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# LEVEL CROSSINGS
# A CONSULTATION PAPER SUMMARY

## INTRODUCTION (CONSULTATION PAPER PART 1)

1. This is a summary of the joint consultation paper on Level Crossings published by the Law Commission and Scottish Law Commission. It sets out the provisional proposals and questions and provides a brief outline of our main arguments. More information and detail is included in the consultation paper. The consultation period ends on 30 November 2010. An assessment of the economic impact of our proposals is available on the Commissions' websites.

2. The provisional proposals represent our preliminary views about how the law should be reformed. We welcome comments and feedback on our proposals and the questions raised and on the economic impact assessment. We will review every proposal on the basis of responses made to the consultation paper. Once responses have been gathered and considered, an analysis of consultation responses will be published. A report containing our final recommendations will be submitted to the Lord Chancellor and Scottish Ministers. The report will include a draft Bill which would give effect to the recommendations.

### Background and scope of the project

3. A level crossing is a place where a railway is crossed by another type of way on the same level. There are between 7,500 and 8,000 level crossings in Great Britain.

4. This consultation paper examines the legal framework relating to level crossings with a view to its modernisation and simplification. The legislation governing level crossings is complex and antiquated, much of it dating back to the nineteenth century when the main railways were constructed. The provisions relating to level crossings are scattered amongst legislation relating to different areas of law. They are contained in public Acts, private special Acts, bye-laws or subordinate legislation which are difficult to access or which have been partially repealed, become spent or obsolete or have been heavily amended over the years. There has been no attempt at consolidation of the law in this area.

5. Under the current regime, the procedure for making generic changes to the protective measures at level crossings is cumbersome and expensive and the relationship between the various systems of safety regulation is far from clear. Significant obstacles stand in the way of closing level crossings even where safety, convenience or economic analysis would point towards closure. The procedures are complicated and time-consuming and often expensive. Although there are criminal offences which are relevant to level crossings, they do not specifically deal with the relevant types of misuse which can occur at level crossings.

6. In light of these issues, the Department for Transport (DfT) and Office of Rail Regulation (ORR) proposed a project to review the law relating to level crossings as part of the Law Commission's Tenth Programme of Law Reform. The Law Commission and Scottish Law Commission agreed to undertake a joint project covering Scotland, England and Wales, but not Northern Ireland.

7. In order to assist the Law Commissions' teams an advisory group was established. A list of the members and the organisations represented on the advisory group is on our websites.

**Definitions**

8. For the purposes of this project we have chosen to define a railway as a transport system where the tracks are segregated from other traffic and where the gauge of the tracks is at least 350mm. This definition excludes some tramways and all tramroads. In arriving at a definition we have looked at the physical and functional aspects of a railway and have not confined ourselves to any of the statutory definitions of railways.

9. **We would welcome the views of consultees on whether, for the purposes of our proposals, "railway" should be defined as a transport system where the tracks are segregated from other traffic.**

10. We define a level crossing as a place where a railway is crossed by another type of way on the same level. This includes roads, footpaths, bridleways and other rights of way. A road in England and Wales is defined as any highway or other road to which the public has access. In Scotland, a road is any way over which there is a public right of passage.

11. In 2009 there were 3,590 public level crossings, 2,073 on public footpaths, 130 on public bridleways. 2,114 public level crossings had special protection measures, such as whistle boards and warning lights to indicate an approaching train. 1836 had no special protection. 2,462 level crossings were in use on the mainline network in 2009, of which 2,383 were on private vehicular roads, 248 were on private footpaths and 11 were on private bridleways. 228 private level crossings had special protection measures and 2,414 had no special protection. There are also an estimated 1,000 to 1,500 level crossings on heritage and hobby railways.

12. There are several ways in which a level crossing can be classified: by physical feature; by reference to users; and by reference to the legal nature of the crossing. This project covers the following types of level crossing:

(1) Public crossings where the railway is crossed by a footpath, a bridleway, and/or a road/highway;

(2) Private statutory rights of way crossings;

(3) Private easement or servitude crossings; and

(4) In England and Wales, track/railway owner crossings in cases where the public has legitimate access over them as a matter of fact.

**History of the railways and level crossings**

13. The consultation paper contains a fuller history of the development of the railways and level crossings. The early railways were constructed and maintained by private companies, usually under private Acts of Parliament known as "special Acts", which conferred incorporation and limited liability, powers of compulsory purchase of land and immunity from liability for public nuisance. A number of public Acts were then passed in an attempt to regulate the contents of private legislation, including the Railways Clauses Consolidation Act 1845 and the Railways Clauses Consolidation (Scotland) Act 1845 which contained model clauses which were deemed to be included in a special Act unless expressly excluded or varied.

14. In 2001, Network Rail Infrastructure Limited (a not-for-dividend company) became responsible for the management of the mainline railway infrastructure. Some parts of the railway network are still owned by heritage railway companies and commercial organisations.

15. After a series of fatal rail accidents at Ladbroke Grove, Hatfield, Potters Bar and Southall, the system of rail regulation was reformed. The Railways and Transport Safety Act 2003 established the Rail Accident Investigation Branch (RAIB) and transferred the Rail Regulator's functions to the new ORR. As a result of the Railways Act 2005 responsibility for railway safety was transferred from the Health and Safety Executive to ORR.

16. In the early days of level crossings, gates operated by gatekeepers were used to protect crossing users from passing trains. Provision for level crossings with automatic and unmanned gates and barriers was made in the British Transport Commission Act 1957. The new safety arrangements sought to balance the interests of safety and convenience. Our proposals seek to maintain this balance.

17. Nowadays protection is afforded in a number of ways, including automatic half-barriers (AHBs), locally monitored open crossings (AOCLs) and remotely monitored automatic open crossings (AOCRs). A glossary of different types of level crossing can be found at Appendix C to the consultation paper.

## SCOTLAND AND WALES – DEVOLUTION AND OTHER ISSUES (CONSULTATION PAPER PART 2)

18. The project takes into account differences in both public and private law between England and Wales and Scotland. From a public law perspective much of the legislation relating to railways and level crossings applies similar provisions throughout the whole of Great Britain. There are, however, differences in relation to highways/roads law, planning law, criminal law and statutory rights of access to land. The most significant differences arise in property law. Part 2 of the consultation paper contains more detailed discussion of devolution and differences in the law.

## DISABILITY AND ACCESSIBILITY (CONSULTATION PAPER PART 3)

19. During the course of our research we have been made aware of a number of issues which concern the accessibility of level crossings, for disabled persons and also for other users, such as cyclists, horse riders and those with pushchairs. Accessibility is part of the equation in balancing safety and convenience when deciding on appropriate protective arrangements at level crossings.

20. Under the Disability Discrimination Act 1995, providers of services and public authorities are under a duty to treat disabled persons equally to other members of the public; and to make reasonable adjustments. The Equality Act 2010 aims to harmonise and consolidate the legislation in the UK relating to discrimination and contains "public sector equality duty" which will, when the Act comes fully into force, replace the current separate disability, gender, and race equality duties. The European Commission has proposed a Directive implementing the principle of equal treatment of persons irrespective of religion or belief, disability, age or sexual orientation, outside of the employment context which would extend the duties beyond those with disabilities.

21. **We would welcome any comments that consultees may have on disability and accessibility issues in respect of level crossings.**

## CREATION OF LEVEL CROSSINGS (CONSULTATION PAPER PART 4)

22. Part 4 of the consultation paper outlines the current legislation relating to creation of level crossings.

### Orders under the Transport and Works Acts

23. Nearly all level crossings were created under private special Acts as part of the construction of the railways during the nineteenth century. Nowadays new railways are authorised by orders under the Transport and Works Act 1992 or the Transport and Works (Scotland) Act 2007. Where an infrastructure project requires compulsory purchase powers or the creation or extinguishment of rights over land, the transport and works procedure is usually adopted, but is not compulsory. In practice, the procedure is used only for large-scale projects.

24. The procedure requires proposals to be published and a timetable to be set for objections to be made. Comprehensive guidance on the procedures requires full consultation to have taken place with interested parties before an application for an order is made. If there are no objections, the Secretary of State, Welsh Ministers or the Scottish Ministers can proceed to determine the application. If objections are made, the Secretary of State, Welsh Ministers or Scottish Ministers may hold a public local inquiry or a hearing or there can be an exchange of written representations between the parties. If a statutory objector, such as a local authority or person whose land would be compulsorily purchased, or (in Scotland) Network Rail, requests an inquiry or hearing, one must be held. Once objections have been considered, the Secretary of State, Welsh Assembly Government or Scottish Ministers may make or refuse to make an order with or without modifications.

25. The 1992 and 2007 Acts provide a thorough process, designed to test the desirability of the schemes promoted under them. In 2006 the procedures under the 1992 Act were comprehensively reviewed resulting in amendments to the procedural advice to make the procedures more flexible and proportionate to the range of applications covered. As a result, the fees and timescales are less for an order authorising a short extension to a heritage railway than for the West Coast Main Line upgrade. However, we consider that the procedures may well be onerous, expensive and time-consuming in relation to individual level crossings.

**Deemed planning permission**

26. In certain cases, planning permission is not required or is deemed to have been given. For example, where a new private footpath crossing is created over a railway, no planning consent would be required. Network Rail is deemed to have planning permission to undertake certain developments on its own operational land and the Secretary of State or Scottish Ministers may deem planning permission to have been granted where a transport and works order is made.

**New level crossings**

27. It is ORR's policy that no new level crossings should be created on any railway, other than in exceptional circumstances. There may still be circumstances where a new level crossing would be required, for example where an existing level crossing had to be closed on the grounds of safety and a new one opened nearby. A level crossing which was previously closed might be brought back into use. If the railway operator could grant a right of way across the railway and the creation of the crossing was uncontentious, there might be no legal difficulties. The transport and works order procedure could be used if compulsory purchase powers were required, although this might be expensive and time-consuming in relation to an individual level crossing.

28. Overall, it seems to us that the modern system is appropriate and works well with the possible exception of the creation of new level crossings on existing railway lines.

29. **We would welcome the views of consultees on the current system of creating level crossings.**

## CURRENT REGULATION OF LEVEL CROSSINGS (CONSULTATION PAPER PART 5)

30. Public level crossings are subject to three possible sources of regulatory control:

    (1) the original special Acts, laying down specific rules about the protection of the crossing;

    (2) orders made under the Level Crossings Act 1983, where such an order has been made; and

    (3) the Health and Safety at Work etc Act 1974 (HSWA 1974) and regulations made thereunder.

### Level crossing orders

31. In England and Wales the Level Crossings Act 1983 applies to crossings where the way which crosses the railway is one over which the public has access. This includes some level crossings where the public has been granted access or takes access (not unlawfully) but where there is no enforceable public right of way. In Scotland, the Act only applies to ways over which the public has a right of passage. We discuss the application of the 1983 Act in the consultation paper and conclude that the 1983 Act does not apply to the majority of private level crossings in England and Wales and to no private level crossings in Scotland.

32. Level crossing orders made under the 1983 Act apply to *individual* level crossings. The Secretary of State has power to specify such barriers or other protective equipment as considered necessary for the safety and convenience of those using the crossing. Orders are usually made following a request from the railway operator (currently Network Rail for the mainline network). ORR may issue a notice requiring the railway operator to request a level crossing order and can issue an improvement or prohibition notice under HSWA 1974 if the railway operator fails to comply. Once an order is made, the Level Crossings Regulations 1997, made under HSWA 1974, impose a duty on the railway operator to ensure that the order is complied with. In the event of failure to comply with an order, ORR may take enforcement action.

33. Special Acts are disapplied (but not repealed) where a level crossing order is in force. Orders made under the British Transport Commission Act 1957 and the Transport Act 1968, which were in force immediately before 1 April 1997, remain in force as if they had been made under the 1983 Act.

### Health and Safety at Work etc Act 1974

34. Prior to HSWA 1974, safety provision for the railways was governed primarily by railway-specific provisions, including special Acts. HSWA 1974 introduced a new general system to protect health and safety, both of workers and of others affected by undertakings, supported by regulations and approved codes of practice. The general purposes of HSWA 1974 include securing the health, safety and welfare of persons at work and protecting persons other than those at work against risks to health and safety arising out of or in connection with the activities of persons at work. Section 117 of the Railways Act 1993 gave the Health and Safety Executive (HSE) and Health and Safety Commission (HSC) jurisdiction over the monitoring and enforcement of railway-specific safety legislation under

HSWA 1974, including the Level Crossings Act 1983 and orders made under the Act.

35. In relation to private level crossings, the Transport and Works Act 1992 gave the Secretary of State powers to make regulations dealing with safety measures at such crossings. The Private Crossings (Signs and Barriers) Regulations 1996 were made under this power.

36. While railway safety is currently governed by the general scheme under HSWA 1974, special Acts and level crossing orders continue to play a role in the regulation of safety at level crossings. It was envisaged in HSWA 1974 that over time codes of practice and regulations would progressively replace existing statutory provisions for health and safety. Where there is no special Act or level crossing order, only the general duties of HSWA 1974 apply to govern safety provision. Although the Level Crossings Regulations 1997 were made under section 15 of HSWA 1974, they were not intended to provide a framework to regulate safety at level crossings. The Regulations merely amended the Level Crossings Act 1983.

37. Since the Railways Act 2005 came into force, neither ORR nor any other organisation has the power to make codes of practice for "railway safety purposes" under section 16 of HSWA 1974. We are not aware of the reason why ORR was not given this power at the time of the 2005 Act.

**Which safety regime takes precedence?**

38. If there is a conflict between the requirements of the different sources of regulatory control, which one prevails? The position is far from clear. Section 1(3) of the 1983 Act provides that a level crossing order trumps the provisions of an earlier special Act. However, it is not clear whether HSWA 1974 trumps level crossing orders. The effect of section 1(4A) of the 1983 Act is that a level crossing order (at least one made after 1 April 1997 when section 1(4A) was inserted into the 1983 Act) does not trump HSWA 1974. But section 1(4A) does not go so far as to say that HSWA 1974 trumps a level crossing order. It may be that this is implied. The general rule of statutory interpretation is that later legislation prevails over earlier legislation, but there is also a principle with says that a general provision does not override a specific provision. Bearing those principles in mind, the general provisions of HSWA 1974 could prevail over the older special Acts, or the specific provisions of the special Acts could prevail over the general HSWA provisions. Our impression is that the railway industry works on the assumption that the provisions of a level crossing order take precedence over special Act provisions, failing which HSWA 1974 applies. This lack of clarity is unsatisfactory and, in our view, points towards the need for a clear regulatory framework for level crossings.

39. **Depending on the outcome of consultation, we suggest that if the current system of safety regulation is to be retained, the relationships between special Acts, level crossing orders and HSWA 1974 duties, should be clarified for the future.**

## CLOSURE OF LEVEL CROSSINGS (CONSULTATION PAPER PART 6)

40. A level crossing might need to be closed not only where there is no longer a need to cross the railway at that location, but also where it is to be replaced by a bridge or underpass and also where the crossing is to be down-graded from a public to a private crossing.

41. In England and Wales, sections 118A and 119A of the Highways Act 1980 provide for the stopping up of public footpaths and bridleways over railways, but not public vehicular ways, on safety grounds only. Section 116 of the 1980 Act also gives the magistrates' court a general power to order the stopping up of a vehicular highway as well as a footpath and bridleway. Nevertheless, the 1980 Act does not adequately address all the situations where a public right of way over a level crossing may need to be extinguished or diverted.

42. In Scotland, the general stopping up provisions of the Roads (Scotland) Act 1984 are restricted to circumstances where a road has become dangerous or has become unnecessary. There is no provision which relates specifically to level crossings. It also seems that there is a gap in provision for the diversion of ways over which there is a public right of passage, which are neither "core paths" under the Land Reform (Scotland) Act 2003 nor "public paths" under the Countryside (Scotland) Act 1967. The powers of stopping up and diversion in relation to both "public paths" and "core paths" are not exercisable on safety grounds. Rather they are exercisable only on the basis of consideration of convenience of the public and the effect of stopping up or diversion on the land.

43. A private level crossing can be closed by agreement between the railway operator and the owner of the right of way over the railway. There are no means by which a private level crossing can be compulsorily closed against the wishes of the owner of the right of way, apart from the order-making powers under the Transport and Works Act 1992 and the Transport and Works (Scotland) Act 2007 or by compulsory purchase. This is discussed in more detail in Part 8 of the consultation paper. It is unlikely that a system designed for much larger scale works, would generally be used solely for the closure of a single *private* level crossing. We are not aware of any such use.

## THE CASE FOR REFORM (CONSULTATION PAPER PART 7)

44. Regulatory regimes should be clear, consistent and transparent. In addition, there are requirements specific to level crossings which are determined by the physical engineering involved and the responsibilities and aims of the regulators and regulated.

45. **We provisionally propose that the regulatory regime for level crossings should aim to:**

    **(1) ensure safety at level crossings;**

    **(2) promote the efficient operation of railways and, where present, highways/roads, taking account of the need to strike a balance between the interests of rail, road and other users;**

    **(3) allocate duties and responsibilities appropriately amongst the various actors; and**

**(4) provide appropriate means to define rights of way at level crossings in so far as feasible, and to extinguish them where necessary.**

46. **We welcome views on whether these objectives provide an appropriate guide for reform. Would any other objectives be appropriate?**

47. The regulatory regime should include appropriate and proportionate procedures for the permanent closure of level crossings including the extinguishment of rights of way over crossings with or without diversion or replacement by a bridge or underpass. Such procedures should allow the economic costs and benefits in relation to each level crossing to be taken into account in reaching a decision about closure or replacement. Economic analysis should not, however, be the only criteria taken into consideration.

48. Where regulatory action involves interference with rights or land administered by another public body, such as a highway/roads authority, a suitable dispute-resolution mechanism should be in place. Where regulatory action interferes with private rights or interests, there should be a dispute-resolution mechanism which encourages settlement and, where settlement is not possible, a clear mechanism for determining whether the interference should take place, including an appeal process and provision for compensation where appropriate.

49. We suggest that the current regulatory regime should be reformed in order to address the problems associated with making generic changes to the safety provision at level crossings. At present, individual level crossing orders prescribe specific safety measures which must be complied with. These can prevent timely introduction of safety measures in response to developments in technology. For example, a report of the RAIB might show that a simple change to the lighting or warning sounds might make level crossings safer. Under the current regime, each individual level crossing order would have to be amended or new individual orders made to give effect to these changes. This is an unnecessary burden to place on the regulator and the regulated.

50. Level crossing orders relate largely to public and not private crossings. The current distinction between public and private level crossings means that safety is governed by different regulatory regimes depending on whether a level crossing is a public crossing or a private crossing. For safety purposes, it is not helpful to distinguish between public and private crossings in this way. Safety is governed by the general duties under Part 1 of HSWA 1974 but also, where appropriate, by specific provisions in special Acts and level crossing orders. A simple and clear approach to the governance of safety would be more conducive to ensuring safe level crossings.

51. **We provisionally think that the current regulatory regime should be reformed as it does not sufficiently recognise the potentially competing interests affecting level crossings and does not adequately cater for all level crossings**.

52. An economic model can be used to assess the costs and benefits of closing a level crossing and replacing it with a bridge or underpass. A model has been developed by the Rail Safety and Standards Board (RSSB) known as the Alternatives to Level Crossings Assessment Tool (AXIAT), which applies only to public vehicular crossings. The model considers the costs of maintaining an existing level crossing against the most favoured alternative. Delays caused to drivers at a public vehicular crossing may be expressed in economic terms. In some cases level crossings are closed for up to 45 minutes in an hour. In such cases the fair balance between the interests of road and rail users must be called into question. The potential costs of accidents can also be expressed in economic terms, including the potential costs of catastrophic incidents. Any model will be limited by the information put in and the weight given to different types of information. AXIAT cannot, for example, determine whether the initial costs required to close a level crossing would be a better use of public funds at that time than a competing interest such as a highway scheme. It should also be borne in mind that economic considerations are not the only criteria to take into account. Even if an analysis of economic costs and benefits concludes that closure would be appropriate, there may be compelling public policy considerations, such as the protection of rights of way, local amenities or local or national transport policies, which outweigh the economic benefits.

53. An initial study of level crossings in four counties in England applying the AXIAT model indicated that there was an economic case for replacing 49 of 288 level crossings (some 17%). The disparity between these findings and the number of level crossings actually closed suggests that there are features of the legal regime which prevent closure where economic benefit would result. This is likely to be, in part, because of the limited circumstances in which a level crossing closure can be ordered, together with the lack of time limits within the current decision-making process.

## SAFETY REGULATION, CLOSURE AND OTHER REFORM PROPOSALS (CONSULTATION PAPER PART 8)

### Safety regulation

54. As noted, the current safety regime at level crossings is based on individual provisions in special Acts, or in level crossings orders. In most cases the general duties under HSWA 1974 also apply. The specific provisions applicable to level crossings in special Acts and level crossing orders are the sort of regime that Part 1 of HSWA 1974 anticipated replacing over time. In the consultation paper we provisionally conclude that it would be preferable for level crossings to be governed entirely by HSWA 1974 together with the regulations and codes of practice made under the Act. This approach would afford greater flexibility and allow for generic changes to be made to protective arrangements at crossings, removing the need to make or amend level crossing orders.

55. **We provisionally propose that the regulation of safety at level crossings should be governed entirely by the general scheme of HSWA 1974.**

56. We accept that there is some force in the arguments for retaining the current system of safety regulation. Individual level crossing orders have the advantage that they can be tailored to the specific safety requirements at particular crossings and they provide certainty for the railway operator and for ORR in enforcing safety requirements. However, they cannot be made in relation to all level crossings. Level crossing orders cannot be made in respect of any private level crossings in Scotland, or in England and Wales in respect of private crossings to which the public does not have access. As regards HSWA 1974, the general duties under the Act apply to most private level crossings, albeit that they do not apply in all circumstances as the Act only imposes duties on employers or self-employed persons in relation to their undertaking. However, on balance we think a move to the HSWA 1974- based system would be beneficial.

57. It could be argued that the relatively good safety record of level crossings is evidence that the current system of special Acts and individual level crossing orders works well. If so, an alternative approach to relying on HSWA 1974 would be to retain the current safety regime, whilst increasing the flexibility to allow generic safety improvements to be made where appropriate.

58. **However, if consultees consider that it would be preferable to retain the current system of regulating safety at level crossings, what changes should be made to improve the system?**

59. ORR is the safety and economic regulator for the railways. It would be counter-productive and impractical to separate railway safety from safety at level crossings, but there is an argument for separating safety at level crossings from other aspects of highways/road safety. There is no single regulator for road safety. However, ORR is the single regulator for railway safety and can currently impose requirements on the appropriate traffic authority as well as on the railway operator in respect of a level crossing. We also take the view that the strong safety record is the product of effective implementation of safety standards by HM Railway Inspectors (now part of ORR's Safety Directorate).

60. **We invite consultees to comment on our provisional proposal that ORR, as the safety regulator for the railways, should remain as the body with overall responsibility for safety regulation at level crossings.**

61. ORR has the power to propose that regulations should be made under section 15 of HSWA 1974. We propose that new regulations should be made under this power, imposing obligations on the railway operator to protect the safety of those using level crossings. These regulations should be used in place of individual obligations in level crossing orders and special Acts.

62. ORR has no power to issue codes of practice under section 16 of HSWA 1974. ORR's role in relation to railways is defined by the 2005 Act in very similar terms to the role of HSE in other areas, but is confined to "railway safety purposes". We provisionally consider that codes of practice should be issued in relation to level crossings, containing practical guidance on how to meet the requirements set out in the regulations. Regulations and codes of practice would provide the flexibility needed to take account of the differing circumstances and risks at individual level crossings.

63. **If our preferred option of moving to a HSWA 1974-based system of regulating safety is accepted, we propose that regulations should be made by the Secretary of State under section 15 of HSWA 1974 in relation to level crossings.**

64. **If our preferred option of moving to a HSWA 1974-based system of regulating safety is accepted, we propose that ORR should be given the power to issue approved codes of practice under HSWA 1974 in relation to level crossings.**

65. ORR is responsible for the enforcement of "relevant statutory provisions" under Part 1 of HSWA 1974, to the extent that they relate to the operation of the railway. This includes the enforcement of duties imposed on traffic authorities under level crossing orders. In the event of a move to a HSWA 1974-based system of safety regulation, we need to consider how far traffic authorities can be bound by the system operated by ORR. As discussed in Part 5 of the consultation paper, the general duties of HSWA 1974 apply to highway and roads authorities. ORR has the power to propose that the Secretary of State makes regulations under section 15 of HSWA 1974, which would be binding on highways/roads or traffic authorities, where the purpose of regulations is to ensure the safety of the public at level crossings. If ORR were given the power to issue approved codes of practice under section 16 of HSWA 1974, these could also provide guidance to highway/roads authorities. Failure to follow guidance could then be enforced by ORR. Similarly, ORR would be responsible for the enforcement of any breach of new regulations under HSWA 1974 against highway/roads authorities.

66. There is room for doubt as to whether ORR would be responsible for enforcement of a breach by a highway/roads or traffic authority of its duties under section 3 of HSWA 1974. Section 3 imposes general duties on employers and self-employed persons in relation to persons other than their employees. We discuss the extent of this duty in Part 5 of the consultation paper. If, for example, the highway/roads authority breached its duty to maintain the highway/road adequately at a level crossing, would that breach relate to the operation of the railway? We think it could, but we also accept that the opposite is arguable. If ORR were not the authority responsible for enforcement of a breach under section 3 of HSWA 1974 at a level crossing, enforcement would be divided between HSE and ORR. We think that safety on the road and rail networks at a level crossing is inextricably linked and should be the responsibility of a single authority.

67. **We therefore ask consultees whether it would be desirable expressly to provide that a breach of section 3 of HSWA 1974 at a level crossing should be subject to enforcement by ORR, not HSE?**

68. A business user, such as a farmer, crossing the railway at a private level crossing would be subject to general duties to persons other than his or her employees, under section 3 of HSWA 1974 so that ORR could take enforcement action for unsafe use which compromised the safety of people not employed by the business user. If the same farmer was harvesting grain in a field next to the level crossing, any breach of the duty under section 3 of HSWA, that did not relate to the level crossing, would be enforceable by HSE. If a breach took place partly on the level crossing and partly on the adjoining land, would HSE or ORR be responsible for enforcement? We think that ORR's jurisdiction would take precedence over HSE's jurisdiction under the current law. It might be preferable for one enforcement body to be able to deal with the whole of the conduct, rather than dividing it between HSE and ORR and pursuing separate prosecutions. It might be preferable for HSE and ORR to have concurrent jurisdiction where a breach occurs partly at a level crossing.

69. **Would it be desirable for ORR and HSE to have concurrent jurisdiction for enforcement of breaches of the general duties under HSWA 1974 or "relevant statutory provisions" where the breach occurs partly at a level crossing; or should ORR's railway-specific jurisdiction oust that of HSE?**

70. HSWA 1974 imposes duties on employers and self-employed persons. Some private level crossings are used for day-to-day social access to a person's property and not for business use. Under our proposed regulatory regime, the railway operator would be subject to safety duties under HSWA 1974, but the owner of the right of way would not be.

71. **We invite consultees to comment on the problem that HSWA 1974 cannot apply to owners of rights of way over private level crossings who are not business users.**

72. The overriding purpose of a level crossing order is to provide for the protection of those using the crossing, but it may also make provision for their convenience. Convenience is currently taken into account in level crossing orders in determining the protective arrangements to be put in place at a particular crossing. HSWA 1974 does not, however, provide for convenience.

73. There are two possible examples.

    (1) It might be necessary to require the railway operator to make provision for those with particular mobility needs, such as, cyclists, horse riders or those with pushchairs, for the sake of their convenience.

    (2) It might be necessary to bind the highway/roads or traffic authority to take action to enhance the efficiency of the railway for the convenience of those using the level crossing, but which had no impact on safety. We found it difficult to envisage such a situation, but it is possible that the highway/roads authority might consider work which required a balancing exercise between the convenience or efficiency of highway/road users and that of rail users.

74. **Do consultees think that a move to a HSWA 1974-based system would create problems in practice?**

75. **We ask consultees to consider whether there is a "convenience gap" in our proposal to replace reliance on special Acts and level crossing orders with a HSWA 1974-based system? If so, how should the gap be closed?**

76. **We ask consultees whether in practice it would be necessary to have a legal instrument that would:**

    (1) require rail operators to take safety-neutral steps to enhance the convenience of the users of the highway/road at a level crossing; and/or

    (2) require highway/roads or traffic authorities to take safety-neutral steps to enhance the convenience of rail users, by enhancing the efficiency of the level crossing for rail use.

77. **Is there a need for provision to enable convenience-related measures to be put in place at level crossings? If so, would it be preferable to:**

    **(1) extend the power under section 15 of HSWA 1974 to make regulations, to include considerations of convenience; or**

    **(2) create a new power to make separate convenience-related orders for particular level crossings?**

**Closure**

78. The consultation paper contained a detailed discussion of the current provisions relating to closure and the problems and gaps left by the current regime.

79. The consultation paper also discusses how the AXIAT model for assessing the economic costs and benefits of closing level crossings indicates that there is an economic benefit to be gained from the closure of a significant minority of level crossings. If a practical and reasonably predictable procedure was available for closing individual level crossings, significant savings could be made to the engineering cost of replacement by a bridge or underpass.

80. **We provisionally propose a new procedure for level crossing closure orders to allow for closure of both private and public level crossings.**

81. The powers available would include: compulsory purchase and stopping up and diversion of highways/roads. The railway operator, highway/roads authority, planning authority, ORR, and others would be able to apply for an order, which would be made by the Secretary of State, the Scottish Ministers or the Welsh Ministers, as appropriate. The procedure should include strict time limits to enhance predictability. Proposals for closure could made with or without replacement. We provisionally think that there should be a list of criteria for the decision-maker to take into account in determining an application for closure, but we ask consultees for views.

82. **Should there be a list of factors to be taken into account in considering an application for a level crossing closure order?**

83. **If so, we would welcome the views of consultees on the following list of factors:**

**(1) safety of users of the crossing (including information as to the incidence of accidents at the level crossing);**

**(2) costs involved in maintenance of the crossing compared with costs involved in closing or closing and replacing the crossing;**

**(3) the effect of closure as opposed to retention (in the case of public level crossings) on the efficiency of the rail and road networks;**

**(4) the effect (in the case of public level crossings) on the integrity of the network of non-vehicular public rights of way;**

**(5) the effect of closure compared to retention of the crossing on the local community;**

**(6) the effect on those holding private rights over the crossing;**

**(7) the usability of the level crossing or its potential alternatives for all level crossing users;**

**(8) the convenience of level crossing users; and**

**(9) the effect on the environment and local amenity.**

84. **Should the factors be set out in order of importance? If so, how should they be ordered?**

85. Who should determine applications to close level crossings? Traditionally, railways have been seen as a national network, whereas land, communities and highways/roads have been treated as local issues. We consider the issues in more detail in the consultation paper and conclude that the issues are sufficiently important that the decision should be made at Ministerial level.

86. **We provisionally propose that the application for a closure order should be determined in England by the Secretary of State, in Wales by Welsh Ministers and in Scotland by the Scottish Ministers.**

87. Where a public level crossing is to be closed, closure would necessitate the stopping up or diversion of the highway or road running over the level crossing. This could be a small diversion to bring the highway/road into alignment with a replacement bridge or underpass, or a substantial change to a footpath some distance from the crossing.

88. **In relation to the question as to whether to stop up a highway or road, and whether to divert a highway or road either side of the railway, we suggest three options**:

**(1) decision by the local highway/roads authority;**

**(2) decision by the Secretary of State/Scottish Ministers/Welsh Ministers but subject to consultation with interested parties and local bodies; or**

**(3) initial decision by the local highway/roads authority, subject to an appeal on the merits to the Secretary of State/Scottish Ministers/Welsh Ministers.**

89. **We provisionally favour the third option, but would invite comments from consultees.**

90. The grant of compulsory purchase powers must be limited in time in order to minimise the blight on affected land values.

91. **We invite views from consultees on what time-limit for the use of compulsory purchase orders would be appropriate.**

92. Closure orders made under the Transport and Works Acts can incorporate deemed planning consent in some circumstances.

93. **We invite views of consultees on whether planning consent should be deemed to be included in a level crossing closure order.**

94. The detailed arrangements for funding are not an issue for the Law Commissions to consider. However, the proper allocation of costs should be an integral part of the decision-making process in relation to the closure order. Promoters are unlikely to apply for a closure order without a proposal as to how to fund the closure. If an application were made without a proposal on funding, it would be likely to be rejected on that basis.

95. **We provisionally propose that level crossing closure orders should be capable of including provision for the apportionment of the costs of closure and replacement between the statutory authorities concerned.**

96. **We invite consultees to comment on the apportionment of costs of closure and replacement of level crossings.**

97. Timely consideration of applications is highly desirable if the maximum benefit is to be gained from a new procedure for closure, so as to enable appropriate scheduling of work. The procedure for a simple closure, where no stopping up or diversion of a highway/road is required, might be subject to the following timetable:

    (1) Serving application to the commencement of consultation: 1 month.

    (2) Consultation: 12 weeks.

    (3) Determination by Secretary of State/Scottish Ministers (following any further proceedings necessary): 2 months.

98. **We provisionally propose that the procedure for level crossing closure orders should be subject to short time-limits at each stage, including consideration by the Secretary of State/Scottish Ministers/Welsh Ministers.**

99. **We ask consultees for their views on what time-limits there should be for the application process.**

100. **We invite views on what the time-limits should be for closure orders including the stopping up or diversion of a highway or road.**

101. **We provisionally propose that, after the expiry of the consultation period, the Secretary of State/Scottish Ministers/Welsh Ministers should decide whether, exceptionally, to hold a hearing before a person appointed by them. Otherwise, further consideration of competing views should be dealt with by the exchange of written representations.**

102. No proposals are made to change the system for closure of a level crossing as part of a transport and works order. It would be undesirable to require promoters of such a scheme to obtain a level crossing closure order in addition to a transport and works order. The two systems should work in tandem with the level crossing closure order providing a more straightforward, quicker and cheaper method where the closure of a single level crossing alone was required.

103. **Provisionally we do not consider that it is necessary to exclude the possibility of obtaining a TAW/S order where a level crossing closure order may be obtained, or the other way round, but we invite consultees' views.**

104. Level crossing orders are not statutory instruments. However, the new level crossing closure orders may well need to contain amendments, modifications or disapplications of primary or secondary legislation, such as special Acts. The enabling Act could provide for a statutory instrument to include these powers as well as powers to amend, revoke or re-enact the statutory instrument itself. If treated as general instruments, they would also be printed and published as well as being made available online.

105. **We therefore provisionally propose that level crossing closure orders should be statutory instruments and that they should be treated as general instruments.**

**Closure of level crossings and devolution**

106. The proposed new system of closure orders raises a constitutional issue in Scotland. Where the closure of a public crossing is proposed, a road will have to be stopped up. Where in Scotland, the roads authority refuses to stop up a road, we propose a right of appeal to the Scottish Ministers. Under the current devolution arrangements, the final policy decision on closure of a level crossing in Scotland would have to rest with the Secretary of State. If the Scottish Ministers upheld the refusal to stop up a road, this would create a potential conflict between the Scottish Ministers (as final decision-maker on stopping up) and the Secretary of State (as the final decision-maker on the closure of level crossings).

107. We propose to avoid this problem by transferring the power to make level crossing closure orders in Scotland to the Scottish Ministers, either by primary legislation or by a transfer of functions order under section 63 of the Scotland Act 1998. This would also achieve the policy objective that decisions about the closure of level crossings in Scotland, should be taken by Scottish Ministers rather than the Secretary of State.

108. **We provisionally propose that under the new system for closure of level crossings, the function of making level crossing closure orders in relation to both public and private level crossings in Scotland should be transferred to the Scottish Ministers**.

109. A similar constitutional issue arises with regard to Wales and we make the same proposal. Although Scottish and Welsh devolution arrangements differ in many respects, the Welsh Ministers have responsibility for matters relating to highways and for transport and works orders and so should, we think, determine applications for level crossing closure orders.

110. **We therefore provisionally propose that under the new system for closure of level crossings, the function of making level crossing closure orders in relation to both public and private level crossings in Wales should be transferred to the Welsh Ministers.**

### Other reform proposals

#### *Co-operation between interested parties*

111. We consider that there is scope for improving consultation and co-operation between the various parties concerned with level crossings. We suggest that infrastructure agreements (as used in Australia) might be useful where a major change is planned, requiring the interested parties to enter into an agreement before an application for closure is made.

112. **We invite views of consultees on whether it would be useful to introduce a system of infrastructure agreements for level crossings.**

113. Network Rail has encouraged the development of road-rail partnership groups in recent years to consider mutual areas of concern, including level crossings. It might be useful to establish a more formal mechanism to bring together those groups with an interest in level crossings, including Network Rail, the local authorities and other stakeholders, such as those representing ramblers, farmers or horse riders.

114. **We provisionally propose the expansion of the role of road-rail partnership groups, as they have proven to be successful in bringing together the various and often competing interests dealing with matters relating to level crossings.**

#### *Creation of new level crossings*

115. Both Network Rail and ORR have policies which oppose the creation of new level crossings other than in exceptional circumstances. The guidance in relation to transport and works orders supports this view. We provisionally propose that the current system for authorising new level crossings, by transport and works orders (or, in England, under the Planning Act 2008) as part of a proposal for a major new railway, should be retained.

116. In addition, there may be circumstances where it would be appropriate to create a new level crossing, in the legal sense, over an existing line. There are particular issues relating to statutory access rights in Scotland, which might give rise to the need to require the railway operator to create a new level crossing across the railway, for example, in the Highlands of Scotland. It might also be necessary to create a footpath crossing to enable walkers to cross safely, rather than by trespassing at some convenient point.

117. **Should there be statutory provision requiring the construction of new level crossings on existing railway lines in certain specified circumstances?**

118. **If so, should the decision-maker be able to override opposition to the construction of a new level crossing?**

**Special Acts and Level Crossing Orders**

119. Special Acts and level crossing orders contain provisions relating to safety at level crossings, amongst other things. As far as we can tell, there are several thousand private special Acts still in force. These Acts do not only relate to level crossings, but to the authorisation of the railways themselves and a wide range of consequential matters. It would be extremely difficult and time-consuming to search out each Act and repeal the relevant parts on an individual basis. A general repeal provision might give rise to unintended and unexpected consequences. We would therefore prefer that a general provision be enacted to disapply the special Acts in so far as they relate to safety at level crossings. However, provision should also be made enabling the Secretary of State to repeal the relevant safety provisions in special Acts where possible. If the HSWA 1974 regime is adopted, all level crossing orders would become redundant and could be revoked.

120. **We therefore would welcome the views of consultees on our proposal that the provisions in special Acts should be disapplied in so far as they deal with safety at level crossings to the extent that HSWA 1974 applies.**

121. **We would also welcome the views of consultees as to whether there should be a power for the Secretary of State to make orders to enable the repeal of provisions in special Acts in so far as the provisions relate to safety matters.**

122. **We provisionally propose that all existing level crossing orders should be revoked if the HSWA 1974-based system is adopted.**

**Heritage and private railways**

123. The provisional proposals have been developed largely to address issues we see arising on the mainline railway where the majority of level crossings are situated. There are also between 1,000 and 1,500 level crossings on heritage and private railways, including railways in docks and other industrial settings as well as hobby railways. There are both similarities and differences between these and the mainline railway, but they all come under the oversight of ORR. Trains on heritage railways are often slower and lighter than mainline trains, but may well also have been built to less exacting safety standards.

124. **We provisionally consider that our proposals should apply to all level crossings on all types of railway.**

125. **However, we would welcome the views of consultees as to whether our provisional proposals should be adapted for heritage railways and private railways and if so, how.**

**PLANNING: ENGLAND AND WALES (CONSULTATION PAPER PART 9)**

126. A development can have an effect on a level crossing, even if the development is not adjacent to it, where it results in an increase in use of the highway/road network. Any increase in the use of a highway/road can increase the risk associated with the level crossing.

127. In the consultation paper, we consider the planning systems in Scotland, England and Wales and provisionally conclude that there appear to be adequate legal tools available in the planning process to protect level crossings and the road network from the impact of developments. However, we are aware that concerns remain as to how far consultation and joined-up working between planning authorities and railway actors take place in practice. Opportunities for collaboration may be lost and planning decisions may not take into account the need to review protective measures at level crossings and to consider the future convenience of crossing users.

128. **We would welcome examples or experiences of how consultation works in practice.**

129. **Do consultees think that the current practice of consultation relating to level crossings is adequate between local planning authorities, railway interests, developers and the public? If not, we welcome specific examples.**

130. **Do consultees think that the current legal requirements for consultation where development affects a level crossing should be modified? If so, what modifications should be made?**

131. **We provisionally think that the current legal provision is sufficient to allow for developer contributions towards closure, replacement or improvement of level crossings. It may be that what is required is guidance, which would be beyond the scope of this project.**

132. In England and Wales, where a planned development requires infrastructure changes, funding is usually obtained from the developer through an agreement under section 106 of the Town and Country Planning Act 1990, known as a "section 106 obligation". This provision allows local authorities to negotiate with developers to come to an agreement or obtain an undertaking restricting the development of the land in a specified way. It also requires specified operations or activities to be carried out in relation to the land and requires the land to be used in a specified way, or requires a sum to be paid to the local authority. Although we are not aware of such an agreement being used in relation to a level crossing, one could be. Section 106 agreements are used to develop public transport infrastructure.

133. **Do consultees think that section 106 obligations are appropriate legal mechanisms for obtaining developer contributions for upgrading or replacing level crossing infrastructure?**

134. In April 2010 the Community Infrastructure Levy was brought into effect in England and Wales under the Planning Act 2008. The purpose of the levy is to pass the costs of infrastructure development to the developers or owners of the land. Each local planning authority has a discretion to impose the levy and its impact will depend upon whether local planning authorities choose to exercise that power.

135. **Will the situation be improved if the Community Infrastructure Levy is adopted by local planning authorities?**

136. **If not, what more is needed?**

**PLANNING: SCOTLAND (CONSULTATION PAPER PART 10)**

137. In Scotland, the Scottish Ministers are responsible for developing planning policy and exercise a supervisory function over the local authorities (planning authorities) who make day-to-day planning decisions. As in England and Wales, planning authorities are required to consult with Network Rail where the proposed development is likely to result in a material increase or material change in the character of traffic using a level crossing. During the passage of the Bill which became the Road Safety Act 2006, amendments were proposed to strengthen the duty to consult in relation to level crossings, but these were not included in the 2006 Act as enacted.

138. **We would welcome examples or experiences of how consultation works in practice.**

139. **Should amendments be made to the requirements under the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 for consultation with Network Rail Infrastructure Limited and other railway undertakers, where development is likely to affect a level crossing to a material degree?**

140. **Should there be a requirement for a transport plan to be produced in connection with an application for planning permission for a development in the vicinity of a level crossing, which is likely to have a material effect on the traffic (in terms of volume and/or composition) that uses the level crossing?**

141. The Town and Country Planning (Scotland) Act 1997 gives planning authorities the power to stop up or divert a road, footpath or bridleway where satisfied that it is necessary to enable the development to be carried out in accordance with planning permission. Where replacement of a level crossing is preferable to stopping up or diversion, the planning authority may compulsorily purchase land in order to do so. Network Rail has no power to stop up roads or compulsorily purchase land and is dependent upon the planning authority to do so. The planning authority should, therefore, be involved in future decisions to close level crossings.

142. **Our provisional view is that any future procedure governing closure of level crossings should aim to involve planning authorities in the decision to close or replace a crossing (in particular where development is a factor necessitating closure).**

143. Agreements can be made in Scotland between a developer and a roads authority or a developer and a planning authority, which may include the funding of infrastructure improvements. Where a development might have an impact on its infrastructure, Network Rail may request that the planning authority reach an agreement regarding, for example, the funding of a level crossing replacement.

144. **Are there any legal obstacles to the use of agreements (in particular, planning agreements under section 75 of the Town and Country Planning (Scotland) Act 1997) to secure contributions from developers towards level crossing infrastructure? Are there any other improvements which could be made in this area?**

## RIGHTS OF WAY AND ACCESS ISSUES: ENGLAND AND WALES (CONSULTATION PAPER PART 11)

145. This Part, and Part 12 in relation to Scotland, deal with difficult issues of land law. This summary can only outline them in the briefest terms. Consultees with a particular interest in this area should consult the consultation paper.

### Private rights of way

146. Private rights of way in the law of England and Wales are generally examples of easements; easements give one landowner the right (rather than merely a permission) to do something on another's land. Easements can arise either by grant (by one landowner to another) or through long use, known as prescription.

147. When the railway was built, it both crossed existing easement rights of way, and created new rights of way. These new rights of way were created because the railway might divide someone's land. Without a new right of way across the railway, a landowner would not have access to both parts of the land. In the consultation paper we analyse the law on the nature of these rights of way, and conclude that where the conveyance of the land on which the railway was built reserved an easement, the right of way would be a normal easement. Where it did not, a purely statutory right of way would arise, analogous to, but not the same as, an easement.

148. We consider the extent to which the current law allows greater use to be made of rights of way over time, and whether it is possible for an easement to be acquired by prescription (for example, of greater extent than a statutory right of way). We ask: **Do consultees think there should be a statutory prohibition on the future acquisition of private rights of way over the railway by prescription?**

149. While it is a matter of fact whether, in a particular, case, the use to which a level crossing is being put is excessive or not, we think it would help if a non-exhaustive list of factors was set out to help consideration of the question.

150. **We provisionally propose that there should be a statutory list of factors which should be taken into account by courts when deciding whether changed or increased use at a private level crossing amounts to excessive use**.

151. **We provisionally propose the following factors:**

    **(1) impact on safety of the railway and crossing users;**

    **(2) the operational requirements of the railway, including how heavily used the railway line is;**

    **(3) whether the use is of a substantially different character to the original use;**

    **(4) the frequency of use compared to the original frequency of use; and**

    **(5) whether the use will have such an impact upon the railway as to require expenditure on the part of the railway operator.**

152. **Do consultees think there should be such a statutory list of factors to be taken into consideration when construing the extent of a general right of way?**

153. **If consultees agree that there should be a list of factors, is the list above satisfactory or are there any other key factors which should be taken into account when assessing whether increased use of a private level crossing amounts to excessive use?**

154. We then consider closure of level crossings, and ask: **Do consultees think that it would be helpful for the law expressly to state that private rights over a level crossing can be extinguished by agreement between the rights holder(s) and the railway operator?**

155. A difficult question arises where the land on one side of a level crossing is sold, but later the two parts come back into the same ownership. Does the right of way across the level crossing survive or not? In England and Wales, it is extinguished, according to a case called *Midland Railway Company v Gribble* [1895] 2 Ch 827.

156. **Do consultees agree that the law should be as laid down in *Midland Railway Company v Gribble*? If so, should this rule be given statutory effect, or is it sufficient that it remains a matter of case law?**

**Private rights of way and public rights of way**

157. A public right of way is usually either a full highway, or carriageway, a bridleway or a footpath. Highways are created by "dedication". A highway may be dedicated impliedly, as well as expressly. The law as to whether it is possible for a public right of way to come into existence by implied dedication over the railway is complicated and unclear. We ask: **Do consultees think there should there be a statutory prohibition on the future implied dedication of highways over the railway?**

## PART 12: RIGHTS OF WAY AND ACCESS ISSUES: SCOTLAND

### Private rights of way

158. The equivalent to an easement in England and Wales is a servitude in Scotland.

159. We consider that railway operators can under the current law, grant a servitude of way over the railway, and ask: **Do consultees agree that it should be competent for the owner of the railway to grant a servitude of way?** In general, servitudes can arise by prescription. **Should it be possible for prescriptive use to create a servitude across a railway?**

160. We discuss the nature of statutory rights of way over the railway and conclude that, on balance, they are not servitudes.

161. In relation to excessive use of a statutory right of way over a level crossing, we consider that a statutory rule, rather than guidance to the courts (as we propose for England and Wales), would be more appropriate.

162. **For Scotland, a suitable approach might be something on the following lines. The use made of the statutory right of way over a crossing is not to be such as would:**

    **(1) be unreasonably detrimental to the safety of the railway users and crossing users;**

    **(2) interfere unreasonably with the operational requirements of the railway;**

    **(3) be substantially different in character (including frequency) as compared with the original use; and**

    **(4) give rise to unreasonable expenditure on the part of the railway infrastructure manager.**

163. **Would it be desirable to clarify the extent of use permitted under the Railways Clauses Consolidation (Scotland) Act 1845?**

164. **If this is the case, would such a list of factors be useful?**

165. **Alternatively, would alignment with the law of servitudes be helpful in determining the permissible extent of use of a statutory right of way crossing?**

166. There is a body of law in relation to the discharge of servitudes. How should it apply to statutory rights of way? **Should the law expressly state that the authorised user of a statutory right of way crossing can enter into a discharge agreement with the railway operator validly to extinguish the right to use the crossing, as happens in practice at present? If so, are any qualifications or exceptions necessary? In consultees' experience, are there any practical difficulties involved in the current process of extinguishing a right of way over a level crossing?**

167. We referred above to the law in England and Wales as set out in *Midland Railway Company v Gribble*. In a first instance case, *Robertson v Network Rail Infrastructure Ltd* (Inverness Sheriff Court, 28 May 2007, unreported) the law in Scotland was said to be different – the statutory right of way had not been extinguished. We discuss the merits of the issue in detail in Part 12 and ask: **Should the *Robertson* rule (assuming that it correctly states the law) be replaced by the *Gribble* rule, for existing crossings as well as for new ones? If so (and assuming that that would in fact result in a change in the law) would you agree that the owner of the track would in principle be liable to compensate those who suffered loss as a result? If so, do you have views about how such compensation should be calculated?**

168. Servitudes can be extinguished by negative prescription. **Would it be useful for there to be express legislative provision as to the extinction of statutory crossing rights by negative prescription? If so, what should the law provide?**

169. The Lands Tribunal for Scotland has the power to discharge servitudes. **Should the jurisdiction of the Lands Tribunal for Scotland be extended to include statutory rights of way over level crossings created under section 60 of the Railway Clauses Consolidation (Scotland) Act 1845?**

**Public rights of way**

170. We think the law allows a railway operator to grant a public right of way over the track, but to test views, we ask: **Is legislation needed to clarify the power of a track/railway owner to make a voluntary grant of public rights of way?**

171. Similar issues arise in relation to prescriptive acquisition of public rights of way in Scotland as for implied dedication in England and Wales. We discuss the law in detail in Part 12 and ask: **Should the public use of a private level crossing be capable of giving rise to a public right of way through the operation of prescription?**

**Access rights under the Law Reform (Scotland) Act 2003**

172. The 2003 Act creates access rights over most private land in Scotland. There is no direct equivalent in England and Wales. A difficult question arises as to whether access rights extend to private level crossings. In Part 12 we discuss in detail the complicated legal issues raised and ask: **Should the Land Reform (Scotland) Act 2003 be amended to clarify whether access rights do or do not extend over private level crossings? If so, which policy approach should be adopted?**

173. It appears that crossing the railway otherwise than at level crossings is quite common in parts of the Highlands, in part because users feel it necessary to do so in order to exercise their access rights on both sides of the railway. This raises the question of whether there should be a requirement to create new level crossings in such circumstances.

174. **Should it be competent for the appropriate public authority to require the railway operator to install new non-vehicular public level crossings in order to facilitate the exercise of access rights? If so, should that authority be the local authority or the Scottish Ministers, or should the decision be a joint one? Who should be responsible for the expense of new crossings?**

175. It may be desirable to promote access rights for a private crossing to be made available for non-vehicular use. **Should it be competent for the appropriate public authority to order that a private level crossing become subject to access rights?**

## CRIMINAL OFFENCES (CONSULTATION PAPER PART 13)

176. The main cause of danger, or of actual collisions, is the conduct or misconduct of those crossing the railway. The risk caused by factors within the control of the rail industry is negligible.

177. The criminal law has a role to play in preventing members of the public from using level crossings in a way which causes danger to themselves and rail users. Whilst criminal offences relating to the railways and roads can potentially be applied to misconduct at level crossings, most of these offences have not been designed with level crossings in mind. We consider how satisfactory the current criminal law is in addressing misconduct at level crossings and propose the creation of new offences specific to level crossing users.

178. Criminal law sets standards of behaviour which it is expected that the public will meet. Failure to meet these standards can result in punishment, which should have a deterrent effect. Other measures should also be considered, such as prosecution and sentencing practices and guidance, changes to the design of level crossings, and better signs and warnings. Also safety education campaigns, the inclusion of level crossing awareness in the training of new drivers, and the highlighting of level crossing safety issues in guidance such as the Highway Code may well improve behaviour and public attitudes and therefore, safety.

179. Concerns have been expressed that level crossing misuse is frequently under-charged and that this reduces the deterrent effect of prosecuting offenders. It may be that less serious offences (incurring less severe penalties) are being charged, perhaps because offenders are more likely to plead guilty to less serious offences. We are also aware that concern has been raised about the level of sentences imposed by magistrates and sheriffs for misuse of level crossings.

**Current offences**

180. Road traffic offences generally apply to drivers of vehicles only. Aside from the road traffic offences, the current criminal law which can apply to misuse of level crossings consists of a confusing collection of offences of varying degrees of severity, spread across bye-laws, public and private legislation, some of which has been superseded or amended on numerous occasions. For example, the offences relating to railways are the only provisions of the Malicious Damage Act 1861 still in force in England and Wales and the current wording of section 55 of the British Transport Commission Act 1949 (trespass on the railway) is particularly difficult to ascertain. Some offences only apply to certain types of level crossings. For example, it is not entirely clear whether the offence of criminal trespass is applicable to conduct on a public level crossing. A list, containing some 24 relevant offences can be found at Appendix B of the consultation paper.

**Proposed offences: advantages and disadvantages**

181. We think there is a case for a new set of offences specifically designed to deal with misconduct of drivers, pedestrians and others using level crossings. A proposed new scheme would provide a hierarchy of offences appropriate to level crossings. It would be much simpler than the current law. It would be clearer, drafted in modern language and free from distinctions between types of level crossing. The offences would apply to all level crossing users and on all types of level crossing. The provisions setting out the offences would also be readily accessible in a public general Act.

182. The existing road traffic offences would continue to apply to misconduct on level crossings. The principal disadvantage we can see is that the scheme would add three *further* offences to an already crowded field, and one or other of the new offences would overlap with many of those already existing. If the offences are too similar to dangerous driving and causing death by dangerous driving, confusion amongst the police and prosecutors could result, undermining their effectiveness as a coherent code. One way of avoiding such confusion would be to restrict the new offences to circumstances where the existing road traffic offences do not apply, for example, on private roads or when the user is not a driver.

183. **We provisionally propose that the general road traffic offences should continue to regulate the conduct of drivers at level crossings over public highways/roads.**

184. **Do consultees think that any new offences should be limited to circumstances where existing road traffic offences do not apply?**

185. **We propose that there should be a new scheme of level crossing offences, comprising:**

    **(1) An offence of failing to comply with an authorised sign at any kind of level crossing, punishable by a fine;**

**(2) An offence of dangerous use of any kind of level crossing, where the accused's behaviour had breached an objective standard of conduct (not to behave in such a way as to create a risk of injury or serious damage to property); and the accused was aware his or her conduct risked creating a danger of injury or serious damage to property. This offence would be punishable by a prison term similar to that for dangerous driving; or**

**(3) An offence of dangerous use of any kind of level crossing, where the accused's behaviour had breached an objective standard of conduct (with no requirement that the accused was aware of any risk). This offence would be punishable by a prison term similar to that for dangerous driving; and**

**(4) An offence of dangerous use of a level crossing, intentionally or recklessly causing death, punishable, as with causing death by dangerous driving, with a maximum prison term of 14 years; or**

**(5) An offence of dangerous use of a level crossing, causing death (with no requirement of intention or recklessness). This offence would be punishable by a maximum prison term of 14 years.**

186. **We would welcome the views of consultees on the proposed offences and penalties.**

187. **If consultees do not think that new offences should be created, we would welcome views on whether penalties for existing offences relevant to level crossing misuse should be increased.**

188. **What other steps do consultees think should be taken in order to reduce the incidence of offending at level crossings?**

## SIGNS AND THE HIGHWAY CODE (CONSULTATION PAPER PART 14)

189. In this Part of the consultation paper we outline the provisions regulating traffic signs at or near level crossings and the relevant rules of the Highway Code.

190. We have been made aware of a number of complaints about signs and warnings at level crossings. We are also aware of calls for review of the current law on signs "to make them more effective, coherent, comprehensive and accessible". We have also heard criticism of the guidance given in the Highway Code in relation to level crossings. It is neither within our remit for this project, nor within our area of expertise, to advise on the design of signs or warnings, or the wording of guidance given to motorists or others. However, **we would be interested in views about whether the *legal structure* relating to the specification of signs is adequate, or is in need of a general review.**

191. Consultees may feel that the system of signs, warnings and guidance needs reviewing as a whole; or that a different approach is needed for signs, warnings and guidance in relation to level crossings. We therefore ask: **Are the current legal structures providing for signs and warnings at level crossings, and for providing guidance in the form of the Highway Code to motorists or others, adequate?**

**HOW TO RESPOND**

The consultation paper may be found on our websites at: www.lawcom.gov.uk/level_crossings_consultation.htm and http://www.scotlawcom.gov.uk.The Law Commissions would be grateful for comments on their provisional proposals by 30 November 2010.

Comments should be sent either –

**By email to:** levelcrossings@lawcommission.gsi.gov.uk

or

**By post to:** Sarah Young
Law Commission
Steel House
11 Tothill Street
London SW1H 9LJ
Tel: 020 3334 0279/ Fax: 020 3334 0201

If you send comments by post, it would be helpful if you could also send them electronically.

We will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and we may attribute comments and include a list of all respondents' names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.