Thank you for sending me a copy of the Discussion Paper. I have been out of this area now for several years but I read it with interest and it was a good read. I think it is the most comprehensive and clearest discussions of this whole area that I have come across, certainly better than the English Law Commission equivalent.

I have two general comments. First of all, I share the Commission's view that the current legislation is not fit for purpose and that a modern, comprehensive statutory restatement is long overdue. (Q.1, p.4). Notions of simplicity, clarity, efficiency and effectiveness would seem to be the drivers of change. That apart, you also seek views on whether the current law works satisfactorily so that you can consider whether to recommend change. My comment is that, in the final paper, you may need to consider setting down some measure of satisfaction or some objective against which to judge the adequacy of the system or some standard against which you can assess the proposals for change that you receive. Such measure, objective or standard would show why you accept some changes and reject others. I realise that, at the end of the day, the measure is a matter of political choice and that it has changed over time; but it should be possible to draw out such measure from the way in which the system has evolved (both legislatively and judicially) up to the present time. For example, changes to the procedural arrangements to be considered under Part 2 might be judged against some notion of balance or of fairness to the parties; for Part 3, which considers changes to the compensation arrangements, the very generalised concept of equivalence might provide a guide so that you are giving effect to what you understand to be the intention of the legislation.

Secondly, I appreciate the difficulty in deciding what to include and what to exclude from your review. I think you are probably right to exclude consideration of utility way leaves, although you do mention them in passing. This is an area badly needing attention and it is an area where the question of 'justification' looms large; but it is probably best left to a later date. Incidentally, I accept that there are difficulties in seeking to attach to an enforced statutory regime the attributes of a consensual contract such as a lease and I note your firm rejection of the idea; but that is exactly what statutory rights akin to servitudes and wayleaves try to achieve and some of them are every bit as complex as some leases. They create a continuing relationship carrying rights and obligations.

I have comments on some of your specific questions but I'm not sure how helpful they will be as I have been out of this area for some years now:

Chapter 3

Q.6: Yes, the lack of an express right doesn't seem to have been a problem but it would seem sensible to confer such a right.

Q.7: Yes, I agree.

Chapter 5

Q.8 Yes, I see no convincing reason why this should not be the position.

Q.9: The more you can bring the enactments in Appx B into line with standard

procedures, the simpler things will be.

Q.12: So far as I am aware, the current list of statutory objectors is satisfactory.

Q.13/15: Given the seriousness of the effect of a CPO on owners and occupiers, I would be reluctant to see the right to a hearing eroded - but there should be no right to insist on a public inquiry.

Q.14: Yes, it should serve to concentrate the mind on any negotiations; and negotiations will not necessarily stop just because of the reference to the DPEA.

Q.16: Yes the timescales should continue to be set out in secondary legislation.

Q.17: The provision for promoters to confirm unopposed orders seems sensible if it leads to savings in time.

Q.19-21: Yes, a promoter should be able to revoke a CPO subject to the payment or out of pocket expenses. Owners and occupiers, having been through this experience, are entitled to a degree of certainty so a time limit of say 5 years before any new order is made would seem reasonable, perhaps with provision for Ministers to agree a shorter limit in exceptional circumstances.

Q.22/23: Yes, promoters should be required to register CPOs in the Land Register. It would be desirable to avoid a multiplicity of registers.

Q.24: It is the accumulation of the 3 years for implementing the CPO and 3 years for serving a notice to treat or GVD which in my experience is the main problem for owners and occupiers. I would support anything that can be done to reduce the cumulative period.

Q.25: It does not seem unreasonable to require that a CPO should only be confirmed where there is clear evidence that the project is reasonably likely to proceed. If it is not reasonably likely to proceed, I don't see how a confirming authority could properly confirm the order.

Chapter 6

Q.31: The current grounds of challenge seem to me to be sufficiently wide.

Q.35: Yes, the time period for the validity of a CPO should be extended pending resolution of a court challenge.

Chapter 7

Q.37: I think it would be helpful for promoters with limited experience of using CPOs to list the interests.

Q.40: It would be helpful to claimants if a notice to treat was accompanied by information about how to claim compensation.

Q.42: No, the mischief is the attempt to increase the burden of compensation and that should be ruled out whether it happens before or after the service of the notice to treat.

Q.43: See my answer to Q.24.

Q.44: Yes, promoters should be able to withdraw a notice to treat within, say, 4 weeks of receiving a claim for compensation. The promoter will need time to take advice on the claim.

Q.45: No, I don't see any case for this.

Q.46: Yes, that would seem reasonable.

Q.48: Provision should be made for a notice of entry to lapse if it is not implemented within, say, 28 days. Promoters should not serve a notice of entry unless they are ready to move in.

Q.49: Yes, this would seem tidier.

Q.51: I do not see any case for limiting the circumstances in which a GVD can be used.

Q.52: Yes, they seem to be.

Q.53-55: Yes.

Q.56: No, not unless you can envisage circumstances in which such a discretion might be required. It will introduce uncertainty.

Q.60: Yes, unless there is convincing evidence that a faster process is sometimes necessary. I am not aware of such evidence.

Chapter 8

Q.68: Yes. An acquiring authority could still allow a tenancy to continue to its normal expiry date in appropriate cases.

Chapter 9

Q.73: Yes, it is an esoteric area but I am not aware that the provisions create problems and they seem to serve a purpose.

Chapter 11

Q.74: Yes, the concept of value to the seller should continue to reflect factors that might restrict the value of land in the market.

Q.75: Yes.

Q.76: As you point out, negative equity arises as a result of market conditions and is

not caused directly by the compulsory purchase. However, other things being equal, an owner would not choose to sell at a time when he is experiencing the effects of negative equity. If he/ she can hold on until market conditions change, there is no hardship. So in a real sense, the compulsory purchase is creating the hardship by forcing a sale at the time when no owner in his or her right mind would choose to sell. That being so, there is an argument for giving recognition to the hardship

Q.77: Yes.

Q.78: This is a difficult question. If land is not devoted to a purpose for which there is no general demand or market, it presumably has, or may have, a market value and Rule 5 would not apply. I think the English Law Commission's proposal more properly reflects what Rule 5 is trying to achieve.

Q.79: Yes, this seems reasonable. Presumably, this is the sort of consideration that would influence the Tribunal in deciding whether to exercise its discretion to award Rule 5 compensation.

Q.80: It has always been the case with Rule 5 that there must be a bona fide intention to reinstate so it would not be unreasonable to impose such a condition. However, if the condition is breached, you may need to spell out the alternative measure of compensation? The land is devoted to a purpose for which there is no market so Rule 2 cannot apply.

Chapter 12

Q.81-84: These are the most difficult questions in the whole paper and it will be a brave person who attempts an answer. I am going to duck the questions and state what in my view should be the approach to answering the questions. In general terms, my view is that any re-formulation should try and keep as close as possible to the principle of value to the seller in the open market. In other words, if a person selling in the open market would benefit from an uplift in value as a result of what has been done or is proposed to be done by a public authority, then that is the basis on which compensation should be assessed. If a public body then finds itself paying a price inflated by its own efforts, that is unfortunate. Betterment of that sort is really a matter for national or local taxation and it is unfair to deny that value to an owner simply because his or her land is being compulsorily acquired. Of course, logic suggests that the converse in terms of reflecting a downturn in value should also apply. It is only increases and decreases in value which would not be reflected in the market which should be disregarded when assessing compensation. In other words, the scheme would not be something that affects wider market values but only the value of the subject land. I realise that this is a bit simplistic!

Chapter 13

Q.85: The purpose of the assumptions is to try and bring the claimant as close to the open market position as possible. The application of the assumptions to land other than the land which is being compulsorily acquired would help to fulfil that purpose but I can see that it could raise difficulties in practice.

Q.86: Yes.

Q.87/92: It is neater and simpler if the date for applying planning policies and considering physical factors is the same and that would suggest the date on which the interests in land are taken to be fixed (ie the date of the notice to treat or deemed notice to treat). But I can see that might be harsh if there is a long delay between that date and the valuation date and planning policies change or land values rise or fall significantly in the meantime so there is something to be said for the date of valuation. If the latter date is close to the date on which interests are fixed, there is no problem. If there is delay, the date of valuation more closely reflects the position at the time when compensation is assessed. Of course, that may not always benefit a claimant. And see the answer to Q.100 below.

Q.88 No, I agree with the English Law Commission. A person selling in the open market could not make such an assumption. At best it would be reflected in hope value and that is as it should be.

Q.90: I agree.

Q.91: Yes.

Q.93-95: I agree.

Q.96: Yes.

Q.98: Yes, but there might be difficulty in expecting a claimant to apply for a CAAD prior to confirmation of the CPO. It might give the impression that any objection to the CPO is unlikely to succeed. And if an objection is successful, a claimant would have incurred the costs of applying for a CAAD unnecessarily.

Q.99: The more precise the information in a CAAD, the easier the valuation - so yes, I would support a requirement to be as precise as possible but that would require the application for the CAAD to be precise. The equivalent of an application for outline planning permission should not be sufficient; or if it is, there should be some discount because of the uncertainty. Ideally, use, density, size and any infrastructure requirements should be specified.

Q.100: Ideally, the date should be the same as that in answer to Q.87/92 above. There doesn't seem to be any good reason for providing for different dates.

Q.101/103: It is desirable that the answer to Q.93 and Q.101/103 should be the same.

Q.104: Am I missing something or have we already considered this question at Q.100 above? It would be desirable to tie in the dates in answer to Q.87/92 and 100 above to the date here. If the relevant date was to be taken as the date on which notice of the CPO was first published, there could be a considerable gap between that date and the date of valuation which might render the valuation somewhat historic.

Q.105: No, they should be treated as for a planning appeal - that is what the CAAD tries to replicate.

Q.107-108: My preference would be for keeping appeals with the Scottish Ministers. While the CAAD process is about the assessment of compensation, it turns on planning issues in much the same way as a planning appeal.

Q.109: It would be simpler if the test was the same as for the planning assumptions. I see no good reason why it should differ.

Q.110: A difficult question! To restrict compensation to a value based on hope value alone where the evidence shows that permission would have been granted is unfair but could treating a probability as a certainty sometimes give a claimant an advantage they would not have enjoyed in the market?

Chapter 15

The whole question of how to treat betterment and injurious affection or blight has caused difficulties for the system for years. I note that you suggest (recommendation 118, p.245) that the provision for set off of benefit to retained land might be dropped from the compensation code and I agree with this. My view is that it is a matter better dealt with through general or local taxation.

However, the converse of set off of betterment is compensation for other injurious affection. I make a distinction here between loss arising because the acquired land is important to the overall value of the land (severance) and loss arising because the scheme of the acquiring authority has a negative impact on the retained land (other injurious affection). If set off of betterment is taken out of the compensation code, logic suggests that other injurious affection should be as well and perhaps dealt with through Part 1 of the 1973 Act which provides for compensation for the negative impacts of public works. These are not increases or decreases in value directly attributable to the compulsory acquisition - contrast severance - but are increases or decreases which might be experienced in common with neighbours who have had no land acquired. The only argument for dealing with other injurious affection as part of the compulsory purchase compensation is that the claimant only has to make one claim - and I accept that that is a powerful argument.

As regards your specific recommendations in the Chapter, I agree with 112-116 and 118. I have no strong views about 117 but think that there is something to be said for treating the matter in the same way as for severance - as they are the converse of each other.

Chapter 16

Q.119: Agreed.

Q.120: Yes please.

Q.121: Ideally, all 3 principles should be articulated.
Q.122: Yes, that seems reasonable.

Q.123: Yes.

Q.124: Is it necessary to be so specific? If it is an identifiable loss caused by the CPO and is not too remote, it should be recoverable.

Q.125: yes, subject to the normal tests for disturbance.

Q.126: Given the complexity of corporate structures this will always be a difficult area but, given that, the present approach seems to work satisfactorily.

Q.127: I agree with your comment that equivalence requires some degree of flexibility and, by and large, tribunals and courts have applied that flexibility so as to achieve equivalence. The impecuniosity rule has been an exception but even here things seem to be moving in the right direction. I think action is required to ensure that the impecuniosity rule is dead in the water but, if guidance is being contemplated, that would be a better way forward than trying to legislate for different aspects of disturbance.

Q.128: See my comments in answer to Q.127. I think this needs dealing with but could this also be dealt with by guidance?

Q.129: Yes. If losses can be claimed from that date, the duty to mitigate loss should start from that date.

Q.130: Yes, agreed.

Q.131: This is another example where a lot will turn on particular circumstances and flexibility is desirable. Is this another area where guidance might help (see Q.127 and 128 above).

Q.132: There is a lot to be said for compensating for actual rather than anticipated loss and this may benefit acquiring authorities as much as claimants; but in fairness to the acquiring authority there needs to be some limit to how long this process can go on for. It would be interesting to know how the New Zealand provision (which is very open ended) has worked in practice. It's been going since 1981.

Q.133: Wouldn't this be covered by Q.132 above?
Q.134: Agreed.

Q.135-136: Agreed.

Chapter 17

Q.138-140: I don't not see that an owner's home loss is greater simply because the market value of their property is greater. This payment needs to be simple and I would be against individual assessment. I think a flat rate payment is probably the easiest option and leave it to the Ministers to decide when it should be reviewed.

Q.142: It would be a lot easier just to have one flat rate payment rather than several separate payments to acknowledge the particular loss arising from compulsory acquisition. I can see the arguments for a home loss payment and for a farm loss

payment but, having researched compensation by business claimants in the past, there seems an equally strong argument for what in England is referred to as a 'basic loss payment' and an 'occupier's loss payment'. Once you add these to the list you might as well have one single payment. It would be a lot simpler.

Chapter 18

Q.146/147: Yes to both questions.

Q.148: As it is the date for lodging, rather than settling a claim, which is subject to the time limit, I should have thought it could be shorter. But if disturbance is to be based on actual rather than anticipated loss, it will probably be necessary to provide for a longer time limit for disturbance.

Q.150: I think greater discretion would be helpful.

Chapter 19

Q.160: Yes.

Q.161: Yes.

Q.162: Yes.

Q.163: Yes.

Q.164: Yes. I should have thought 25 years would be reasonable.

Q.169: If the claw back provision in s.31 is to be dropped, it would seem reasonable to drop this provision too.

Some years ago, I encountered a problem with the valuation of land being returned under the Crichel Down Rules. Land was compulsorily acquired for a road scheme but some of it eventually turned out to be surplus to requirements and was offered back under the Rules. However, the acquiring authority argued that the land to be returned now formed a ransom strip providing access to the former owner's land and they would only return the land at ransom strip value. As the compulsory acquisition created the situation in which the ransom strip was formed, that seemed inequitable. I understand that that example is by no means unique. I don't know if this situation has cropped up in your deliberations.

Chapter 20

Q.173: I should have thought that harmonisation was desirable.