undertake our analysis and capture your views correctly if you could fill in the online survey at <https://www.surveymonkey.co.uk/r/RV5CTV8>. If you are not able to complete the online survey, please complete this questionnaire. The list of questions is not exhaustive. The final question provides an opportunity to add any additional comments or suggestions on the planning appeal inquiries process. Please feel free to skip any questions you do not wish to answer.

If you are unable to respond online, please complete this questionnaire and email to InquiriesReview@communities.gsi.gov.uk or post to the Inquiries Review Team, c/o MHCLG, 3rd Floor, Fry Building, 2 Marsham Street, London SW1P 4DF.

This call for evidence document and process have been planned to adhere to the Consultation Principles issued by the Cabinet Office. Information provided in response to this call for evidence, including personal data, may be published or disclosed in accordance with the access to information regimes. The Ministry of Housing, Communities and Local Government will process your personal data in accordance with the law and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties. Further information is included at Annex A and a full privacy notice is included at Annex B.

The call for evidence closes on 18 September 2018. Individual responses will not be acknowledged unless specifically requested.

Thank you for your interest and for taking the time to respond.

Inquiries Review Team
July 2018

About you

Q1. Contact details

Name	Paul Brown QC
Organisation (if applicable)	Planning and Environmental Bar Association
Role in organisation (if applicable)	Vice-Chair
Address	Landmark Chambers 180 Fleet Street London
Post code	EC4A 2HG
Email address	pbrown@landmarkchambers.co.uk

Q2. Is this an organisational or personal response?

Organisational	Personal
Organisational	

Q3. Who are you?

Developer	
Planning Consultant	
Lawyer	Barrister (self-employed) On behalf of Specialist Bar Association
Local planning authority	
Community group	
Non-governmental organisation	
Statutory consultee	
Private individual	
Construction company	
Professional organisation	Specialist Bar Association
Planning Inspector	
Other (please specify)	

Q4. What role have you had at an inquiry in the last five years?

Please select the one or more boxes that best describe your usual role(s) at an inquiry over the last five years

Role in inquiries	Expert witness / or given evidence in person at inquiry	Legal representative	Submitted written representations/ evidence	Observer
Appellant		PEBA Members have acted for all parties within the left-hand column during the last 5 years		
Local planning authority		As above		
Rule 6 party ¹		As above		
Community group / non-governmental organisation		As above		
Statutory consultee		As above		
Private individual		As above		
Other		PEBA considers that the categories cover all common categories – and therefore this is likely to be “not applicable”		

¹ A rule 6 party is any person (apart from the appellant and local planning authority), who has notified the Secretary of State (Planning Inspectorate) of an intention or wish to appear at an inquiry

If “other” please add description here:

Q5. How many inquiries have you been involved in?

Number of inquiries involved in	0	1-2	3-5	6-10	More than 10
Please select					PEBA Members have been involved in thousands of inquiries

VIEWS ON THE OVERALL PLANNING APPEAL INQUIRIES PROCESS

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

	Important	Quite important	Neutral	Not very important	Unimportant
Ability for all parties to meet face to face	Yes				
Ability to present evidence orally	Yes				
Ability to cross examine witnesses	Yes				
More time to prepare all the evidence	Yes				
Ability for detailed consideration of potential impacts of a development	Yes				
Ability to consider complex issues	Yes				
Ability of local community to be heard	Yes				
Other factor(s) - please specify _____	The above listed factors are fairly comprehensive as to the benefits of the inquiry process. They should be read in the light of our comments in the accompany Covering Letter and below – notably the opportunity				

	to make legal submissions, which can be discussed by both parties and subject to clarification by an Inspector				
--	--	--	--	--	--

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

We have set out in the Covering Letter (notably at 1.4 and 3.1-3.4) how the Inquiry process performs an essential statutory function in scrutiny of planning decisions for development.

This has long been recognised by the courts, including in the context of the Article 6(1) of the European Convention on Human Rights (*R(Alconbury Developments) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295).

Substantively, the process “works well” because it affords both those who support and oppose development schemes an opportunity to undertake a detailed examination of the evidence (through the examination of witnesses) and to make detailed submissions on legal matters, including the interpretation of legislation and policy.

Procedurally, the process “works well” because participants are able to take an active role in shaping both the above processes. Participants are able to shape their own case, in a public forum.

PEBA considers, and the Inspectorate should be able to confirm, that the adversarial nature of proceedings improves the quality of overall decision-making and overall reduces the scope for successful legal challenge of Inspector decisions on grounds of legal error.

In summary, PEBA considers that the current inquiry process is not necessarily divisible into aspects that “work” well or “do not work”. The process is best analysed as a series of key procedural phases, each of which perform a key function or seek to guarantee a specific procedural right:

(1) Statement of Case: Framing the Main Issues and identifying the nature of the evidence that will be called, including any key legal issues (legislation or case law);

(2) Statements of Common Ground: Fixing those Main Issues and narrowing considerably the scope of the evidence that needs to be considered at Inquiry
NB this includes bespoke or separate Statements of Common Ground covering

specific technical evidence, e.g. on Housing Land Supply

(3) Proofs of Evidence: Providing detailed evidence on those issues which remain contested and under challenge (alongside the above-referenced Statements of Common Ground), with reference where applicable to key legal issues (legislation or case law)

(4) Inspector's Identification of Main Issues: Notifying parties in clear terms the scope of the Inquiry with a clear indication as to those matters on which the evidence should focus

(5) Opening Submissions: Providing brief introductions to the case in a public forum and confirmation as to the nature of the participant's evidence by reference to the Statement of Common Ground and Proofs of Evidence

(6) Examination of Witnesses (in Chief, Cross- and Re-Examination): Enabling detailed explanation and testing of the evidence on the focused matters in dispute before the Inspector, with the additional opportunity for Inspector questions

(7) Closing Submissions: Concluding on the key issues in dispute, as now explored in the live evidence before the Inquiry, and including any key legal submissions (legislation or case law).

Q8. What aspects of the current inquiry process don't work well?

NB in the next section of the questionnaire we look at each stage in the process in turn, so if your concern is about process then it may be easier to make the point below.

PEBA considers that the primary aspects of the current inquiry process that "do not work" well are related to "process" in some way, either due to delays in the performance/conclusion of key steps or the scope for procedural challenge on the basis of unclear guidance.

In the Covering Letter, we have isolated in Section 4 our response to the specific occurrences of delay, and in Section 5, five key areas where the Review should scrutinise the current procedural arrangements:

- 5.1 Statements of Case and State and Statements of Common Ground
- 5.2 Proofs of Evidence
- 5.3 Inspector's Identification of Main Issues
- 5.4 Examination of Witnesses
- 5.5 Counsel's Opening and Closing Submissions

In broad summary, we consider that

- 1) Statements of Case may be too limited and Statements of Common Ground are agreed too late;
- 2) Proofs of Evidence may as a consequence be over-long;
- 3) The delivery of the Inspector's Identification of Main Issues in the majority of cases, i.e. those without Pre-Inquiry Meetings, occurs too late in the process;
- 4) The Examination of Witnesses is consequently difficult to provide accurate time estimates for, and consequently can lead to adjournment;
- 5) The Closing Submissions process takes up considerable time and may benefit from greater clarity (including in respect of closing in writing).

We have set out our reasons in greater detail in the Covering Letter.

However, of even greater importance to the issues set out above, we consider that the Inquiry process suffers from a lack of resourcing in two key respects:

- Case management at the outset, ensuring timely validation of appeals
- Inspector availability, including inquiry event dates and caseload following conclusion of the Appeal

Our experience is that both Inspectors and their support staff are presently stretched in respect of their workload in a manner that is incompatible with the ambitions of the Review: to rapidly reduce delays in the system. This experience is supported by frequent discussion of human resourcing issues in the Inspectorate's Board's Minutes, which are published online in accordance with its duty as a public body.

We have set out our detailed response in our Covering Letter at section 1.3: Financial and Human Resources, the Rule of Law & Access to Justice and our Conclusion: Adequately Resourcing Justice)

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

NB the criteria the Planning Inspectorate take into account for determining the appeal procedure are set out in Annex K of the Planning Appeals Procedural Guide (<https://www.gov.uk/government/publications/planning-appeals-procedural-guide>)

Yes	No
Yes	

Comments

PEBA considers that the vast majority of inquiries are correctly designated as such. Such cases, having met the Annexe K filter, are likely to be complex, controversial, and lasting more than one day.

There is no statistical evidence, nor any anecdotal evidence, to support the proposition that the Annexe K filter allows an excessive number of appeals to proceed to inquiry.

First, the inquiry process provides all of the benefits listed above and in our Covering Letter at Sections 1.4, in respect of cross-examination and the opportunity to make detailed legal submissions (without certain strictures of the hearing process). The inquiry process is a high-level, contested process for a concentrated portion of the Inspectorate's overall caseload (2%).

Second, as set out in Section 2.3, Inquiries enjoy an overall 10% greater success rate for Appellants over hearings. Inquiries are popular with Appellants, as the initiating "customer", because they allow Appellants to provide more detailed information, call their own witnesses, test the evidence of witnesses on the other side, and make detailed closing submissions. Inquiries are therefore well-understood by the development industry as the most effective way to promote schemes that cannot gain acceptance by Planning Committees or officers under delegate powers at first instance.

Third, the inquiry has a significant level of flexibility such that where matters become less contentious over time, and thus requiring shorter questioning and more limited legal submission by advocates, then the format can be adapted accordingly. A good example is the use of roundtable discussions to consider housing land supply, where all parties agree on this approach. By contrast, allowing cross-examination in a hearing is a more complex matter: see Rule 11(3) of the Inquiries Rules as set out in Section 3.2 of the Covering Letter.

IMPROVING EACH STAGE IN THE PROCESS

Q10. **Receipt to valid.** On receipt of an appeal, the Planning Inspectorate undertake a check to ensure that all the relevant documents have been submitted. Many appeals are complete on submission and thus the process of checking is completed within a day. However in a significant number of cases, some information is missing on receipt. In these cases, the Planning Inspectorate will contact the appellant to request the missing material.

The time taken for all inquiry appeals from receipt to being valid was an average of 4.5 weeks in 2017-18. **Could the receipt to valid stage be improved?**

	Yes – a lot	Yes, but not much	No
Tick as appropriate	Yes		

If yes, please explain how it could be improved

PEBA's members are involved in the drafting of Statements of Case, draft Statements of Common Ground and general advice on permission to appeal. They are less frequently instructed in respect of the submission of documents and monitoring validation processes – on those matters, the RTPI and the Law Society's Planning and Environmental Law Committee are better placed.

PEBA has however given detailed consideration to the Procedural Guide, notably in respect of Statements of Case: see our Covering Letter, Sections 4.2 Missing Documents and 5.1: Statements of Case and Statements of Common Ground. At present, the Procedural Guide in respect of Statements of Case is extremely open: see paragraph J.2.3 for Appellants and J.3.2 for LPAs respectively. The Inspectorate should consider the use of standardised templates, which would ensure quicker and easier verification by Inspectorate staff – but more importantly would guide Appellants in the "significant number of cases" listed above, to avoid missing information.

We would be happy to advise further of the specific structure of the Guide or of templates on explanation of the most common types of missing information – parts of which are likely to have a specific statutory status and therefore give rise to bespoke legal issues in respect of notification and consultation.

Q11. **Valid to start date.** This stage includes the Planning Inspectorate confirming whether the inquiry process is the appropriate appeal procedure to use (following consultation with the local planning authority), setting up the file, and preparing the “start letter” which explains how the inquiry process will proceed. The issue date of the start letter is important in terms of the overall programme of the appeal.

This stage took an average of 2.7 weeks in 2017-18. **Could the valid to start stage be improved?**

	Yes – a lot	Yes, but not much	No
Tick as appropriate		Yes The addition “but not much” is unclear, but is taken here to connote days rather than weeks	

If yes, please explain how it could be improved

See our response under Q9 that PEBA. See also the Covering Letter, Section 4.1.
Clearer guidance would likely reduce the scope for delays in this phase.

Q12. **Start to event.** This stage covers the period from the start date to the first date of the inquiry event. It includes the agreeing and setting of the inquiry event dates, the pre-inquiry meeting when one is held, and the submission of different forms of evidence by all parties. This stage took an average of 29.4 weeks in 2017-18. **Could the start to event stage be improved?**

	Yes – a lot	Yes, but not much	No
Tick as appropriate	Yes		

If yes, please explain how it could be improved

We have noted at Section 3.2 of the Covering Letter that Rule 10(1) of the Inquiries Rules specifies that inquiries are ordinarily expected to commence between 4 and 22 weeks from the start date. 29.4 weeks is therefore at least 7.4 weeks (almost 2 months) longer than the statutory outer limit.

We have addressed the main causes of delay identified by the Review during this phase at Sections 4.3 to 4.6 of the Covering Letter. We do not consider that this list is necessarily complete. Indeed, we consider that it refers to several types of event that are not often foreseeable and therefore are not the primary cause for delay between start and event.

PEBA considers that the primary cause of delay between start to event is due to the dates offered by the Inspectorate (i.e. Inspector availability) rather than Counsel/witness availability. There is very little discussion of this issue in the consultation material provided to date.

Inspector availability has been reported consistently in the Inspectorate's own Board minutes and is routinely relayed to Counsels' clerks as the reason for the offer of dates at 6-7 months range. The answer lies in part in the solutions already addressed by the Board in those same Minutes – increased recruitment and retention. Those fall outside PEBA's expertise, but it cannot be stressed enough that the Review cannot provide a complete response without addressing this core issue: see also Section 1.3 of our Covering Letter on adequately resourcing justice.

PEBA acknowledges that listing delays can on occasion be generated by Counsel availability. However Counsel, consistent with their practice before the courts, make best endeavours to be available on the inquiry dates provided or refer cases to their colleagues. It is not considered that Counsel availability is a primary cause of delay. The same applies to expert witness availability, a matter that other professional institutes (such as RTPI) are best placed to cover.

There is a clear need for documentary preparation and agreement of core issues between start date and the event, i.e. the opening of the inquiry (hence the 4 week minimum in Rule 10(1)). However, the above denoted average of 29.4 weeks (or 7 months) significantly exceeds the statutory guideline (the above stated 7.4 weeks) and in PEBA's view vastly exceeds that necessary to carry out the required documentary preparation. There is scope for much of this process to be frontloaded, see Sections 5.1 to 5.3 of the Covering Letter.

Indeed, the extent of current delays also has significant knock-on effects on the documentary process, in disincentivising early agreement of the Statement of Common Ground, in generating further need for updating of evidence and increasing the risk of adjournment (e.g. to take account of departure of LPA key staff members).

In summary, existing delays tend to promote a culture of deferral in the inquiry preparation process, especially amongst hard-pressed, under-resourced Local Planning Authorities. This renders all the more acute by the perception that the Inspector will not begin to read the evidence until the Monday before the Inquiry

starts. We have set out in Sections 5.1 to 5.3 of our Covering Letter how the Review should consider more prescriptive guidance and earlier Inspector active case management to address and reverse this culture of deferral.

Q13. Event to decision/submission of report. This stage covers the period from the first date of the inquiry event to the decision being sent out, or in the case of a called in planning application, or an appeal that has been “recovered” for decision by the Secretary of State, this stage ends with the submission of the Inspector’s report to the Ministry of Housing, Communities and Local Government.

This stage was an average of 10.9 weeks in 2017-18 for Inspector decisions. The average time period for the submission of reports for called in applications and recovered appeals was 21.4 weeks and 22.7 weeks respectively. **Could the event to decision/submission of report stage be improved?**

	Yes – a lot	Yes, but not much	No
Tick as appropriate	Yes		

If yes, please explain how it could be improved

PEBA considers that it is likely that the 10.9 week period could be subject to reduction by several weeks.

We have addressed durations in Section 2.5 of the Covering Letter.

PEBA does not consider that Inspectors should be placed under any pressure to issue decisions rapidly. It is however concerned that the delays adverted to by the review arise not due to the speed with which an Inspector considers the material before them and the competing submissions but due to the extent of the workload which Inspectors face – i.e. the competing cases.

As to Recovered decisions, further scrutiny is required as to why such cases have a much longer overall phase, including the extent to which this is attributable to longer inquiry durations (with adjournments) where the event date is measured from the opening of the inquiry. Scrutiny should also be applied to the post-inquiry submission process.

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?** (eg in relation to sharing of evidence or electronic working at inquiries). It would also be helpful if you could highlight any issues/risks to be avoided as well as good examples from elsewhere.

PEBA as a Specialist Bar Association does not itself make, sell or otherwise operate any case management technology or assistive technology.

It is however highly likely that new technology can enable more efficient handling at each stage of the process.

In Sections 6.1 to 6.3 we have commented on: transcription, case management and visual technology.

At present the use of such new technology is still at a comparatively early stage.

PEBA notes that there is a parallel process being undertaken by Her Majesty's Courts and Tribunals Service (HMCTS) in the Court Reform Programme and there is therefore likely to be some synergy between the Review's question and work that is already underway.

PEBA would also recommend that the Review speak to bodies that are currently working in this field, including Future Cities Catapult, who are working with MHCLG to deliver digital transformation.

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?**

We have addressed Withdrawals briefly at Section 2.1.

In PEBA's experience, the expense of the inquiry process makes a decision to withdraw an appeal a very weighty matter.

Detailed analysis should be applied to the timing of withdrawals to understand how these correlate to national events: e.g. new policy or case law, or general elections, or may be attributable to more local events, e.g. Inspector/Secretary of State decisions in other appeals and housing land supply announcements.

The costs regime is unlikely to be an effective tool as those seeking to withdraw

are in any event seeking to save the extensive costs of continuing with the appeal.

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

PEBA has set out a number of suggestions throughout the Covering Letter, in respect of both data-gathering and reform.

In particular, we would re-emphasise the recommendation set out in Section 5 on specific phases, including updating the Procedural Guide, encouraging active case management by Inspectors and producing protocols on cross-examination and closing submissions.

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

PEBA has set out in the Covering Letter its preliminary analysis of the issues.

We understand that there will be further detailed meetings.

We would request that following those meetings we are able to update these written submissions to deal with any specific issues that arise

The matters considered above are of significant concern to PEBA, but are also fundamentally of significant concern to those who PEBA represents/

Thank you for your response

Annex A

About this call for evidence

This call for evidence document and call for evidence process have been planned to adhere to the Consultation Principles issued by the Cabinet Office.

Representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions when they respond.

Information provided in response to this call for evidence, including personal data, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA), the EU General Data Protection Regulation, and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, as a public authority, the Department is bound by the Freedom of Information Act and may therefore be obliged to disclose all or some of the information you provide. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Ministry of Housing, Communities and Local Government will process your personal data in accordance with the law and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties. A full privacy notice is included at Annex B.

Individual responses will not be acknowledged unless specifically requested.

Your opinions are valuable to us. Thank you for taking the time to read this document and respond.

Are you satisfied that this call for evidence has followed the Consultation Principles? If not or you have any other observations about how we can improve the process please contact us via the [complaints procedure](#).

Annex B

Personal data

The following is to explain your rights and give you the information you are entitled to under the Data Protection Act 2018.

Note that this section only refers to your personal data (your name address and anything that could be used to identify you personally) not the content of your response to the call for evidence.

1. The identity of the data controller and contact details of our Data Protection Officer

The Ministry of Housing, Communities and Local Government (MHCLG) is the data controller. The Data Protection Officer can be contacted at dataprotection@communities.gsi.gov.uk

2. Why we are collecting your personal data

Your personal data is being collected as an essential part of the call for evidence process, so that we can contact you regarding your response and for statistical purposes. We may also use it to contact you about related matters.

3. Our legal basis for processing your personal data

The Data Protection Act 2018 states that, as a government department, MHCLG may process personal data as necessary for the effective performance of a task carried out in the public interest. i.e. a call for evidence.

4. With whom we will be sharing your personal data

We will share your data with the Planning Inspectorate, who are working with us as part of the Inquiries Review Team.

5. For how long we will keep your personal data, or criteria used to determine the retention period.

Your personal data will be held for two years from the closure of the call for evidence.

6. Your rights, e.g. access, rectification, erasure

The data we are collecting is your personal data, and you have considerable say over what happens to it. You have the right:

- a. to see what data we have about you
- b. to ask us to stop using your data, but keep it on record
- c. to ask to have all or some of your data deleted or corrected
- d. to lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at <https://ico.org.uk/>, or telephone 0303 123 1113.

7. The Data you provide on SurveyMonkey will be stored by SurveyMonkey on their servers in the United States. We will also transfer any data you provide to us by email or hard copy to SurveyMonkey, so that all the data collected through the call for evidence is located in the same place and can be more

easily analysed. MHCLG has taken all necessary precautions to ensure that your rights in terms of data protection will not be compromised by this.

8. Your personal data will not be used for any automated decision making.

9. Your personal data will be stored in a secure government IT system. While the call for evidence is open some of the data may be copied over from SurveyMonkey to our internal secure government IT system. After the closure of the time period of the call for evidence, all the data may be copied over to our internal, secure, government IT system.