



Law Society
of Scotland

Consultation Response

Proposed DPEA Guidance Note 24: *Provision of material evidence and conduct of parties in proceedings before DPEA Reporters*

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Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Planning Law Sub-committee welcomes the opportunity to consider and respond to DPEA's consultation on proposed guidance note 24: *Provision of material evidence and conduct of parties in proceedings before DPEA Reporters*. We have the following comments to put forward for consideration.

Consultation questions

1. Do you agree the principles and desired outcomes set out above which under-pin the proposed issue of this Guidance Note?

Yes, we agree with the principles and desired outcomes, including supporting DPEA's ability to issue high quality decision and reports by ensuring clearly material information and evidence is placed before Reporters and attention is brought to material changes of circumstances in relation to material evidence.

2. Do you agree that issuing this Note is an appropriate way to proceed to further the achieving of those principles and outcomes?

In principle, we consider that this proposed guidance note is welcome and should help with more accurate and informed decision making.

We consider, however, that the proposed Note raises an issue in the context of The Town and Country Planning (Development Planning) (Scotland) Regulations 2008 ('the 2008 regulations'). Planning Circular 6/2013¹ refers to the 2008 Regulations, regulation 22 which provides that a reporter may, at any stage, request further representations or information from any person. The Circular provides:

¹ <https://www.gov.scot/publications/planning-series-circular-6-2013-development-planning/>

“113. There is no provision, for either those who have made representations or the planning authority/SDPA, to submit any further material to the Examination unless invited and required to do so by the reporter. This reinforces the importance of front-loading the process, ensuring that the reporter, the planning authority and other interested parties have the relevant information from the start of the Examination.

114. There need be no link between the importance of an issue and whether the reporter seeks further representations on it. There may be issues of great significance where the reporter feels they have all the information they need to reach a conclusion without any further input. Conversely, they may feel unable to make a recommendation on a relatively minor issue without further information.”

While we support the proposed approach set out in the Guidance Note, we suggest that if the Note is to be introduced, it would be helpful for it to specifically acknowledge that practice has moved on since the Circular was drafted in 2013 to avoid a lack of clarity about which document takes precedence.

3. Is there more that can be done by DPEA or others to pursue these ends?

No comment.

4. Is there anything missing from the Note? Are there other examples or behaviours which this Guidance Note should address?

No comment

5. Are there better ways in which we could focus the issues to further the achieving of those principles and outcomes?

In the circumstances, we consider that the proposed Guidance Note will help to remind all participants in the process of the need to ensure that Reporters are aware of all material matters. However, we note that there is already material which supports this approach.

The case of *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (“Ikarian Reefer”)*² is considered to be authority for expert witnesses owing certain duties and responsibilities in the context of civil cases. We consider that these duties may be applied to expert witnesses giving evidence to a planning inquiry or appeal, either in person or in writing. The Supreme Court confirmed the application of the principles in Scots law in *Kennedy v Cordia (Services) LLP*³.

The *Ikarian Reefer* case provides:

² [1993] 2 Lloyds Rep 68

³ 2016 UKSC 6 at [52]

“An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise....An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.”⁴

This supports the idea that an expert witness is to provide all relevant information to assist the Reporter, not just the information that supports a client’s case. In addition, it is common for professional bodies to have guidance for their members in respect of providing expert witness evidence - for example, we note that the RTPI guidance ‘*Planners as expert witnesses*’ specifically refers to the principles addressed in the *Ikarian Reefer* case⁵.

6. Is the right balance struck between full provision of information throughout and the risk of undue delay as circumstances change in the course of consideration by DPEA of an appeal or application?

No comments.

7. Is there more that DPEA can do in relation to these matters to further the achieving of those principles and outcomes?

No comments.

Other comments

We note the importance of all parties being aware of new guidance so that they may act appropriately. What steps will DPEA undertake to ensure that this guidance is brought to the attention of all participants, particularly in light of our comments above?

For further information, please contact:

Alison McNab
Policy Team
Law Society of Scotland
DD: 0131 476 8109
AlisonMcNab@lawscot.org.uk

⁴ [1993] 2 Lloyds Rep 68 at 81.

⁵ <https://www.rtpi.org.uk/media/1832/plannersasexpertwitnessespracticeadvice2018.pdf>