



Each case is unique and must be considered on its merits. It is for the person appointed to determine the case to satisfy him/herself that the application of the practice contained in this note is appropriate to the circumstances of the case. A reporter who intends to depart from the guidance should advise his/her SGL so issues emerging can be considered for future case work.

Guidance note for:	<b>Reporters</b>
Relating to:	<b>Addressing undue delay in a planning appeal</b>
Background:	<p>Occasionally it may appear that an appellant has lost interest in progressing their appeal. Typically this will come to light where the reporter has sought, but not received, further information. This might be because the appellant regards the request as too onerous or as an indication that the reporter is unlikely to support their proposal. Alternatively (and perhaps more likely) there might be other issues unconnected with the appeal itself that have caused the appellant to lose interest.</p> <p>It is possible that this issue might also arise after a reporter has issued a notice of intention, where an appellant fails to engage with the planning authority in compliance with the notice. In such circumstances the reporter could decide to determine the appeal in the absence of whatever the notice of intention required. However, in some cases, it might be appropriate instead to use powers under section 48(8).</p>
Legislation	<p>Section 48(8) of the Town and Country Planning (Scotland) Act 1997 states:</p> <p><i>If at any time before or during the determination of an appeal under section 47 it appears to the Secretary of State that the appellant is responsible for undue delay in the progress of the appeal, he may—</i></p> <p><i>(a) give the appellant notice that the appeal will be dismissed unless the appellant takes, within the period specified in the notice, such steps as are specified in the notice for the expedition of the appeal, and</i></p> <p><i>(b) if the appellant fails to take those steps within that period, dismiss the appeal accordingly.</i></p>
DPEA practice	<p>Reference to the Secretary of State also covers an “appointed person” under Schedule 4 to the 1997 Act. Therefore, provided that a reporter can reasonably conclude that the appellant is responsible for undue delay in the progress of the appeal, (s)he can give them written notice (an example structure is suggested below) and a deadline by which certain steps have to be taken. If they do not take those steps, (s)he can dismiss the appeal on that basis, without needing to set out a full consideration of the case in the decision notice.</p> <p>In the example below, the appellant had failed to respond to a procedure</p>

notice request for supplementary environmental information. The section 48(8) notice therefore referred to the EIA regulations. However, it is not merely cases to which those regulations apply that can be the subject of such a notice. As the quotation above confirms, section 48 applies to all appeals under section 47.

The wording at the start of section 48(8): "*If at any time before or during the determination of an appeal*" (added emphasis) suggests that section 48(8) could apply to an incomplete appeal (ie prior to allocation to a reporter), where an appellant has caused undue delay to progress by failing to submit information necessary to make the appeal complete.

In all cases, when deciding whether it would be appropriate to issue a section 48(8) notice, regard should be had to: the impact the appellant's failure to progress the case has had upon the reporter's ability to determine it in the normal way; the number of opportunities the appellant has had to resolve the issue; and the nature of any response they had previously made. The appellant needs to have caused "undue" delay and not merely delay so this procedure should not be one that is followed without careful consideration.

A decision on whether to issue a notice will depend on the facts of each case. However, our customers will expect reporters to approach the issue with a degree of consistency. For this reason, reporters should seek advice from the duty principal before issuing such a notice.

#### **Example structure for a notice under s48(8)**

The notice should be sent by the case officer, but should refer to the decision to issue the notice having been made by the reporter(s) (being the "appointed person(s)" to whom the power is given). While the notice would take the form of a letter, it should clearly refer to section 48(8) and confirm that it is a formal notice under that provision of the Act.

In one or more paragraphs, the notice should set out the chronology of requests for information. This does not need to be especially detailed, but it may be helpful (if the recipient of the notice were to seek legal or other advice from someone who has not previously been involved) for a full explanation to be provided as to what has happened, in order to provide background to the reporter's conclusion that this has caused undue delay.

The notice should then move on to confirm formally that the reporter finds the appellant has caused undue delay and give them notice of what will happen if they do not comply with certain specified steps. Below is an extract from a section 48(8) notice showing how that information was conveyed.

1. *The appeal proposal is subject to the 2011 EIA regulations.*
2. *The appointed reporters conclude that additional information is reasonably required for them to give proper consideration to the*

*application, including the likely significant effects of the development on the environment, and that the appellant could provide that information. The appointed reporters are therefore required by regulation 23 of the 2011 EIA regulations to request that information from the appellant. The appointed reporters consider they cannot reach a reasoned conclusion on the significant effects of the proposed development on the environment (as they are required to do by regulation 3A of the 2011 EIA regulations) unless they have received the additional information sought by the procedure notice. If the appointed reporters are not able to reach such a reasoned conclusion, a grant of permission would not be lawful.*

*3. The appointed reporters have not received the information requested in the procedure notice and the appellant has not given any timescale to provide it. The appellant also has not taken any issue with the appointed reporters' request for the additional information.*

*4. Having regard to the above, the appointed reporters find that the appellant's failure to respond to the procedure notice is causing undue delay in the progress of the appeal.*

*5. I hereby give notice that, if the appellant does not provide the information sought by the procedure notice by close of business on Tuesday 2 April 2019, or does not, by that same deadline, give a timescale satisfactory to the appointed reporters for providing it, or give an explanation satisfactory to the appointed reporters as to why it is not necessary or should not be provided, then the appointed reporters will exercise their section 48(8) power to dismiss the appeal.*

*6. In the event that an extended deadline for submission of the response to the procedure notice were agreed, any failure to provide a satisfactory response by that extended deadline would also lead the appointed reporters to exercise, without further notice, their section 48(8) power to dismiss the appeal.*

In the above example, due to the complexity of the missing information and the likely need for further environmental fieldwork, the appellant was given the opportunity to provide a firm deadline by which the missing information would be provided. This avoided the need for the reporter to calculate how long should reasonably be allowed for the work to be undertaken. The appellant responded by the deadline to confirm that an additional three months would be required to produce the required information, making it difficult for the appellant later to claim that insufficient time had been given.

In simpler cases, for example where an answer to a specific question in a procedure notice has not been given and no justification has been provided for that failure, it is likely to be sufficient for the section 48(8) notice simply to set a further (and final) deadline for submission of the required answer and not offer the opportunity to seek any further extension.