1.1 This paper sets out my comments about the Scottish Law Commission ('SLC') Discussion Paper [No. 159] on Compulsory Purchase. It also addresses some of the questions posed in that paper.

1.2 I have submitted herewith a brief CV setting out my qualifications and experience.

General comments

2.1 The SLC is to be commended for its substantial paper about compulsory purchase. The subject being considered is recognised to be both a sensitive and a complex issue.

2.2 The SLC Discussion Paper does not address certain specified aspects of compulsory purchase, Further there are some significant omissions in the SLC's discussion paper. For instance it does not refer to the seminal decision in *Bryan v United Kingdom* (1995) 21 EHRR 342 (see ECHR Article 6(1) referred to in section 5 below). Further it does not refer to the decision in *Stirling Plant (Hire and Sales) Ltd v Central Regional Council*, The Times, 9 February 1995[1] (see also (1995) 48 SPEL 21 ('Compulsory Purchase Procedure – Overhaul Needed') and 35).

2.3 I agree that the current legislation is not fit for purpose. The SLC's proposal to repeal the existing legislation and replace it by a single new statute is supported.

2.4 It seems that the proposed new law should operate for the most common examples of compulsory acquisition such as compulsory purchase orders, believed to be such orders made under the Roads (Scotland) Act 1984 by the Scottish Ministers. It should also operate for foreseeable proposed changes. These include changes following on from the May 2014 Land Reform Review Group report 'The Land of Scotland and the Common Good' including the proposed extension of compulsory purchase rights and having regard to the proposed 'Land and Property Information System'.

2.5 Compulsory acquisition of land must be justified in the public interest. There has to be an assessment of the impacts on the people affected and the public benefits (such as economic, environmental and/or social benefits) of compulsory acquisition (including compulsory purchase) and related projects. That assessment ought to be a fundamental part of the acquiring authority's Statement of Reasons (see section 5 below).

2.6 Will the new statute articulate the test or criteria by which the public interest of society as a whole can be tested against – and, if necessary, preferred to – the interests of individual citizens? What constitutes 'a compelling case for acquisition in the public interest'?

2.7 One matter that ought to be considered is clarity about compensation for time etc lost in handling matters pertaining to any proposed compulsory acquisition by those that receive a personal notice of compulsory acquisition and regarding professional fees incurred by them. The position is clear regarding fees for a relevant

[1] Cited in *Scottish Planning Law* (3rd edition, 2013), McMaster, Prior and Watchman.

local public inquiry including a CAAD inquiry (expenses follow success) and in relation to negotiation and settlement compensation (entitled to reasonable professional fees). There is a lack of clarity about reimbursement of fees and compensating the recipient of a notice about compulsory acquisition relating to both the opportunity costs (such as loss of time of recipient of compulsory acquisition notice in considering papers etc) and costs of advice that may be sought about the general position and more specific advice about whether or not to oppose the proposed compulsory acquisition.

2.8 There is clearly a perception about an inequality of arms and a perception of unfairness that the state has created the situation in which a person is expected to address the proposed compulsory expropriation (this could simply be by simply engaging with acquisition authorities and dealing with enquiries before an order is made and considering relevant papers and taking a decision about whether to oppose the proposed compulsory acquisition). It seems to me that if the state creates the situation in which a person may reasonably be expected to seek legal and other related professional advice about rights and options then the state should reimburse the persons costs in considering matters and reasonable professional fees for seeking advice. In many instances this approach would be beneficial to the state too as progress may be slowed up if the person receiving a personal notice of compulsory acquisition does not have the benefit of professional advice.

2.9 I anticipate that the SLC will consider developments following the publication of its December 2014 Discussion Paper on Compulsory Purchase. For instance the DCLG/HM Treasury March 2015 consultation paper about improving the compulsory purchase regime in England. That Westminster consultation paper includes proposed changes of culture such as encouraging a more positive negotiating stance by acquiring authorities towards achieving the acquisition of land by agreement by not simply looking at offering the minimum possible expression of market value and loss payments for individual plots of land and to take account of factors such as the time and legal costs that can be saved by avoiding compulsory purchase and the certainty that is offered by a voluntary agreement. That paper also includes proposed changes of law for example allowing advance payments to be claimed and made earlier.

2.10 The SLC should also consider initiatives in other jurisdictions and approaches which may appear novel here – for instance those whose land is compulsorily expropriated being given a share in the ‘marriage value’ of the land assembled by compulsory expropriation.

New rights or interests in or over land

3.1 Compulsory purchase ought to be an option of last resort. If there is a more proportionate alternative (such as a lease, servitude or a wayleave) short of compulsory purchase to achieve a public interest objective, then that alternative should be used rather than compulsory expropriation.

3.2 An example of that approach is a compulsory electricity wayleave under the Electricity Act 1989. The Scottish Government’s standards terms for a compulsory electricity wayleave are set out at Appendix 3 of the Scottish Government’s 2014

guidance 'Applications to the Scottish Ministers for the Grant of a Necessary Electricity Wayleave in Scotland'.[2]

Temporary possession

4.1 The fundamental problem here is the uncertainty about the period of temporary possession required. Public projects more often that not exceed the anticipated duration of works. Any extension of an initial or extended temporary possession period would almost inevitably be given. There is no incentive for the acquiring authority to get in right first time. Further the landowner might make plans on the basis that that the land will be returned after the specified period and those plans would be undermined, or at least be prejudiced, by any extension of that period. Further it is not unknown for acquiring authorities that initially wanted land for temporary possession to subsequently want permanent possession of the land.

Human rights

5.1 In my opinion there should be a 'front-loading' of consideration of ECHR Article 8 and A1P1. An acquiring authority's Statement of Reasons should be required to be sent along with the notice of making the CPO or the draft CPO as the case may be.[3] That Statement of Reasons should address matters including ECHR Article 8 and A1P1. This, in turn, would ensure that ECHR Article 8 and A1P1 have been considered and addressed both prior to making the CPO or the draft CPO as the case may be. In relevant cases the acquisition authorities should consider a proposed Statement of Reasons as part of the suite of documents considered before the relevant authority makes the compulsory acquisition order. The recipients of the compulsory acquisition notice etc would then be aware that ECHR Article 8 and A1P1 have been considered and the terms of that consideration.

5.2 At paragraph 3.80 of the Discussion Paper it is stated that:

> '… it now appears to be settled law that provided there is an option of appeal to an independent and impartial tribunal, Article 6(1) will not be breached where there is an exercise of administrative discretion by a decision-maker which is not itself independent and impartial.'

That statement is overly simplistic and is, in my opinion, flawed.

5.3 In cases of 'the classic exercise of administrative discretion' judicial review of the legality of the administrative decision will only be sufficient where the initial decision on the merits involves a quasi-judicial procedure that sufficiently complies with ECHR Article 6(1). The manner in which the decision was arrived at is important.

5.4 For instance, in the *Alconbury* decision it is clear in relation to findings in fact and the inferences from fact the relevant safeguards (including those provided by the public inquiries and related post-inquiry procedures) were essential to the acceptance of a limited review of fact by the courts. Therefore the availability of judicial review

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[2] http://www.gov.scot/Resource/0044/00447590.pdf

[3] *Compulsory purchase and compensation: A guide for owners, tenants and occupiers in Scotland* (Scottish Government 2011), at paragraph 32.

at the end of a decision-making process does not of itself guarantee that the process is ECHR Article 6(1) compliant.[4]

5.5 I would also draw attention to the summary of the law by Baroness Hale of Richmond in *R (Wright and Others) v Secretary of State for Health*:[5]

> 'It is a well-known principle that decisions which determine civil rights and obligations may be made by the administrative authorities, provided that there is then access to an independent and impartial tribunal which exercises 'full jurisdiction': *Bryan v United Kingdom* (1995) 21 EHRR 342. ... What amounts to 'full jurisdiction' varies according to the nature of the decision being made. It does not always require access to a court or tribunal even for the determination of disputed issues of fact. Much depends upon the subject-matter of the decision and the quality of the initial decision-making process. If there is a 'classic exercise of administrative discretion', even though determinative of civil rights and obligations, and there are a number of safeguards to ensure that the procedure is in fact both fair and impartial, then judicial review may be adequate to supply the necessary access to a court, even if there is no jurisdiction to examine the factual merits of the case.' (underlining my emphasis).

5.6 Therefore the requirements include a procedure that is quasi-judicial; a procedure that allows interested parties to have their views thoroughly aired and considered and a procedure which substantially complies with the rights guaranteed by Article 6.

Procedure for obtaining a compulsory purchase order

6.1 At least as a matter of policy, a statutory objector should have the right to choose the process for determining objections to a compulsory purchase. The suggestion that the Scottish Ministers acting through their reporters should be able to chooses that process – especially in cases where the Scottish Ministers are promoting compulsory purchase – appears to be unsustainable.

6.2 The principle of democratic accountability suggest that compulsory purchase orders should be confirmed or made by the Scottish Ministers (including through their reporters) and/or local authorities. That principle has in the past been translated by transferring some 'local development' planning appeals from the Scottish Ministers to planning authority 'Local Review bodies'. The choice of confirming and making authority (in the case of compulsory purchase promoted by the Scottish Ministers) is at least primarily a matter of policy.

6.3 Consideration should be given to a requirement that acquiring authorities should also post on their websites compulsory purchase order materials and that orders etc should be accessible through the proposed 'Property and Land Information System'.

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[4] For further details see *Local Planning Reviews in Scotland* (Avizandum, 2015), Ferguson and Watchman, Chapter 1.

[5] [2009] UKHL 3, at para 23.

Challenging a confirmed compulsory purchase order

7.1 Earlier chapters of the SLC Discussion Paper have dealt with the principle of democratic accountability for public interest decisions.

7.2 This chapter (Chapter 6) deals with the principles of the rule of law; that is that the decision-maker must take decisions in accordance with the law.

7.3 Clarity should be provided about whether CPO appeal proceedings fall within the scope of Court of Session Rule 58A.

Certificates of Appropriate Alternative Development

8.1 I consider that, as a matter of consistency, the appellant (as opposed to the Scottish Ministers through their Reporters) ought to be able to choose the form of appeal process and, accordingly, they should be able to insist upon a public inquiry for a CAAD appeal. This opinion is academic if the jurisdiction for CAAD appeals is transferred to the Lands Tribunal for Scotland (see below).

8.2 A CAAD appeal should be dealt with by the Lands Tribunal for Scotland. In my opinion it is, at least as a matter of policy, unsustainable in a modern justice system to endorse the possibility of the Scottish Ministers as acquiring authority having a right of appeal against the grant of a positive CAAD to the Scottish Ministers. I would also draw attention to the 13 October 2014 decision of the Lands Tribunal for Scotland (LTS/COMP/2013/12) in *Steel v The Scottish Ministers*. That decision, which is not referred to in the SLC Discussion Paper, refers to an appeal to a tribunal (as opposed to government) avoiding the obvious potential difficulty of the apparent [financial] conflict of interest of the Scottish Ministers as the acquiring authority challenging the grant of a positive CAAD and as the authority that is the decision-maker tasked with determining that challenge.

8.3 I do not support the Scottish Ministers (acting through their reporters) reporting to the Lands Tribunal for Scotland. Given the apparent conflict of interest the Scottish Ministers should not be involved in any capacity other than as acquiring authority. The members of the Lands Tribunal for Scotland are suitably qualified and experienced to deal with planning and compensation matters.

Resolution of disputes etc

9.1 Unless a claimant indicates otherwise, an acquiring authority should be required to make payment of advance payments on the basis of the acquiring authority's estimated value no later than the date the acquiring authority takes entry to land. This would make the acquiring authority focus on valuation and cash flow issues early on in the compulsory expropriation process. It would also allow a claimant an opportunity to defer payment if that were considered to be in the claimant's best interests.

9.2 Negotiations for agreement of compensation could proceed in parallel and, failing agreement; matters can be pursued before the Lands Tribunal for Scotland.

John Watchman
16 June 2015