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Commissioner  
Scottish Law Commission

1.1 I refer to your email dated 11 April 2016 about paragraph 7.3 of my 16 June 2015 comments about the Scottish Law Commission Discussion Paper [No. 159] on Compulsory Purchase.

**Access to Justice, “Equality of Arms” and Protective Expenses Orders**

2.1 My comments include concerns about access to justice and in particular, at paragraph 7.3, I raised the point about availability of Protective Expenses Orders in statutory applications to the Court of Session about the making and confirmation of compulsory purchase orders.

2.2 Scottish Government Circular 6/2011: Compulsory Purchase Orders states:

*46. At various stages of the [compulsory purchase] process the [acquiring] authority must serve notices on people with an interest in the land. The wording of these notices is prescribed by statute and some people may find them difficult to understand. When serving a notice, the authority should therefore include a covering letter that explains as clearly and plainly as possible why it has sent the notice, what the notice means, what the person should do next and where they can go to get help and advice. The authority may wish to refer to the Scottish Government’s easy read guide in this letter.*

*2011 Scottish Government guide*

2.3 The Scottish Government’s 2011 ‘Compulsory Purchase and Compensation Guide for Owners, Tenants and Occupiers in Scotland’<sup>1</sup> does not apply to compulsory purchase orders issued by Transport Scotland and to compulsory purchase for railways, tramways or other transport systems under the Transport and Works (Scotland) Act 2007.<sup>2</sup>

2.4 The 2011 advice in the guide apparently seeks to avoid directing those affected by compulsory purchase orders to solicitors and states that:

*[an affected person is not] entitled to claim the costs of general professional advice about the compulsory purchase order, such as any fees involved in objecting to the compulsory purchase order. But you may be able to get free help and advice from some of the organisations listed at the end of this guide.*

*75. The authority has to repay professional fees to you only once the authority becomes the legal owner of your property and takes possession of it. Until then, you must pay any fees your adviser charges.*

*76. Early in the compulsory purchase process the authority should tell you the terms on which it will repay any professional fees you have had to pay. Before employing an adviser you should make sure that you, the authority and your adviser are all agreed on the way their fees will be worked out and how and when they will be paid.*

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<sup>1</sup> <http://www.gov.scot/resource/doc/360922/0122046.pdf>

<sup>2</sup> See paragraphs 6 and 7 of the Guide.

*Scottish Government Transport and Works (Scotland) Act 2007 guidance*

2.5 Transport Scotland has published guidance about the Transport and Works (Scotland) Act 2007 and related legislation.<sup>3</sup> It says little about an affected person obtaining advice particularly as regards objecting to the proposal.

*Scottish Government Road projects guidance*

2.6 In 2014 Transport Scotland published guidance ‘Road Projects: Guidance on the Compulsory Purchase Process and Compensation’ about the procedures that the Scottish Ministers follow when using compulsory purchase for road projects.<sup>4</sup> It states:

*1.4 This guidance should not be regarded as a substitute for professional advice. If any interest you have in a property, farm or business is affected by the scheme, the Scottish Ministers recommend that you seek advice from a professionally qualified person such as a surveyor or solicitor. They can advise you on the rights that you have and act on your behalf if appropriate. Whilst the Scottish Ministers will not meet the costs of you obtaining general professional advice, the Scottish Ministers will meet the fees of a professionally qualified person you appoint to negotiate the amount of compensation you will receive for the compulsory purchase of your property in line with a set scale.*

2.7 I note for the sake of completeness that the Ryde’s Scale was abolished in Scotland with effect from 1 May 2014.

2.8 Apparently little, if any, concern is shown by government about those affected by proposed government expropriation of land being able to access appropriate professional advice regarding compulsory purchase. For instance, has the Scottish Legal Aid Board ever financed the cost of legal advice about compulsory purchase? In any event why should the availability of legal advice only be restricted to those persons affected by compulsory purchase that meet specified financial criteria?

2.9 The taxpayer funds professional advice to acquiring authorities regarding making and confirming a compulsory purchase order.

2.10 However an affected person is not only suppose to pay professional fees for general legal advice related to compulsory purchase and challenging a confirmed or made compulsory purchase order but also is, at least potentially, out of pocket for the professional fees related to agreeing compulsory purchase compensation.

2.11 The current position may be viewed as unfair to an affected person who, after all, in the overwhelming majority of cases has not done anything to invite compulsory expropriation.

2.12 One potential approach of mitigating the exposure of a “person aggrieved” to the legal expenses of an appeal under paragraph 15 of the First Schedule to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 is to secure a Protective Expenses Order. Such an order might be sought under common law or in terms of Court of Session Rule 58A (Protective Expenses Orders in Environmental Appeals and Judicial Reviews).<sup>5</sup>

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<sup>3</sup> <http://www.gov.scot/Resource/Doc/208005/0055173.pdf>

<sup>4</sup> [http://www.transport.gov.scot/system/files/uploaded\\_content/documents/reports/542490\\_v5\\_20140526.pdf](http://www.transport.gov.scot/system/files/uploaded_content/documents/reports/542490_v5_20140526.pdf)

<sup>5</sup> See, for instance, *Local Planning Reviews in Scotland* (Avizandum, 2015), Ferguson and Watchman, p 160–161.

2.13 Paragraph 7.3 of my June 2015 comments sought clarity about whether an appeal under paragraph 15 of the First Schedule to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 falls within the scope of Court of Session Rule 58A. If so, that is fine. If not,

- should the Rule be amended to make specific provision for such appeals? or
- is it considered adequate that the matter rests on seeking a Protective Expenses Order at common law?

2.14 I do not have any example of a Protective Expenses Order being sought under Court of Session Rule 58A in relation to a statutory application under paragraph 15 of the First Schedule to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947. It may be that the Court of Session can provide information on that matter.

2.15 My concern generally is that persons affected by compulsory purchase orders – expropriation is proposed by the state in the name of the public interest – are not afforded access to justice. There is no “equality of arms”.

2.16 I previously stated, at paragraph 2.8 of my June 2015 comments, that:

*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.*

2.17 If there is to be no level playing field in relation to the taxpayer paying both the acquiring authority and affected persons for appropriate professional advice throughout the compulsory purchase process, then at least there ought to be clarity about matters, such as the availability of Protective Expenses Orders, so that an affected person can make informed choices.

John Watchman  
18 April 2016