Response

by the

Lands Tribunal for Scotland (LTS)

to

Scottish Law Commission (SLC)

on

Discussion Paper on Compulsory Purchase (December 2014)

The LTS welcomes the discussion paper and readily agrees with the SLC that a modern restatement of the law of compulsory purchase is required. There are many aspects to the law. The area where the LTS has jurisdiction and experience is compensation. It is this area where we focus our comments. It is hoped that the new law can address the practical difficulties which have emerged under the old law, and build on the solutions which have worked over the years.

In our experience some of the most difficult cases involve timing issues, planning issues or both. Many of the difficult claims at heart involve lost development opportunities on land. It is hoped these areas will be given due attention.

The LTS does not underestimate the challenge of setting out a system which provides both certainty and fairness. Given the complexity of some of the disputes, which may to some extent be unforeseeable, we venture to suggest it may be appropriate for the new legislation to provide an express set of guiding principles within its own framework. That way the legislation can be given a purposive construction, and avoid some of the controversies which have beset the existing legislation.

We now turn to particular sections of the paper:

Paragraph 2.9 – Topics excluded

We understand that it is not proposed to consider wayleaves which may be acquired by statutory undertakers and others. Appendix B notes that various statutes providing for compulsory wayleaves such as the Gas Act 1986 and Electricity Act 1989 incorporate certain of the old Acts. If the old Acts are to be abolished, what does this mean for the wayleave statutes? Obviously the result would be anomalous if the old Acts remained applicable for wayleaves but are no longer "core" elements of the system.

Q15 – DPEA Procedure

If the procedures for determining CPO objections are not robust then legal and HR challenge is more likely and, from the perspective of the LTS, there risks a greater sense of grievance by the time an objector has become a claimant for compensation.

The problem with "hearings" in the planning setting is that cross examination is not permitted. Take a particular CPO scenario. A development is a commercial development to be carried out by a private developer. The development has the active support of the planning authority. The developer cannot assemble the site by agreement with all the landowners. Therefore the developer secures a typical back to back agreement with an acquiring authority for the latter to use its compulsory powers and then transfer the land to the developer. Objectors might well seek to cross examine the authority/ developers in order to explore issues such as the extent of public interest in the project, the likelihood of the development proceeding, available funding etc. In such a case it would seem surprising that there would be no right to cross examine those promoting the development.

It is understood that DPEA statistics show very few "inquiry sessions" (i.e. where cross examination is permitted) are allowed in planning cases . It would be fair to say they are not routinely allowed. Such procedural decisions (i.e. whether to hold a "hearing" as opposed to "inquiry session" or even whether to hold any form of hearing at all) are not appealable. If the reporters have a discretion not to permit the procedure sought by an objector in a CPO setting, there is a risk of injustice and legal challenge. It should be recalled that one of the reasons why the previous planning system survived challenge in *Alconbury* (citation at n.69 paragraph 3.74 of Discussion Paper) was because parties had the opportunity to cross examine at the public inquiry (Lord Slynn of Hadly paragraph 46).

As the SLC points out, compulsory purchase requires a more rigorous exercise than the vast majority of planning cases. This point is also relevant to the determination of CAADs discussed below. We think any discretion of the DPEA as to procedure should be subject to the right of parties to public inquiry.

Q28 – CPO Process - General

Clearly it is highly desirable that wholesale reform should be equally applicable to non-devolved matters where the UK Government is acquiring authority.

Q31- Aggrieved Persons Appeal

It is understood that the earlier and arguably more narrow approach by the courts to these paragraphs and their many equivalents in other legislation has now been superseded. The interpretation is now more analogous to a requirement to make out the familiar grounds for judicial review: see reasoning of Lord Carnwath at [108] et. seq. in *Walton v Scottish Ministers [2012] UKSC 44.* Clarity would be welcome.

Paragraph 7.54 – Related Parcels of Land

We would point out that there appears to be an anomaly in this area of legislation. Rowan Robinson (3rd edition) 3-16 points out that the "material detriment" branch of the test seems to be more onerous than the "seriously affected" branch of the test. A "garden" is specifically mentioned in the context of the "seriously affected" branch of the test. However, a garden can

also be construed as being part of the curtilage of a "house" (*op cit* n.60) and so the material detriment branch of the test also applies. As the objector only has to succeed on one branch of the test to prevent severance, it might be thought strange that the legislation at least as construed hitherto provides for two tests for the same subjects.

Paragraph 7.68 – Counter - Notices

We would point out that under section 50(3) of the 1973 Act the *claimant* may withdraw from the counter – notice and prevent the acquisition of the severed lands.
Under sections 50(5) and 5(4) the claimant cannot claim development value of the severed lands where they are acquired under a counter –notice procedure. If the existing use as agricultural land is prevented by the severance, and the development is also prevented whether the severed lands are acquired or not, it would seem anomalous why development value should be denied under the existing legislation.

Q56- Discretion as to Valuation Date

In practice there are potentially three important dates; namely (1) the date for fixing interests in land, i.e. ownership of potential claimants (2) the date for fixing planning and physical assumptions and (3) the valuation date. As our comments to this paragraph and elsewhere seek to illustrate, many complex land cases involve seeking to quantify what can be seen as a loss of a development opportunity. In many cases it is possible to identify in broad terms that a party has sustained a loss because of a compulsory purchase order. But if one applies a strict approach to dates, whether or not a loss can in fact be established may be fortuitous depending upon various timings in a lengthy process over which a claimant may have no control. There is a strong potential for what will be perceived as injustice, which cannot be cured by the principle of equivalence.

We would therefore welcome an approach which seeks to make it clear whether or not the interests of certainty in fixing dates for the assumptions should take priority over the interests of justice and, in particular, the principle of equivalence or "full compensation." One solution would be to provide for a range of dates which can be applied for the assumptions, bearing in mind proper principles and the interests of justice. We think that the suggestion contained in Q56 merits serious consideration.

The following is a particular example. There are cases where compensation is particularly sensitive to the valuation date. The "shadow" period between the initial blighting (i.e. "blighting" used in non technical sense) effect (e.g. the date of the draft order but could be earlier) and the vesting date (or, if relevant, the settlement date) can be many years. In that time the market could move against the claimant and benefit the authority. The opposite can of course happen to the benefit of the claimant. However, in the former case if the claimant can show he would have sold when the market was good, but did not do so because the CPO had blighted his property, he has sustained a loss which he would not have suffered otherwise. In such a situation there would be a case for a discretion as to the choice of valuation date. At present this type of loss would have to come under the heading of disturbance, but may be difficult to establish. A relevant principle would be if the depreciation in value was solely because of the likelihood of a CPO, then that depreciation would not be taken into account: c.f. section 16 of the 1963 Act. Clarity as to how this type of scenario falls to be dealt with under the new regime would be welcome.

See also comments below on date for planning and physical assumptions.

Q62 - Disposition

There have been cases where the relevant instrument has not make it clear that the disposal is under the shadow of a CPO and that compensation has not been agreed, leading to problems as to whether the disposal was simply a "voluntary" act. We would suggest that the legislation provides a style disposition reserving parties' rights to go to the LTS where compensation is not agreed.

Q 75 – Depreciation of Acquired Land

We agree that the value of the acquired land should be its value before such depreciation occurs. See also Q113 below.

Q76 – Negative Equity

Again the example shows how injustice can work where there are timing issues at the point when a loss is crystallised, over which a claimant has no control. We think the law would be unsatisfactory if it did not permit a claim to be made, perhaps under the heading of disturbance, that but for the acquisition an owner might have been able to trade out of negative equity. See also the example we give at Q56. The principle of equivalence and full and fair compensation might also help to cover this point.

Q80 – Reinstatement Compensation

We are aware of cases where an acquiring authority voluntarily carry out the reinstatement on behalf of the claimant. In such situations there may be a case for tying any additional compensation to the *de facto* use of the new property by the claimant for the original purpose recognised under Rule 5. But we think there will be considerable difficulty in providing compensation only when the reinstatement takes place, since in many cases the claimant will be unable to acquire and build on new land without the compensation first.

Q81 – 84 – Disregarding the Scheme

There are genuine valuation problems caused by not being able to define the scheme, particularly when it is , say, phased over a long time (eg a new town), but for most cases it should be clear. We think there should be some flexibility in any definition since a common sense approach (as in *Waters* discussed at 12.50) could be prevented by over prescriptive language.

Q98 – Time Limit for CAAD

We think it would be difficult to impose time limits. There are cases where the land is only in fact taken long after the making of the CPO. So long as a claim is not time barred why should it not be possible to apply for a CAAD?

Q99 – CAAD Information

We think it would be helpful if CAADs included, if possible, all the conditions which would be applicable to a planning consent, eg residential density, parking provision, roads matters, s75, affordable housing content etc.

Q87, 100 – 104; 109, 110, 111 – Planning Assumptions and Dates

We think it is fair to say that the less flexible is the relevant date for the fixing of planning and factual assumptions, the greater the certainty of rights but the greater risk of injustice. As we suggest at Q56 above there may be merit in a stated policy aim whether the fixing of relevant dates should prevail over the right to "full" compensation and equivalence, and whether a range of dates should be specified within which a discretion to fix compensation should exist. We illustrate the point with reference to hope value, but illustrations could no doubt be made in other types of claim:

A difficult question is the date for fixing hope value. Hope value may exist in land even where there is no reference to it in a statutory or evolving development plan. But the value is date sensitive. Assume there is no CAAD issue, and also assume the site is not an allocated development site in the adopted development plan. The tortuous provisions of ss 22 – 30 of the 1963 Act do not directly apply. In this scenario it is by no means certain what is the correct date to fix the *planning assumptions* for assessing hope value. Arguably it is the same date as the *valuation* date. Without going into a lengthy discourse on what was said *obiter* in cases such as *Spirerose* (p226 of discussion Paper n. 74) and others we do not think there is clear judicial guidance on how far back section 16 (no depreciation in value on account of knowledge of the scheme) allows the Tribunal to consider what would have happened in the no scheme world as regards the evolution of planning issues. The legislation is unsatisfactory.

As we said at Q56 many difficult case involve an assessment of the value of a lost opportunity in the shadow period. The opportunity may have been transient. Planning is a dynamic process. For example, development sites come in and out of the development plan during what can be a lengthy process of the plan's formation. If the site is in the draft plan on a supposed "relevant date", that may be fortuitous for the claimant in the assessment of hope value. It would be equally unfortunate if the relevant date was say a year later by which time the site had been removed.

There is then the complication if the site is seen less favourably by the planners (and the market*) because* of the risk or need for a CPO. If the development site was removed from the draft local plan at a particular date because of a possible CPO, e.g. because a "better" non blighted site emerged, there would be injustice if the planning assumptions in the no scheme world have to be fixed at a later date.

This then gives rise to the issue how far the back the Tribunal should look to attempt to ascertain the no scheme world at the valuation date. The principle of equivalence and full compensation might require that to be a very long time in some types of case. In reality, a piece of land can be "blighted" (in the non technical sense) well before even a draft order stage. The site of some future infrastructure is often "safeguarded" from the date of its being entered in a draft local plan. From that point on the planners and market know there is a risk of a CPO, so the site is likely to be treated differently. From then on it has poor prospects of securing a valuable allocation in the plan or a consent, but still well before the making of the CPO. (There are of course procedures to require the planning authority to buy land if not capable of reasonably beneficial use, but that is a different issue, and for present purposes it is assumed there is an adequate existing use. It is also assumed that the strict requirements for a blight notice have not been met.) A loss is incurred well before the making of the CPO, prior to the deemed cancellation of the scheme, and that loss can only be ascertained by looking at the planning picture in existence well before the CPO was made.

It may be the example we have given would be considered to be too remote to give rise to a recoverable loss. There was no scheme in existence to be hypothetically cancelled. Nevertheless, it illustrates just how fortuitous circumstances can be in regard to timings and the incidence of a loss. We therefore suggest consideration of an approach which allows flexibility in selecting dates to consider planning issues in the no scheme world. In other words there could be an approach where the selection of one particular date may have to yield to the interests of justice.

Consistent with this approach we note that *in South Lanarkshire Council v Lord Advocate 2002 SC 88* the Lord President at [11] said it was permissible for a CAAD to specify what would have been granted planning permission at a date after the relevant date because of a change in circumstances. He went on to say that a flexible approach would advance the aim of the system to assist in determining the appropriate level of compensation.

Whatever date is to be relevant for establishing planning assumptions and deemed cancelation of the scheme, consideration should be given for providing the same date for assumptions to be applied for the fixing of hope value. Or is hope value to be fixed at the valuation date, assuming there has never been a scheme? Clarity would be of assistance.

We note that under existing law a negative CAAD does not prevent the assumption of hope value. Although we do not endorse the existing legislation we would point out that it achieves a proper aim namely to reflect market behaviour where there may be hope value in some cases even where a planning application would have been refused at a particular time

Separately, we note there is the anomaly, central to *Spirerose*, that absent a CAAD where the LTS consider that a development *would*, on balance of probability have been given planning permission, it cannot award full development value but only a value discounted for uncertainty.

Q100 / Paragraphs 14.14 and 14.17 – Relevant Date for CAADs

We think the SLC is correct when it says that in England the planning and other assumptions for a CAAD are assessed when the land is proposed to be acquired, in the sense used by Lord Denning in *Jelson v Minister for Housing*. However it is not clear whether his dictum is applied in practice and it is highly unsatisfactory that there should be doubt about this matter. As he put it the dates under section 22 (2) of the 1961 Act are (a) (put shortly) where there is an *actual* notice to treat; (b) (put shortly) where there is a *deemed* notice to treat; (c) (put shortly) where there is an offer to negotiate to purchase. If as stated in paragraph 14.17 the practice in Scotland by virtue of section 30(2) of the 1963 Act is that this is the date of the notice of publication of the making of the CPO, then this interpretation leads to an earlier date and is inconsistent with the interpretation of the equivalently worded English Act. But it may be a preferable approach for the reason given by Lord Neuberger in *Spirerose*. There would need to be clarity as to whether "making the order" includes, in an appropriate case, the making of a draft order.

Q 105,107,108 – CAAD Procedures

One problem is that where a government department appeals a positive CAAD issued by a local planning authority, seeking a negative CAAD in its place, there is a perception that such appellants may tactically "throw the kitchen sink" at the claimant developer's case. In the no scheme world this may not have happened. The government would not have been involved in the decision. There is no third party right of appeal and, in today's planning world, little possibility of a call in. Even in a call in, the Ministers would in reality only have objected for reasons within their remit (eg trunk roads) and not a host of other reasons. The developers having taken advice as to the position of the local planning authority might have invested in a

project, not expecting another perhaps equally persuasive but opposing view of the planning merits to be presented against them by an acquiring authority subsequently coming on the scene in the "scheme world." This is a difficult and perhaps an extreme example, but nevertheless leads to a concern that the acquiring authority, if a government department, should not have its appeal heard by the DPEA. The Scottish Ministers have judicially admitted that, in the context of a planning case where a government agency was a party to the proceedings, that the reporter and Ministers were not an independent and impartial tribunal: *County Properties v Scottish Ministers 2000 SLT 965 at [12]* (decision but not concession overturned on the view that right to judicial review and procedural safeguards then in existence cure the lack of impartiality – see *Alconbury* at Q 15 above).

We cannot comment whether a perception of unfairness would be removed by the reporters reporting to the LTS instead of Ministers. However we would point out that "hearings" almost invariably held by the DPEA do not provide opportunity to test the other party's case by cross examination, discussed under Q15 above. This situation, when carried into the CAAD procedure, may risk not holding the public's confidence in the type of contentious issues to be expected in compulsory purchase compensation. The default procedure in the LTS would be for evidence to be given under oath and subject to cross examination, although parties may agree to have their cases determined in writing without any form of hearing.

The LTS has experience of assessing hope value which in turn involves an assessment of evidence about the likelihood of planning permission being granted.

Q113 - Concurrent or "before and after" approach

We would prefer the statute not to be prescriptive. We agree there is merit in the before and after approach in appropriate cases such as where, in reality, the same assumptions fall to be applied to the taken land as well as the retained land. Equally we believe there may be cases where the before and after approach could achieve an unrealistic result.

Q114 – Assessment of Injurious Affection

In principle we would have thought it right that the assessment for injurious affection should be made at the same time as the assessment of the value of the taken land. We are aware however of cases where compensation for say disturbance is deferred until a point where e.g. removal costs have been incurred and are known. We are not sure if that scenario is so very different to the one postulated for known or likely impacts to the value of retained land, but difficult to quantify at a particular time.

Q115 – Compensation for Injurious Affection

We agree with paragraph 15.38 that the CAAD procedure, in practice, provides useful guidance as to the value of retained land. If part of a development site is taken, there would seem to be no good reason why the remainder should be valued without reference to the same planning assumptions in the no scheme world.

We are cautious as to limiting a claim for injurious affection in the way suggested. The legislation would need to be clear that it does not intend to prevent an alternative disturbance claim which might also be related to the retained land. If the concern is to prevent a double recovery, it is considered that such would not in any event be permitted under normal valuation principles.

Q119 / Q120 – Compensation for Disturbance

We suggest that the *Horn* problem might be resolved by the modern approach to causation and remoteness, exemplified in *Shun Fung* (paragraph 16.35). If the landowner in the no scheme world would, in any event, have removed, say in order to extract development value, it would seem contrary to principle for it to claim removal costs as a "loss" since it already gets compensation for the loss of development value. If those costs would have been incurred in any event in extracting development value why should they be recoverable?

We think experience shows that the "value to seller" approach to market value of land taken is apt to blur into disturbance claims in certain cases. We think any new statutory approach to disturbance should bear in mind the many ways disturbance may take effect, including in the valuation of the land itself. Accordingly we would favour an approach where there are stated guiding principles (such as no double recovery if that is not already clear) rather than too strict a compartmentalisation of claims.

Q128 /9 - Personal Circumstances

We think there are always likely to be personal circumstances involved in disturbance claims, whereby a party's actings will require to be assessed objectively.

Q132-3- Disturbance and Dates

At present this issue can be dealt with under the flexible LTS procedures; i.e. in practice a claimant may seek to reserve its right to come back once the disturbance costs are known. We have experience of disturbance claims coming forward for proof many years after the acquisition, such as for loss of development opportunity, which could not have been established at the time of the acquisition. We are cautious about primary legislation cutting across this flexibility. Also, in practice it is difficult to separate "disturbance" from "scheme world" valuations so we would be cautious about any attempt to compartmentalise disturbance claims.

Q136 Disturbance Payments / LTS Jurisdiction

We agree.

Part 4 - Dispute Resolution

Paragraph 18.6 - LTS

At present in compensation cases the LTS would usually sit with both a legal member, who will be an experienced QC, and a surveyor member who will be an experienced FRICS.

Paragraph 18.7 - LTS

The LTS regularly sits outwith Edinburgh for convenience of parties, although for longer evidential hearings with experts it is usually more convenient to all parties for it to sit in Edinburgh. If it sits outwith Edinburgh it seeks accommodation in local sheriff courts where this is possible. It usually undertakes site visits.

Paragraph 18.10 - LTS

We understand it remains the intention of the Lord President and the Scottish Parliament for the LTS to become an Upper Tribunal.

Paragraphs 18.11 to 18.17 – LTS - General

The LTS would make the following general comments which are hoped may assist in understanding the background. It always welcomes comments whereby its procedures could be improved.

The LTS benefits from flexible rules which allow for informal case management. Its approach to case management depends upon the type of case involved, which might range from the taking of a small portion of garden to very large areas of commercial land. For example in one recent severance case in Aberdeen of fairly modest value, it was possible to deal with pressing case management issues, which had not been able to be informally resolved by email correspondence with the Tribunal clerks, by means of conference call with a tribunal member. No change in the rules was required for this to happen. The case itself was heard in Aberdeen. On the other hand large and complex cases have required procedural hearings in Edinburgh and necessitate the appearance of senior counsel on both sides.

The LTS has powers regarding citation of witnesses and recovery of documents. The hearings themselves are conducted with formality; i.e. witnesses are put on oath, which is believed to be commensurate with the importance and type of issues involved.

The type of issues before the LTS naturally involve valuation and there is usually a background of continuing negotiation between parties. This leads to the cases usually being marked by a high degree of cooperation between professional representatives. Very often the time a case takes to get to a hearing is largely dictated by parties themselves, since parties have a good idea how long it will take to prepare pleadings and prepare and disclose all relevant documents and reports. It follows that the LTS's timetables are largely set in a consensual manner, which vary depending upon the type and complexity of case. In cases where we are aware that one of the parties has complained of undue delay, it may be because the other party has not been professionally represented. There has been an omission to carry out basic preparation work which has a knock on effect on later progress. Reasons for delays are numerous and can often relate to the nature of the case itself; eg where an authority subsequently decides to change the statutory order in question so as to reduce loss and inconvenience to claimants, resulting in a claim "starting again".

The standard LTS hearing fee is £50 for every £5,000 lump sum awarded, but not less than £155 per sitting day, up to a maximum of £5,000. It is understood the Sheriff Court charges £214 per day, and the Court of Session charges £90 per half hour for a hearing before a single judge which is the equivalent of £900 for a five hour sitting day.

For a low value claim, or indeed any claim, it is possible for the LTS to determine a case by reference to documents only, so long as parties agree to not having a hearing.

As discussed later there are rules regarding awarding expenses which the LTS is bound by statute to apply: cf section 11 of the 1963 Act.

Paragraph 18.19 Short Tenancies

We agree that disputes about short tenancies should be dealt with by the LTS.

Q149 Time Limits

We agree that some disturbance claims take many years to be capable of quantification. We agree it would be sensible for there to be a discretion to extend time limits in defined circumstances, since the alternative is for unquantified claims to be made and then sisted for many years. However there would need to be safeguards to prevent authorities being faced with stale claims long after the event.

Q150 - Expenses

We think care needs to be applied here. It would be helpful to know the background to section 11 being introduced. One does not wish to encourage unnecessary litigation where an acquiring authority has made a reasonable offer which was not, and was never very likely to have been "beaten". There will be many cases where the loss in value is within a range of reasonable opinion. Therefore, a change in the rules could mean that so long as a claimant holds a professional opinion at the higher end of the spectrum, he will have nothing to lose by litigation while the authority maintain an offer based on an opinion at a lower level. In this scenario the claimant is still acting "reasonably" by not settling. The result could be that for authorities to avoid litigation they will always have to make an offer at the high end of the scale.

But it may be such an outcome is to be preferred as a matter of policy, and depending upon the discretion given to the Tribunal the claimant would still be risking not getting a recovery of his own expenses in such a situation. We therefore agree that the problem of a narrowly defeated but reasonable claim, if indeed it is a problem, could be addressed by some softening in the language of section 11.

One familiar issue with section 11(2) is that there are often arguments as to the point when a claim is sufficiently detailed so to expect the authority's offer to be made. Nevertheless we think the provision is very useful in requiring claimants to specify their claim in appropriate detail.

Q154 – Advance Payments

We agree it would be possible to introduce some form of procedure to require advance payments to be made on the basis of an enforceable valuation by the LTS. There are however certain issues about doing so. Any valuation would be an interim valuation. Therefore some test would need to be devised as to the likelihood of the final claim reaching the amount of the interim valuation. Presumably the LTS would require to consider competing valuations rather than undertake an inquisitorial role. If the LTS was, at a final hearing, to be asked to differ from its earlier opinion of value, perhaps triggering a repayment, then there is a risk that the members who determined the earlier valuation would be conflicted.

Q159 – Costs Incurred

See comments and rates at 18.11 – 18.17 above**.**

Q170 – Surplus Land – LTS jurisdiction

We agree.