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Planning and Environmental Appeals Division (DPEA)
Scottish Government
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27 April 2022

Dear David,

Consultation Response: Pre-examination meetings, hearings and inquiries: options for a future operating model

Scottish Renewables is the voice of Scotland's renewable energy industry. Our vision is for Scotland leading the world in renewable energy. We work to grow Scotland's renewable energy sector and sustain its position at the forefront of the global clean energy industry. We represent over 290 organisations that deliver investment, jobs, social benefits and reduce the carbon emissions which cause climate change.

Our members work across all renewable energy technologies, in Scotland, the UK, Europe and around the world. In representing them, we aim to lead and inform the debate on how the growth of renewable energy can help sustainably heat and power Scotland's homes and businesses.

Scottish Renewables welcomes the opportunity to provide our view on the proposed amendments outlined in this consultation. In responding, we would like to highlight the following key points:

- The extent to which the DPEA and stakeholders adapted to exceptional circumstances during the pandemic is to be commended. Virtual inquiries provided a means of progressing applications/appeals during a public health emergency.
- We oppose the use of virtual inquiries and hearings becoming a default and permanent feature, given that the temporary emergency restrictions are no longer in force.
- We recognise that some positive aspects of the way of working adopted over the past two years could and should be retained. In less complex cases, virtual proceedings should be available as a tool to contribute to making relevant hearings easier and less burdensome.

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- We are concerned about an apparent drift toward virtual inquiries in a number of recent cases and an apparent change of policy where in-person inquiries are being refused on the basis of the DPEA's COVID-19 Guidance (updated February 2022).
- A move towards virtual proceedings as the default should be avoided as we feel that in the long term this will have consequences for the quality of decision-making and public participation in the planning process.
- It is our position that a default position should not be set, but rather a hybrid approach to inquiries and hearings should be adopted, with the format agreed upon a case-by-case basis reflecting the scope and objectives of the case.

Scottish Renewables would be keen to engage further with this agenda and would be happy to discuss our response in more detail.

Yours sincerely,



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OVERARCHING COMMENTS

We have supplied answers in the second half of this response to the questions sent with David Henderson's email of 01 March 2022 seeking views on working practices for pre-examination meetings, hearings and inquiries.

However, we are concerned that the questions posed miss some fundamental points about the nature and purpose of public inquiries. The questions focus too much on how well the virtual process works from a technical perspective and the ease with which parties can attend virtual and in-person proceedings. These overarching comments address matters from two perspectives. Firstly, we look at what public inquiries should be designed to achieve. Secondly, we address in detail some of the points answered in the attached paper.

We have assumed that this exercise relates to both Town and Country Planning (Scotland) Act 1997 appeals (and other processes which might be subject to oral procedures under the Act) as well as inquiries under s.36 of the 1989 Act (and potentially other statutory provisions).

Primarily we are concerned about an apparent drift toward virtual inquiries in a number of recent cases. This appears to be a change of policy from that expressed in previous discussions with you. We are not aware of any consultations having taken place on this apparent change of policy, which appears to be happening before this current consultation process has been completed.

We base our concern on a number of recent applications currently being processed by the DPEA where in-person inquiries are being refused on the basis of the DPEA's COVID-19 Guidance (updated February 2022). The updated guidance apparently indicates a general resumption of in-person inquiries and suggests that Reporters should consider "*whether there would be a clear advantage*" in proceedings being held in-person and suggests that "*events involving solely or largely professional advocates and witnesses are much less likely to justify an in-person format*".

The last sentence is of considerable concern. The fact that professional advocates and witnesses are instructed is a key factor indicating the evidence is of a level of complexity that makes in-person proceedings preferable in many cases. We note that the questionnaire asks "*is there a justification for having meetings with professional advocates and witnesses held virtually rather than in person?*" It appears that a view has been reached on that question already. We set out here why such an approach and a presumption to hold virtual proceedings as default would be wrong and could threaten the quality of decision making.

Virtual inquiries provided a means of progressing applications/appeals during periods of lockdown and subsequent restrictions in a public health emergency. The extent to which the DPEA and stakeholders involved in the system quickly adapted to exceptional circumstances is to be

commended. However, the changes were introduced to deal with an emergency situation which has now largely passed.

We recognise that some positive aspects of the way of working adopted over the past two years could and should be retained, however, we oppose the use of virtual inquiries and hearings becoming a default and permanent feature, given that the temporary emergency restrictions are no longer in force.

It is our position that a default position should not be set, but rather a hybrid approach to inquiries and hearings should be adopted, with the format agreed upon on a case-by-case basis reflecting the scope and objectives of the case. The pre-inquiry meeting provides a suitable opportunity to agree on the format. Ultimately if the case merits (or requires as in the case of s.36 applications) an inquiry or hearing session to take place the Applicant, whose project it is, should have the final choice of in-person or virtual proceedings.

With regards to what public inquiries are designed to achieve, Reporters always stress that the purpose of an inquiry is to enable them to gather the evidence they need to make a decision or write a report. With respect that is incorrect or at least incomplete.

It is essential that not only the owner (or a developer in place of the owner) but also those who oppose the owner's plans are able to speak their views in a public forum. The use of virtual proceedings as an available technical opportunity to gather evidence for the benefit of the Reporter is not the most effective approach to ensuring this, particularly in complex cases. Public restrictions on the use of land are a serious matter and not simply a "technical" issue to be resolved.

That is not to say that if all parties agree on a virtual process that is still not acceptable, but our emphasis is on all parties. If the developer or the Planning Authority chooses an in-person inquiry, then that is what should take place.

We recognise that members of the public may choose to appear virtually, just as they have always been able to articulate their views in writing. But not the Planning Authority which has decided to object to/refuse the use proposed, which should appear in person unless a virtual appearance has been agreed upon by all parties.

We add that cost savings must not hold precedence where in-person hearings would offer meaningful advantages. The right to appear and be heard is fundamental, and if cost is allowed to be a strong influence, then Planning Authorities may opt for virtual proceedings in most cases. In any event, we set out below why virtual proceedings do not always save costs.

Importantly, in-person inquiries can facilitate a sense of acceptance and closure to an adversarial and, by nature, divisive process. Where there is no opportunity to debate issues in person there can be a sense of disenfranchisement and a missed opportunity.

Lack of acceptance and closure naturally breeds longer-term distrust of the planning process, a feature seen too often with major infrastructure (such as roads), which is seen as publicly promoted. The theme of justice being seen to be done is important.

Another advantage of in-person inquiries is the benefit of social interaction with all parties. The opportunity to network at breaks with opposition parties can encourage a more constructive approach to the resolution of issues. In addition, this can reduce the scope of oral sessions, for example, if the Applicant meets with the Council in person to debate and agree on conditions, which is often more effective than e-mail exchanges. This fosters better long-term relationships in the event that consent is granted and a development built.

Socialisation is a major benefit of the in-person inquiry system. This point is too often ignored by a cost-driven or technical approach. A rapport between advocates and Reporters is a major benefit of in-person inquiries, and this point applies equally to all parties involved in the public inquiries.

The value of the process as a whole can be diminished by the absence of face-to-face contact and interaction in certain cases. If the pandemic teaches us anything it is the crucial value of human interaction. Virtual meetings never achieve the value of in-person meetings or produce the ideas that flow when two or three are gathered together.

It has been said that virtual inquiries have led to greater public involvement. We consider this to be misleading. Many more people may watch the webcast, an option still open for in-person inquiries if the DPEA continues to webcast proceedings. However, current evidence is that those who actually take part and give evidence are often better served by physical attendance.

It would be wrong to assume that those attending in-person to watch proceedings do not benefit from being able to do so and from being seen to do so. It also cannot be assumed that everyone wishing to attend an inquiry will have access to the hardware, internet connection and technical knowledge required to follow and/or take part in virtual proceedings.

Overall, the value of an in-person hearing within the context of development decisions (particularly those complex ones which require such proceedings) should not be diminished. Virtual hearings, if taken as the norm, could serve to diminish this process. That said, where all parties are agreeable and where such issues can be dealt with virtually, hearings or elements of them may be appropriately held in a virtual setting. This should be an additional tool for reports and those appearing to make the process easier and less burdensome.

It is also the case that holding virtual inquiries as default may limit the on-the-job training available to young advocates and witnesses, who can learn from those preparing for and giving evidence or examining witnesses in-person. Looking forward this is an important factor as Reporters have a right to expect a decent quality of presentation of cases.

Turning to issues of detail, our members' experience of conducting numerous virtual inquiries over the last two years indicates that they have a number of drawbacks:

1. The process can be noticeably more tiring for all participants than an in-person inquiry. This means shorter sessions and so potentially additional sitting days. It is much more difficult to concentrate on and properly absorb evidence for sustained periods when it is delivered via a computer screen. This is true for both experienced witnesses and advocates as well as others.
2. In virtual meetings there are frequent technical and connection issues, resulting in interruptions that break the flow and concentration of the evidence, and so lengthen inquiry days and the inquiry overall.
3. Related to this point, it is our members' experience that cost savings with a virtual process are limited at best, due to the need for additional time to complete virtual proceedings occasioned by the factors set out above. We are not convinced that there are substantial savings to the public purse as a result of the use of virtual inquiries, and any savings are at risk of being outweighed by the disadvantages of an inferior process.

Additionally, members of inquiry teams still have to travel to one location for essential preparation and for the inquiry. The advocate and witnesses have to be together, if in separate rooms, in order to best present evidence. Our members' experience of having the advocate and witnesses present in one place makes this point acutely.

The one cost saving in the virtual process is the result of electronic working, thus reducing printing costs. However, this saving can be sustained with in-person proceedings as most parties will continue to use screens to access documents, as they were starting to do as a matter of course before the pandemic.

4. Examination of witnesses in chief and in cross-examination virtually is far less satisfactory than in-person examination. The fact of the advocate and the witness being in the same room is important, although not perhaps so visible to those not experienced in the process. The fact of the advocate and the Reporter being in the same room also has considerable value. In most cases, a rapport is developed between the Reporter and those appearing for the various parties. The value of that rapport in ensuring the proceedings take place in an expeditious manner should not be overlooked. It is not easy to build that rapport when all parties are remote from one another.

We note that many of the views expressed in this letter are echoed by the response of the Faculty of Advocates to the Scottish Civil Justice Council's consultation on remote hearings. The Faculty highlighted a number of "*inefficiencies and inequalities that arise out of the use of virtual hearings*" and expressed concern that if implemented, virtual hearings would "*create problems with access to justice, the quality of justice and in equality*".

Whilst accepting that the context of that response is a different forum, some of the points made by the Faculty echo our concerns, in particular those set out in paragraph 18 onwards, and many of the arguments are equally applicable to the conduct of public inquiries in relation to planning matters. The points made by the Faculty apply with even more force to a necessarily and rightly public event, as opposed to a bilateral dispute.

It is notable that the central proposition in the consultation that there should be a presumption that the vast majority of civil hearings will continue to be dealt with by way of virtual hearings is wholly opposed by the Faculty.

In summary, we consider that the format of inquiries should be decided on a case-by-case basis and reiterate that the in-person format offers many benefits that are not possible to replicate using virtual forums. A move towards virtual proceedings as the default should be avoided as we feel that in the long term this will have consequences for the quality of decision-making and public participation in the planning process. However, in less complex cases, virtual proceedings should be available as a tool to contribute to making relevant hearings easier and less burdensome.

CONSULTATION QUESTIONS

1. In relation to virtual meetings what do you think has worked well?

The virtual process works well for procedural meetings, but not for hearings or inquiries. The key issue is that no evidence is discussed in procedural meetings. In addition, procedural meetings tend not to last for more than a couple of hours.

2. In relation to virtual meetings what do you think has not worked well?

See the answer to Q1. For reasons explained in-person process is always to be preferred as the default option for hearings and inquiries.

3. What do you see as the advantages of virtual meetings?

For procedural meetings, they save a lot of costs when that factor is key. There are no other obvious advantages.

4. What do you see as the disadvantages of virtual meetings?

See the answer to Q3 and our overarching comments.

5. What aspects of these meetings work better virtually and what aspects work better in-person?

Please see our overarching comments.

6. Did you find participating in a virtual meeting more or less demanding than in-person meetings?

For procedural meetings there is no real difference in energy use or the ability to concentrate, the key factor being the brevity of meetings. For hearings and inquiries, the reverse is true. Sound quality and technical stability is also a factor that can interrupt hearing and inquiry sessions, which can be a significant disadvantage for such proceedings.

7. Are in-person meetings, subject to satisfactory broadband connection, considered to be more or less daunting for unrepresented parties?

As set out in our overarching comments this misses the real point of public inquiries. Please see our overarching comments for more detail.

8. What obstacles are there to you participating in-person meetings?

None.

9. What obstacles are there to you participating in virtual meetings?

None subject to sufficient bandwidth, which can always be arranged.

10. What steps could be taken to improve your participation in-person meetings?

None really required so long as the venue is suitable. Wi-Fi can be provided for the duration of the inquiry if required.

11. What steps could be taken to improve your participation in virtual meetings?

Make sure that all parties have sufficient bandwidth, which is a real issue in rural areas where most wind farm third party stakeholders live. This is and will remain a serious issue that interrupts and prolongs inquiries.

12. Are there certain types of case that lend themselves to in-person meetings?

This isn't a question of the case but rather the nature of the meeting. Hearings or inquiries should always be held in-person for the reasons set out in our overarching comments.

13. Are there certain types of case that lend themselves to virtual meetings?

No. See our overarching comments.

14. Is there a justification for having meetings with professional advocates and witnesses held virtually rather than in-person?

No, and as is explained in our overarching comments this undermines the fundamental purpose of the process.

15. What would be the advantages/ disadvantages of more meetings being held in well-equipped regional locations and/ or the DPEA offices in Falkirk?

We are not sure that this is always possible or a good solution. Procedural meetings should now always be virtual. A public inquiry is just that and should always be held in the area of the development proposal. If an evidential process is dealt with by a virtual process then where it takes place is immaterial, subject to the bandwidth issue, but local people cannot be expected to travel many miles to find bandwidth.

16. Should DPEA aim to provide for hybrid meetings, where participants can participate in-person or virtually as they choose?

The principal parties should always attend in person, also consultees if they choose to take part. However, members of the public should be able to choose to attend virtually unless they want to give evidence.

17. Any other comments you may wish to make?

With regards to the approach taken to core documents, the new approach is too onerous.

Our members are now asked that all documents should be submitted as early as possible (which works well and is useful).

However, as these are added to the DPEA website, members are sent lists of hyperlinks to those documents. These links take you to a holding page and then you have to click to open the core document which is to be added to the core documents list. The Applicant must create a hyperlink for every single core document and then it has to check that each one is correct. This has proved to be necessary on one or two occasions.

The process of inserting all the hyperlinks into the core documents list, checking every one and then liaising with the DPEA to correct errors, is very time consuming.

It will also be time consuming for the DPEA administration team, which has to create a list of hyperlinks for every document.

We were advised that this approach was being taken because Reporters would use the core documents list as their library for the inquiry sessions. However, Reporters are still requesting that a USB library be provided and we believe that the USB library was then used for the inquiry – rather than clicking into documents via the core documents list.

Thus we are not convinced that anyone is actually using the hyperlinked core documents list – which means that both the Applicant and the DPEA are expending a lot of time on something which potentially has no real worth.

END